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COMMITTEE ON THE DEVELOPMENT OF TRADE

Ad hoc Working Group on Arbitration

DRAFT EUROPEAN CONVENTION ON ARBITRATION

Note by the Secretariat

1. At its fifth session, the ad hoc Working Group on Arbitration instructed the Secretariat to prepare and submit to governments a draft European convention on arbitration containing provisions relating to the questions considered by the Group with a view to their inclusion in a possible European convention on arbitration (TRADE/76, paragraph 54(a)). The Secretariat was instructed to base this draft on the principles elaborated by the Working Group at its fourth and fifth sessions (TRADE/76, paragraphs 4 - 37). The draft prepared by the Secretariat in accordance with the decision of the Working Group appears in the annex to this note.

2. The Working Group requested the Secretariat, when submitting the draft to governments, to draw attention to the controversies and difficulties raised on several points during the Working Party's discussions (see, in particular, TRADE/76, paragraphs 7, 9, 13, 19 and 31). These controversies and difficulties are detailed below in the explanatory note concerning the various articles of the draft annexed.

3. This note also contains an explanation of those adjustments the Secretariat felt obliged to make in its draft convention to certain decisions of the Working Group, in order to solve problems which arose during the actual preparation of the exact provisions of the draft convention. On the other hand, the Secretariat found no need, in the course of its work on the draft arbitration rules and the draft convention, to suggest other points for incorporation in a European convention on arbitration (TRADE/76, paragraph 37), except in regard to the question of setting aside the award, which was also considered by the Working Group (see paragraphs 54 et seq. below).

Title and preamble

4. As the draft European convention on arbitration should not, normally, contain any provision concerning the recognition and enforcement of foreign arbitral awards, which are already regulated by the New York Convention of 10 June 1958, and as the Working Group decided, in regard to other arbitration problems, to consider only the inclusion of those questions which may have caused difficulties internationally, it is suggested that the proposed European convention be entitled "European Convention on Certain Questions concerning International Commercial Arbitration".

5. It is also suggested that the above remarks be included in the preamble to the convention.

Article I

6. In considering the point at its fifth session, the Working Group tended to favour a European convention as wide as possible in its scope (TRADE/76, paragraph 36). In view of that tendency, the Secretariat proposes, in paragraph 1 of Article I of its draft, that the convention apply to all arbitration agreements and procedures with any foreign element in them, whether that element be introduced by the movement of goods, services or currencies across frontiers for the purpose of a commercial transaction, or by the connexions of the parties to the transaction, or by the place of arbitration, or by the fact that the law of the country in which proceedings take place or in which the recognition or enforcement of the award is requested affirms the extra-national character of the arbitral procedure or award.

7. On one point, however, the Secretariat felt bound to narrow somewhat the criteria envisaged by the Working Group for determining to which arbitration agreements the European convention should apply. In defining the criterion for the application of the convention based on the connexion of the parties with two different countries, the Working Group has always considered that, in the case of legal persons, account would have to be taken of main or subsidiary establishments (TRADE/55, paragraph 15 and TRADE/76, paragraph 36). Although undoubtedly calculated to widen the scope of the convention on arbitration, by bringing under it arbitration agreements concluded between physical or legal persons connected with one country and a legal person with its main establishment in the same country but a subsidiary establishment in another country - assuming, of course, that the transaction is concluded with the subsidiary establishment - this solution is difficult to apply in practice. It is not always easy to determine the role that a subsidiary establishment plays in the conclusion of an international transaction, and uncertainty in this regard may become very troublesome should it result in argument and legal dispute over the applicability of the European convention to a particular case. In addition, the definition of main or subsidiary establishments varies from one legal system to another, and even within one domestic legal system it is often difficult to distinguish between a subsidiary establishment and a branch with no independent status. In order to avoid any possible dispute on the subject, the Secretariat thinks it preferable to replace the concept of main or subsidiary

establishment, as the criterion for a legal person's connexion with its domestic legal system, by the concept - perhaps more artificial, but more reliable - of the registered office, on the understanding that the criterion based on habitual place of residence shall be preserved for the connexion of physical persons, in accordance with the Working Group's regularly stated position.

8. In paragraph 2 of Article I, the Secretariat felt bound to define the method by which the "commercial character" of transactions and disputes coming under the convention shall be determined. This appears essential because, in view of the reasons for the interest of the Economic Commission for Europe in the subject, the convention under consideration by the ad hoc Working Group on Arbitration is confined to commercial disputes.

9. If no adequate method of accurately determining the commercial character of the legal relationships and situations covered by the convention is laid down, the discrepancies between the various domestic legal systems on the subject may give rise to problems of the conflict of laws that cannot easily be solved. It would, of course, be possible to consider defining in the convention the commercial relationships which it is intended to cover; but so much resistance to an international definition would probably come from the various legal systems concerned, all of them jealous of their traditions in the matter, that it would seem simpler to solve the problem by specifying under which domestic law the "commercial character" criterion, so essential for defining the scope of the convention, shall be determined. This is, in fact, the principle so far followed in all international agreements concerning either the recognition of arbitration clauses or the recognition or enforcement of foreign arbitral awards (article 1, paragraph 2, of the Geneva Protocol of 24 September 1923, which also applies - under article 1, paragraph 1, thereof - to the Geneva Convention on the Execution of Foreign Arbitral Awards, of 26 September 1927, and article 1, paragraph 3, of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

10. In connexion with the recognition or enforcement of foreign arbitral awards, however, the solution of our problem seems easy - maybe even self-evident. Here the convention is operative in the territory of a country under certain obligations in regard to arbitral awards made abroad and, if the country under these obligations wishes to limit them to commercial disputes, the distinction between commercial and other disputes can naturally be left to that country's domestic law.

11. The situation is rather more complex in regard to the recognition of arbitration clauses. There is a wider choice of laws for determining the "commercial character" criterion, and some hesitancy is permissible between the law of the country (or countries) having jurisdiction over the parties to an arbitration clause and that of the country in whose courts the question of the recognition of the clause is raised. The authors of the Geneva Protocol gave preference to the law of the country which grants the recognition, hence to the law of the court seized of the action. This solution seems quite justified in a text basically concerned with recognition. In a convention like that now being studied under the auspices of the Economic Commission for Europe, the centre of gravity indutiably lies elsewhere, and the law to determine whether the transactions or disputes covered by the convention are of a commercial character or not should probably be chosen on a different basis.

12. The draft European convention, as it appears in the annex to this note, is designed to establish international standards for certain questions regarding international commercial arbitration, with a view to avoiding difficulties which experience has shown may arise if the parties to an international commercial transaction or to an international commercial dispute remain subject to the laws and regulations of the country or countries with which they are ordinarily connected. Hence the aim here is that the country with which the party to a transaction or a dispute covered by the convention is connected should in such cases waive some of its legal provisions concerning arbitration in favour of international provisions. In the case of a convention limited to the commercial field, the definition of that field can probably best be left in the first place to the law of the country whose acceptance is the basis for the application of international standards to certain legal situations.

13. This solution would seem to be valid for the convention as a whole, even although some of its provisions appear to concern primarily other countries, for example the country of the court seized of a dispute covered by an arbitration agreement, that in which the arbitration proceedings are held, or that in which are situate the goods for which interim measures or measures of conservation are requested. The conception on which the convention in general is based is that of a stable and uniform system of arbitration applicable to certain situations which are set forth in article 1, paragraph 1, of the draft, and for the most part

defined in terms of certain foreign aspects related to the legal connexion of the parties concerned with the country where their commercial transactions are normally centred. Moreover, it would be inconsistent with the idea underlying the draft convention, that of stabilizing and reinforcing international commercial arbitration relations, to introduce a wide variety of "commercial character" criteria as the law of one country would then have to supply the criterion for one provision and the law of another country that for another provision, depending on which of any two countries affected was the more interested in the particular provision. In order to avoid the uncertainty which such a solution would surely produce, and with due regard to the general structure of the draft, the Secretariat has proposed in paragraph 2 of article I that, with a view to the general application of the convention, the "commercial character" of the transaction or dispute referred to in paragraph 1 of that article should be defined solely in accordance with the law of the country or countries with which the parties to the transaction or dispute are ordinarily connected.

14. In accordance with the solution adopted in paragraph 1 of article I of the draft for determining the country with which the parties to the transactions or disputes covered by the convention are connected, paragraph 2 also takes the country in which the physical person has his habitual place of residence as that with which he is connected, and for legal persons it takes the country in which their registered office is situate (see above, paragraph 7).

15. Given that the countries with which the parties to the transactions or disputes covered by the convention are connected should supply the definition of the "commercial character" of the transactions or disputes, it follows that, when the parties are, by reason of their connexions, within the jurisdiction of two different countries, the particular transaction or dispute must be "of a commercial character" under both legal systems concerned in order to come within the scope of the convention.

Article II

16. The Group has often expressed the view that the right of legal persons of public law to resort to arbitration in international commercial disputes to which they may be parties is undoubtedly of practical value (TRADE/55, paragraph 19 and TRADE/76, paragraph 7), although it has regularly acknowledged that certain countries specially affected might find difficulty in accepting a provision authorizing legal persons of public law to resort to arbitration in the situations envisaged, since those are

precisely the countries in which the law denies them that right. In accordance with the Group's instructions (TRADE/76, paragraph 7), the Secretariat has included, in article II of its draft, a provision concerning the right of legal persons of public law to resort to arbitration, at the same time pointing out the possible impediments to the general adoption of such a provision and, in particular, to its adoption by those countries for which it would be of the greatest moment.

17. In suggesting to the governments concerned that they might reconsider their attitude to the provision proposed in article II of the draft, the Secretariat would point out that it is limited to international commercial transactions and disputes, i.e. a field in which legal persons of public law are increasingly active and in which they usually act as private undertakings. Even, therefore, if the countries concerned felt bound to retain the general principle that legal persons of public law should not be able to resort to arbitration without special permission from the government authorities controlling them, it might be more readily agreed that they be generally authorized to resort to arbitration in the case of international commercial disputes.

18. The governments concerned should also note that the Secretariat draft gives legal persons of public law the right to conclude valid arbitration agreements only in the cases referred to in article I, paragraphs 1(a) and (b), i.e. where the arbitration concerns commercial transactions involving a movement of goods, services or currencies across frontiers, or commercial arbitration agreements concluded between physical or legal persons having their habitual place of residence or registered office in two different countries. Hence, two legal persons of public law within the jurisdiction of the same State could not resort to arbitration abroad; nor does it seem likely that the provisions of article I, paragraph 1(d) of the draft could be adapted to the particular case of legal persons of public law. The countries concerned might find it easier to accept the proposed provision, with these qualifications.

Article III

19. At its fifth session, the Working Group considered that the draft European convention should contain provisions on the appointment of the arbitrator(s) and the determination of the place of arbitration where parties to an international commercial transaction who are bound by an arbitration agreement have failed to agree on these matters. The Group also indicated that the solution of these

problems to be incorporated in the provision on the appointment of the arbitrators and the determination of the place of arbitration should broadly follow the lines laid down by the Group for the draft arbitration rules, which the Secretariat has also been requested to prepare (TRADE/76, paragraph 20). But the Group has not specified how this provision should be incorporated in the draft European convention. There are several possible solutions of this problem.

20. The first solution would be to insert in the convention itself all the provisions contained in the Secretariat's draft arbitration rules (TRADE/WP.1/30), with the obvious exception of rules 1 and 2, the only place for which is in a set of rules for optional use in practice. An alternative solution, as to presentation, would be to place the rules in an annex to the convention with only a reference to the annex in the convention proper, couched in some such terms as:

> "If an arbitration agreement contains no express or implied provision concerning all or any of the following questions:
>
> (a) procedure for the appointment of the arbitrators;
>
> (b) determination of the place of arbitration;
>
> (c) rules of procedure to be followed by the arbitrators,
>
> disputes between the parties to the arbitration agreement shall be settled by the procedure set forth in the arbitration rules annexed to this Convention".

21. The provisions concerning the arbitration procedure to be followed by the arbitrators (part IV, articles 20 - 45 of the draft arbitration rules) may, however, be considered unsuitable for insertion in an inter-governmental convention, their sole purpose being to serve as a model to which the parties to an arbitration agreement or, where appropiate (e.g. where they are so authorized), the arbitrators may refer in specific cases. Should this view prevail in the Working Group, it would be sufficient to include the first three parts of the draft arbitration rules, i.e. articles 3 to 19 in the convention. These provisions also could, of course, be incorporated in the convention in two different ways, i.e. either as part of the text proper or as an annex thereto, with the same reference clause as that proposed in the previous paragraph.

22. But even an article on the organization of arbitration in such terms, confined to provisions concerning the appointment, removal, death or incapacity of the arbitrators and the determination of the place of arbitration, may still be regarded as too wide in scope for an inter-governmental convention. The view then might be that an inter-governmental arbitration convention should include only such provisions as are strictly necessary to the organization of arbitral proceedings where the arbitration agreement between the parties contains no express or implied provision concerning all or any of the questions set out above in paragraph 20. Article III of the Secretariat draft annexed hereto was re-cast with this point in mind.

23. In choosing questions for insertion in the provision whose main purpose is to permit the organization of arbitration where the arbitration agreement between the parties does not adequately cover this point, the Secretariat considered including the requirement that the presiding arbitrator should be appointed from a panel or that he should be of a different nationality from the parties, unless otherwise agreed by the latter. Its final view was that the inclusion in a provision assumed to cover only requirements for the organization of arbitral proceedings of questions properly belonging in a set of optional rules that may be modified at will by the parties would go beyond the scope of an inter-governmental convention, which need merely specify an institution, the latter being left a certain latitude in the choice of arbitrators, of the place of arbitration, and of the arbitral procedure to be followed by the arbitrators, where such choice has not been made by the parties themselves.

24. On the other hand, the Secretariat considered that the article on the organization of arbitration in the inter-governmental convention should include the provision which the Working Group thought necessary to overcome laws debarring aliens from acting as arbitrators in international commercial arbitration proceedings in some way connected with the countries where such laws are in force (TRADE/76, paragraph 6). The text proposed by the Secretariat in paragraph 6 of article III of the draft is designed to cover this point.

25. It will lie with the Working Group to choose between the various ways of inserting in the European convention the provisions for appointing the arbitrator(s) and determining the place of arbitration where the parties concerned fail to do so. If the Group adopts the solution in article III of the Secretariat draft annexed to this note, it must further decide whether the provisions proposed by the

Secretariat are adequate to permit the organization of arbitral proceedings where the parties fail to take the necessary steps, or whether other provisions should be added, taken possibly from the draft arbitration rules.

26. As the decision on those points is closely bound up with the Working Group's decision on the substance and form of the draft arbitration rules, it is suggested that the Group should consider the draft arbitration rules prepared by the Secretariat (TRADE/WP.1/30) before beginning the discussion of Article III of the draft European convention.

Article IV

27. In this article the Secretariat has covered two questions discussed by the Working Group with regard to pleas that might be lodged before the arbitrator as to his jurisdiction - one being the point in the arbitration proceedings at which such a plea should be lodged, the other the power of the arbitrator to rule on a plea as to his jurisdiction.

28. The question of the point at which the plea as to jurisdiction should be raised before the arbitrator was discussed at the Working Group's fifth session. In accordance with the Group's instructions, the attention of governments is drawn to this discussion (TRADE/76, paragraphs 17-19), the gist of which is given below.

29. Doubts were expressed as to the advisability or value of a provision under which the plea as to the arbitrator's jurisdiction would be raised before him, under penalty of estoppel, prior to the hearing on the substance. Such a provision would nevertheless appear to have its uses in avoiding the raising of procedural points throughout the arbitration proceedings. It would at the same time prevent the possible use of delaying tactics by a party who, having failed to raise a plea as to jurisdiction at the outset of the proceedings, was tempted to do so when he felt that he was losing the suit. It would also appear to be in the interest of good administration and speedy justice to prevent a party who, although unaffected by force majeure, failed to challenge the arbitrator's jurisdiction before him prior to the hearing on the substance of the dispute, from seeking to use such a plea thereafter, having lost his case before the arbitrator, as a means of challenging the latter's jurisdiction before a law-court,

whether by submitting the substance of the case to the judge, or requesting that the award be set aside, or objecting to its enforcement on the ground of the arbitrator's alleged lack of jurisdiction.

30. Certain delegations, however, criticized this provision as being at variance with articles II, IV and V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958, although it is difficult to see wherein the alleged contradiction lies. The proposed estoppel does not affect the right preserved to the courts of Contracting States under article II, paragraph 3, of the New York Convention of examining the validity of the arbitration agreement; it merely prevents parties who have not raised a plea as to jurisdiction in time from raising it later before the court seized of the dispute as an objection to resort to arbitration. Nor would this debarment of the parties from seeking to have the award set aside at the enforcement stage on grounds of the arbitrator's lack of jurisdiction appear to be incompatible with article V of the New York Convention, which, save as regards the burden of proof, says nothing of the circumstances in which the various grounds for setting aside the award may be invoked, so that the settlement of this question may be left to some other international instrument.

31. It should be added that under the solution proposed by the Working Group estoppel would be based on the presumed intention of the parties, i.e. on the presumption that a party who, having been cited to appear before the arbitrator, has entered no plea as to jurisdiction prior to the opening of the hearing on the substance of the dispute has waived the right to lodge such a plea later. Hence, as expressly agreed by the Working Group, this solution should apply only to questions left to the discretion of the parties. This point would, of course, seem calculated to allay the fears and apprehensions aroused by the possible effects of the proposed provision on subsequent proceedings before the arbitrator himself or in the law-courts, i.e. legal proceedings on the substance of the dispute or enforcement proceedings. To remove all possible doubt on the matter, the Secretariat felt obliged to clarify it in paragraph 2 of article IV of its draft, though some members of the Working Group disputed the need for such clarification (TRADE/76, paragraph 18).

32. Thus the Secretariat's draft includes the gist of the formula preferred at the Working Group's fifth session by several delegations which generally favoured the provision concerning the plea as to the arbitrator's lack of jurisdiction. But the Secretariat considered that this formula should be amplified in one particular. For the determination of questions left to the discretion of the parties, the formula proposed by the delegations concerned takes account only of the competent tribunal's rules of conflict (TRADE/76, paragraph 17), thus obviously covering only cases in which a plea as to the arbitrator's jurisdiction, although not lodged before the arbitrator himself prior to the hearing on the substance of the dispute, is lodged later before the law-court. But this question must also be settled for cases in which the plea as to jurisdiction is raised before the arbitrator after the lodging of a statement of claim or defence relating to the substance of the dispute. With this situation in view, the Secretariat's draft proposes that questions left to the discretion of the parties be determined in accordance with the law deemed applicable by the arbitrator, thus falling into line with the solution to be generally adopted in regard to the law applicable (see comments on article VI below).

33. Although there were divergencies of view in the Working Group regarding the point at which the plea as to the arbitrator's competence should be lodged, opinion was unanimous on the substance of the problem, i.e. the question of the arbitrator's capacity to rule on any such plea lodged before him by a party to an arbitration agreement. The solution adopted by the Working Group in this case (TRADE/76, paragraph 8) is incorporated in paragraph 3 of article IV of the Secretariat's draft.

Article V

34. The Working Group was unanimous as to the value of inserting in a European convention on arbitration a provision regarding the point at which a plea as to jurisdiction based on a valid arbitration agreement should be raised before the judge seized, by one of the parties to the arbitration agreement, of the substance of the dispute. Paragraph 1 of article V of the Secretariat's draft reproduces the solution on this point proposed by the Working Group at its fourth and fifth sessions (TRADE/55, paragraph 20, and TRADE/76, paragraphs 15-16).

35. There were, however, differences of view between the various delegations regarding a series of questions also linked with the general question of a plea as to the law-courts' jurisdiction based on the existence of a valid arbitration agreement between the parties, and especially regarding the law under which the court seized of the substance of the dispute must judge the validity of the arbitration agreement, the effect as res judicata to be given the judge's decision on the validity of that agreement, and the repercussions on further proceedings before the judge from the fact that resort was had to arbitration before any case was brought in a court.

36. Paragraph 2 of article V of the Secretariat's draft contains the proposal, backed by certain delegations at the Working Group's fifth session, regarding the law to be applied by courts of States Parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958, which have occasion under article II, paragraph 3, of that Convention to rule on the validity of an arbitration agreement concluded between the parties in dispute (TRADE/76, paragraph 10).

37. Some delegations denied the need for such a provision, holding that the court seized of the dispute should in such case apply its own rules of conflict (TRADE/76, paragraph 12). The Secretariat was therefore instructed to draw attention to the controversy on this point while submitting the draft text concerned to governments (TRADE/76, paragraph 13).

38. It might, however, be suggested in this connexion that the ends of a convention designed to make international commercial arbitration work more smoothly would be served by laying down standard rules of conflict at the very time when the validity of an arbitration agreement is under examination by a court in a Contracting State seized of an action in a case where there happens to be an arbitration agreement between the parties, in order to avoid the risk of contradictory findings due to the fact that judges of different countries seized for any reason whatsoever of the substance of the dispute in question may appraise the validity of the arbitration agreement differently under their different legal systems. The normal way of achieving this standardization would be to adopt, as far as possible, the same rules of conflict as are laid down in the Convention of 10 June 1958 for determining the law applicable in appraising the validity of the arbitration agreement at the stage of recognition or enforcement of the award

made on the basis of such arbitration agreement (article V, 1(a)). Such, indeed, was the method suggested by certain delegations at the Working Group's fifth session (TRADE/76, paragraph 10), which is reproduced in article V, paragraph 2, of the Secretariat's draft.

39. Another suggestion regarding the decision of the court seized of the substance of the dispute on the validity of the arbitration agreement between the parties aroused lively discussion at the Working Group's fifth session, namely, that concerning the effects of such decision. That proposal would make the decision binding on any arbitral tribunals or courts subsequently seized of any question covered by the relevant arbitration agreement, as also on any courts called upon to rule on the recognition or enforcement of arbitral awards made on the basis of the clause on whose validity there has been a decision by the first law-court seized of the dispute (TRADE/76, paragraph 11).

40. Among the objections of some delegations to this proposal was the fact that it concerns a special problem, namely, the effect of the decision as res judicata, which is normally dealt with in conventions on the enforcement of awards and would have no place in a convention on arbitration. But, as was pointed out at the fifth session, this argument may not be entirely convincing, since, once certain provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards accord the effect of res judicata to certain legal decisions taken under the enforcement procedure - e.g. the setting aside of an arbitral award by a competent authority of the country in which or under whose law the award has been made - there seems no sound reason, where such action would appear to be sufficiently worth while, for not settling this question of the effect as res judicata of certain other court decisions within the framework of a European convention on arbitration questions other than enforcement (TRADE/76, paragraph 12).

41. The practical value of the proposed provision appears indisputable. It would serve to prevent the question of the validity or non-validity of the arbitration agreement, once settled by a competent law-court, from being reopened, and perhaps settled differently by other law-courts or by any arbitral tribunal set up under the arbitration agreement. Failing an explicit clause on the subject, a decision by the first law-court affirming the validity or non-validity of an arbitration agreement, binding on arbitral tribunals that are to sit in the country of that law-court, might also be taken into consideration, and perhaps even followed, by

courts in other countries or by arbitral tribunals sitting in other countries. However, there can be no certainty on the point unless the first court's decision on the validity of the agreement is given effect as res judicata at the international level, e.g. within the juridical framework formed by the parties to an inter-governmental convention or arbitration.

42. From the same practical angle, however, the proposed provision may adversely affect the growth of arbitration. Given the diversity from country to country of regulations regarding the jurisdiction of the courts, one of the parties to an arbitration agreement might possibly go to court in a country with which the dispute has little connexion and obtain such a verdict, for example, as that the arbitration agreement is null and void. Under the solution proposed that would suffice to make arbitration proceedings impossible even in countries with which the dispute is more closely connected and in which the validity of the same arbitration agreement might otherwise be recognized. Although this possibility need not be regarded as very likely, it is not entirely theoretical.

43. One way of obviating it would be to grant effect as res judicata internationally only to the decision of the first court confirming the validity of the arbitration agreement, while leaving the possibility of reopening any decision on the nullity of the agreement at the international level. However, such a solution might prove difficult of acceptance by the countries concerned, particularly since there is perhaps no obviously reasonable justification for it. The Secretariat therefore proposes, in paragraph 3 of article V of its draft, an alternative solution, namely that effect as res judicata be granted to decisions of the first court on the validity of the arbitration agreement only where that court is in the country in which or under whose law the award is to be made, while preserving the present possibility - in the absence of any general agreement on the enforcement of awards between the countries concerned - of reopening any decision on the nullity of the arbitration agreement by courts in countries other than that in which or under whose law the award is to be made. This solution would therefore also not be applicable in cases where, at the time the action as to the validity of the arbitration agreement is raised in the first court, it is impossible to ascertain the country in which or under whose law the award must be made. The Secretariat nevertheless thought it preferable to provide a solution covering fewer, although still a fairly large number of, situations rather than a general one that would leave the practical difficulty mentioned unsolved.

44. One final point, regarding lis pendens as between arbitral tribunals and law courts, provoked lively discussion at both the fourth and fifth sessions of the Working Group. Representatives of many countries held that, to avoid duplication of proceedings in the same case, provision should be made to ensure that once the case is before an arbitration tribunal the law-courts must refrain from intervening in the action until the award is made. But there are some countries in which the arbitrator's right to rule on his own competence does not prevent the arbitrator himself or one of the parties from concurrently raising the question of the arbitrator's competence in court without any difficulty in practice, and the representatives of these countries have always disputed the need for a provision denying all competence to the law-courts until the award is made. But, since there are other countries in Europe where the general attitude of the courts to arbitration may unduly aggravate their interference in arbitration proceedings unless such interference is prohibited until the award is made, it would probably be wiser to incorporate in the draft European convention a provision under which, if the appellant chose arbitration in the first place, the courts could not intervene until the award was made (TRADE/55, paragraphs 22-23 and TRADE/76, paragraph 9).

45. A compromise proposal was made at the fifth session whereby judicial intervention in arbitration proceedings prior to the award should be excluded solely from the moment the respondent has appointed his arbitrator or otherwise displayed his intention of participating in the arbitration proceedings, and not from the time the appellant takes steps to have an arbitral tribunal set up under the arbitration agreement (TRADE/76, paragraph 9). But this proposal is open to objection from those who consider it neither useful nor expedient to prohibit the judge from intervening in the arbitration proceedings from their very start where, for example, it might clearly appear that the arbitration agreement is not valid and that efforts to initiate arbitration proceedings would be quite abortive. Nor has it any of the practical advantages of the solution under which the courts could not intervene after steps had been taken to initiate arbitration proceedings. The actual aim of the provision excluding intervention by the courts until the award is madeis to prevent the use of delaying tactics by the party who would like to evade his commitments under the arbitration agreement; but this aim can only be attained if there is no possibility of going to court once the party citing his opposite

number has requested that an arbitral tribunal be set up. To make the ban on judicial intervention dependent on the setting up of the arbitral tribunal due to the acts of the respondent would mean to give him a chance to appeal to the judge after being requested to appoint his arbitrator; it might even be suggested that such a solution would be an open invitation to him to do so.

46. On these grounds the Secretariat inserted in article V, paragraph 4, of its draft a provision fixing as the time for a law-court to suspend its ruling on the arbitrator's jurisdiction until the award is made the moment when either party to an arbitration agreement has personally initiated arbitration proceedings. Since the arguments on the substance of this provision were not exhausted at the Working Group's last session, the Group will probably wish to reconsider the principle behind it when discussing the draft. It may at the same time look into the question whether, should such a provision, although of undoubted value to some European countries, prove absolutely unacceptable to others under whose law the courts' control over arbitration proceedings cannot be excluded until the award is made, the latter countries might not be asked to avoid applying this provision in the case of arbitration proceedings brought under their domestic law at the behest of the parties or the rules of conflict deemed applicable by the arbitrators.

Article VI

47. As the Working Group had reached agreement on the broad lines of a provision concerning the law applicable to the substance of the dispute for insertion in a European convention on arbitration (TRADE/55, paragraphs 48-50, and TRADE/76, paragraphs 21-22), all the Secretariat had to do was to insert in article VI of its draft three paragraphs worded in terms of its instructions from the Group.

Article VII

48. At its fifth session the Working Group also elaborated a practical method of reconciling those European legal systems under which arbitrators are required to give reasons for their award and those under which this is not standard practice (TRADE/76, paragraph 34). The principles on which this method is based are incorporated in article VII of the Secretariat's draft.

49. The Secretariat felt obliged, however, to clarify in its text the formula worked out by the Group, since the latter had not considered the question of the penalty for failure to observe the provision regarding the reasons for the award. This is the point the Italian delegation probably had in mind when it asked at the fifth session whether it would not be advisable to draw a distinction between the enforcement of a foreign award and its effect as res judicata (TRADE/76, paragraph 35).

50. The result of giving reasons for an award where these were required neither under the law applicable to the dispute nor by the parties or, in the opposite case, of giving no reasons for it may in fact be that the award is declared null and void or its enforcement refused. But another solution is conceivable whereby, if no reasons are given for an award for which they should have been given, there should result the impossibility of citing the award's authority on the points of law it covers, while there will be no penalty at all for giving reasons for the award when none were required.

51. In view of the position as regards the obligation to give reasons for awards under some European legal systems, in respect of which the solution contemplated by the Group already represents a certain attempt at compromise, failure to observe the provisions concerning the reasons for the award should probably render the award null and void. This would also be in keeping with what seems to be the idea underlying the solution adopted by the Working Group, namely that the obligation to give, or not to give, reasons for the award is due to the express or implied wish of the parties. That being so, failure on the part of the arbitrator to observe the wishes of the parties, i.e. in fact, the procedure laid down in the agreement between them, should be penalized, like failure to observe any other procedural rule agreed between the parties, by making the award null and void or refusing to enforce it.

52. To make this idea clear and incontestable the draft article VII submitted by the Secretariat on the reasons for the award is so worded as to bring out clearly that the article makes presumptions regarding the parties' intentions in the matter.

Article VIII

53. The Working Group thought it advisable to insert in the European convention a provision under which interim measures or measures of conservation could be taken in the country in which is situate the property in dispute or the property of either party where it is in a country other than that in which the arbitration proceedings are being held. But it was divided on the question whether the European convention should in this respect merely prescribe that arbitration proceedings held abroad should be treated in the same way as arbitrations held in the country in which is situate the property in respect of which interim measures or measures of conservation have to be taken, or whether it should not be expressly provided in the convention that, in the case of arbitration proceedings

covered by the convention, application may be made to the courts of the country where the property is situate for such interim measures or measures of conservation in respect of property situate in the country of these courts as would be adopted if the case was within the jurisdiction of such courts. (TRADE/76, paragraphs 25-28).

54. Controversy on this question was partly due to the fact that, when it was discussed, the Working Group was uncertain whether interim measures or measures of conservation can be taken under all European legal systems by law-courts where this seems likely to promote arbitration proceedings being or about to be held in the given country (TRADE/76, paragraph 27). A survey carried out by the Secretariat on the subject showed that this possibility exists in practically all European countries. Hence, it might appear sufficient to treat arbitration proceedings being held or about to be held abroad in the same way as arbitration proceedings held at home. However, since the rules for requesting interim measures or measures of conservation and the extent to which courts may intervene in the arbitration proceedings before taking such measures differ from one legal system to another, preference might go to a provision assimilating the arbitration proceedings, from the point of view of the conditions under which the court would have to take such interim measures or measures of conservation, to actual court proceedings. Such, then, is the solution proposed by the Secretariat in paragraph 1 of article VIII of its draft.

55. Should the solution adopted with regard to interim measures and measures of conservation be the one based on assimilating foreign to national arbitration proceedings, it was suggested during discussion at the Working Group's fifth session that the provision be completed by a statement to the effect that any request for such measures must be regarded as not incompatible with the agreement to arbitrate (TRADE/76, paragraph 27). Since this struck the Secretariat as of value, even given the proposed wording of article VIII of its draft concerning interim measures and measures of conservation, the point was inserted in paragraph 2 of the article.

56. The same paragraph 2 contains another idea that is a modified version of a suggestion submitted on this question, but not adopted, at the Working Group's fifth session for the addition to the proposal inserted in paragraph 1 of article VIII of the Secretariat's draft of a provision to the effect that the court seized of the application for interim measures or measures of conservation should not rule on the substance (TRADE/76, paragraph 30).

57. This provision was opposed by several delegations as hardly acceptable to their countries; and it does in fact seem so, because, in relation to this more or less minor problem of interim measures or measures of conservation, it denies the law-courts the jurisdiction they may nevertheless have under other provisions of the same European convention or other international or national texts on arbitration.

58. Yet there is some justification for the concern expressed in the proposal to prevent an application for interim measures or measures of conservation being used as a pretext for the law-court intervening in the general dispute. However, the justifiable desire to stop such an application from developing into a hearing on the substance may be satisfied by a simple provision to the effect that such an application does not mean that the party it emanates from intended the substance of the case to go before the law-court. Thus the court, having no other justification for intervening, could not use the application for interim measures or measures of conservation for that purpose. This is the form in which the proposal under review has been incorporated in the Secretariat's draft, as the second part of paragraph 2 of article VIII.

Article IX

59. Although the Working Group had not contemplated drafting a special provision on the setting aside of the arbitral award, various delegations thought it expedient for the Secretariat to prepare a study on the number of cases in which international arbitral awards may be set aside, on the basis of existing European bilateral conventions and of proposals under discussion in other organizations for uniform legislation on arbitration in private international law relations (TRADE/76, paragraphs 14 and 54(c)).

60. The Secretariat found from its study that, while the question of setting aside the award is not directly dealt with in the various bilateral or multilateral international conventions on the organization of arbitration proceedings, recognition o arbitration agreements or recognition and enforcement of arbitral awards, it does arise in at least two ways as regards the recognition and enforcement of arbitral awards.

61. Firstly, the list of grounds for setting aside the arbitral award contained in various national law-books has been used as a model, and usually as a basis, for the international lists of grounds for refusing to enforce awards. Secondly, the setting aside of the award in the country where it was made on one of the grounds laid down in that country's law is given as a ground for refusing to enforce the award in practically all bilateral and multilateral conventions on the recognition and enforcement of foreign arbitral awards.

62. The process of transposing to the international sphere the various grounds for setting aside awards laid down in the domestic laws of the countries concerned seems to result in a substantial reduction in the number of awards actually set aside. While the Geneva Convention of 1927 contains a list of grounds for refusing to enforce awards that constitutes a veritable sum total of all the grounds for setting aside awards conceivable to the lawgivers of the various countries, a very real attempt is made in article V of the New York Convention of 1958 to reduce these grounds to the essential minimum below which the various European countries would probably not be any more prepared to go than they are at the world level. As regards refusal to enforce arbitral awards, the reduction in the number of impediments to their enforcement, which was explicitly requested by some delegations and is undoubtedly in keeping with the general aim pursued by the ad hoc Working Group, would appear to have reached a point beyond which it cannot continue for the time being.

63. The bilateral conventions and the multilateral Conventions of Geneva and New York nevertheless leave the Contracting States entirely free to write into their legislation any ground they care for setting aside an award, and since, under article V 1(e) of the Convention on the Recognition and Enforcement of Foreign Awards of 10 June 1958, a decision to set aside an award by the competent authority of the country in which or under whose law the award was made is binding on other courts of the Contracting States, an arbitral award may, according to the most recent international instrument on the subject, prove unenforceable if it has been set aside in the country in which or under whose law it was made on grounds that cannot, under the New York Convention, be regarded in any of the Contracting States as grounds for refusing to enforce the award.

64. A Convention which is primarily concerned with the recognition and enforcement of foreign arbitral awards naturally makes no provision for the international settlement of the question of awards set aside in the country where they were made but leaves it to the discretion of each of the countries concerned. On the other hand, in an instrument like the European draft convention, which is designed to settle various questions regarding arbitration that may provoke difficulties internationally, it is right and proper to cover the question of the setting aside of awards, in so far as differences between the grounds for setting them aside specified in the legal systems of the countries concerned and the grounds for refusing to enforce awards set out in an international instrument may result in awards being set aside in more cases than could occur in the field of refusal of enforcement under a system in which an attempt had been made, within the pattern

of an international instrument, to reduce the number of grounds for refusing to enforce awards. At once the simplest and most effective way of avoiding this possibility would appear to be to limit, in the European draft convention, the grounds on which an award may be set aside internationally, in the country of origin, by virtue of article V 1(e) of the New York Convention, to the grounds for refusal of enforcement set out in that Convention. This is the solution proposed in article IX of the Secretariat's draft annexed to this note.

65. The list of grounds for setting aside an award in the Secretariat's draft includes only the grounds set out in article V, paragraph 1, of the Convention of 10 June 1958, since the grounds for refusing to enforce an award set out in paragraph 2 of the same article would appear to concern only the countries in which the recognition or the enforcement of the award is sought. Nor does the list of grounds for setting aside an award contain those enumerated in article V, paragraph 1(e), of the New York Convention, since the said provision clearly concerns only refusal to enforce an award. On the other hand, a new paragraph (e) has had to be added to article IX, paragraph 1, to enable the setting aside of an award obtained by reason of fraud by the parties or the arbitrators. This provision appears to be indispensable and corresponds to Article V, 1(e) of the New York Convention whereby an award may be set aside internationally in the country of origin on the grounds provided in the law of such country, such grounds usually including fraud.

Article X et seq.

66. At the present stage in the drafting of the European convention on arbitration, the Secretariat thought it too early to submit a detailed draft of final provisions of the convention concerning, for example, the signature, ratification, entry into force, denunciation, and interpretation of the convention, and amendments thereto. It might be suggested, when the time is ripe, that the final provisions be modelled on chapter VIII of the Convention on the Contract for the International Carriage of Goods by Road, which was done at Geneva on 19 May 1956, also under the auspices of the Economic Commission for Europe of the United Nations, and deals with a subject which, as it touches questions normally governed solely by the laws of the various countries involved, can only be regulated internationally by a text subject to ratification procedure.

67. Given the close link that should exist between the proposed European convention and the New York Convention of 10 June 1958, the former being to some extent designed to complement the latter, it may be deemed expedient to open the new convention to signature or accession only by European States or those participating in the activities of the Economic Commission for Europe that are at the same time Contracting Parties to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958. This result could also be achieved by giving to the European Convention on arbitration the form of a Protocol to the world Convention.

ANNEX

DRAFT EUROPEAN CONVENTION ON CERTAIN QUESTIONS CONCERNING INTERNATIONAL COMMERCIAL ARBITRATION

THE UNDERSIGNED,

DULY accredited by their Governments,

CONVENED under the auspices of the Economic Commission for Europe of the United Nations,

HAVING NOTED that questions concerning the recognition and enforcement of foreign arbitral awards have been regulated in the Convention signed for the purpose at New York on 10 June 1958,

DESIROUS of promoting the development of European trade by, as far as possible, removing certain difficulties that may impede the organization and operation of international commercial arbitration in relations between physical and legal persons subject to the jurisdiction of the various European countries,

HAVE AGREED on the following provisions:

Article I

Scope of the Convention

1. This Convention shall apply:

(a) To arbitrations relating to commercial transactions entailing a movement of goods, services or currencies across frontiers;

(b) to commercial arbitration agreements concluded between physical or legal persons having their habitual place of residence or their registered office in two different countries;

(c) to agreements whereby two physical or legal persons having their habitual place of residence or their registered office in the same country accept arbitration abroad in disputes of a commercial character between them; and

(d) to arbitration proceedings or arbitral awards not regarded as domestic in the country in which the proceedings are held or in which recognition or enforcement of the award is requested.

2. For the purposes of this Convention the commercial character of a transaction or dispute shall be judged in the case of each of the parties thereto in accordance, for physical persons, with the law of the country of their habitual place of residence and, for legal persons, with that of the country in which their registered office is situate. Where the parties to a transaction or dispute have their habitual place of residence or registered office in two different countries, the transaction or dispute shall not be considered of a commercial character in terms of this Convention unless so defined by the laws of the two countries concerned.

Article II

Right of legal persons of public law to resort to arbitration

1. The Contracting States shall authorize legal persons of public law subject to their jurisdiction to conclude valid arbitration agreements in the cases referred to in article I, 1(a) and (b) of this Convention.

Article III

Organization of the arbitration

1. The parties to an arbitration agreement shall be free:

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

(b) to determine the place of arbitration; and

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

2. Where an arbitration agreement contains no express or implied indication regarding all or any of the points mentioned in the previous paragraph, the necessary steps to initiate arbitration proceedings shall be taken, as the case may be, at the request either of the party invoking the arbitration agreement or of the arbitrators appointed by the parties, by the President of the Chamber of Commerce of the habitual place of residence of the respondent, where such party is a physical person, or of the registered office, where the respondent is a legal person.

3. If in the respondent's country, it is impossible to determine the Chamber of Commerce of the respondent's habitual place of residence or registered office, the necessary steps shall be taken, subject to the same conditions, by the President of the country's National Association of Chambers of Commerce, or, if such a body does not exist, by the President of the Chamber of Commerce of the capital.

4. The competent President shall take steps:

(a) to appoint the respondent's arbitrator where the latter fails to do so within 12 working days of the request for arbitration;

(b) to appoint a sole arbitrator where the parties have provided in their agreement for arbitration by a sole arbitrator in the case of any dispute between them but fail to agree on the sole arbitrator;

(c) to appoint the presiding arbitrator, umpire, or referee where the arbitrators appointed by the parties fail to agree on such appointment;

(d) to determine the place of arbitration, provided that, if the competent President takes no decision on this point, the arbitration proceedings shall be held in the country of the respondent's habitual place of residence or registered office;

(e) to establish whether directly or by reference to arbitral rules or statutes, the rules of procedure to be followed by the arbitrators, provided that the arbitrators may establish their own rules of procedure if the competent President expressly accords them this right, or if his decision on procedure contains no reference to all or any of the questions regarding arbitral procedure which may be raised before the arbitrators.

5. The competent President may discharge all or any of the duties falling on him under paragraph 4 of this article by referring the parties in dispute to the rules or statutes of an arbitral institution, in which case the arbitration proceedings shall be held in whole or in part according as the President refers to all or only some of the said rules or statutes, in conformity with the relevant provisions laid down by the arbitral institution thus designated.

6. The choice of arbitrators under the provisions of this article shall not be limited by the requirement that the arbitrators must necessarily possess the nationality of any Contracting State concerned in the arbitration proceedings.

Article IV

Plea as to arbitral jurisdiction

1. Pleas as to the arbitrator's jurisdiction based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed shall be raised during the arbitration proceedings, prior to the delivery of a statement of claim or defence relating to the substance of the dispute; those based on the fact that an arbitrator has exceeded his terms of reference shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is put to the arbitrator or examined by him ex officio.

2. In the case of questions left to the discretion of the parties under the law deemed applicable by the arbitrator, pleas not raised within the above-mentioned time-limits may not be entered at a later stage in the arbitration proceedings and, in the case of questions left to the discretion of the parties by the competent tribunal's rules of conflict, pleas not raised within the said time-limits may not be entered during subsequent court proceedings concerning the substance or the enforcement of the award.

3. Subject to any subsequent judicial control provided for under national laws or international conventions, the arbitrator whose jurisdiction is called in question shall be entitled to proceed with the arbitration, to rule on his own jurisdiction and to decide upon the validity of the arbitration agreement or of the contract of which the agreement forms part.

Article V

Plea as to jurisdiction of the courts

1. A plea as to the jurisdiction of the courts based on the fact that a valid arbitration agreement existed shall be made by the respondent, under penalty of estoppel, before the law-court seized by either party to the arbitration agreement prior to the delivery of a statement of claim or defence relating to the substance of the dispute.

2. In taking a decision, under article II, paragraph 3, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958, concerning the validity of the arbitration agreement prior to the decision on the reference of the case to arbitration, courts of Contracting States seized of a dispute over a matter on which the parties have concluded an arbitration agreement shall examine the validity of such arbitration agreement:

(a) under the law to which the parties have subjected their arbitration agreement;

(b) failing any indication thereon, under the law of the country in which the award is to be made;

(c) failing any indication as to the law to which the parties have subjected the agreement, and where at the time when the question is raised in court the country in which the award is to be made cannot be determined, under the competent law by virtue of the rules of conflict of the court seized of the dispute.

3. Where the court seized of a question on which the parties have concluded an arbitration agreement is that of the country in which or under whose law the award is to be made, its decision regarding the validity of the arbitration agreement shall be treated as res judicata both by any arbitral tribunals or law-courts subsequently seized of a question covered by the arbitration agreement concerned and by any law-courts called upon to rule on the recognition and enforcement of arbitral awards made on the basis of the agreement on whose validity a decision has been given by the first court seized.

4. Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a law-court, law-courts of Contracting States subsequently seized shall stay their ruling on the arbitrator's jurisdiction until the arbitral award is made.

Article VI

Applicable law

1. The parties shall be free to determine, in their contract or arbitration agreement, the law to be applied by the arbitrators to the substance of the dispute.

2. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the contract, commercial practice and the domestic law applicable under the rules of conflict deemed applicable by the arbitrators.

3. The arbitrators shall act as amiables compositeurs if the parties so authorize them and if they may do so under the law they deem applicable.

Article VII

Reasons for the award

1. The parties shall be presumed to have agreed that reasons shall be given for the award unless they expressly declare that reasons shall not be given.

2. The contrary shall hold true only if the parties have assented to an arbitral procedure under which it is not customary to give reasons for awards,, in which case the parties shall be presumed to have agreed that reasons shall not be given for the award unless either party has requested, before the end of the hearing, that reasons be given.

3. Where, under this provision, reasons must be given for the award, they may be set out either in the award itself or in a separate document duly authenticated and annexed to the award.

Article VIII

Interim measures and measures of conservation

1. Where, during arbitration proceedings covered by this Convention, either party deems it expedient to request that interim measures or measures of conservation be applied to property in dispute or to property of the other party situate in a country other than that where the arbitration proceedings are held, the courts of the Contracting States where the property is situate shall take such measures at the request of the party concerned, if necessary on the basis of an interim decision by the arbitrator, in the same way as they would be taken if they had jurisdiction in the case.

2. The request for interim measures or measures of conservation shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court.

Article IX

Setting aside of the arbitral award

1. Arbitral awards made in disputes covered by this Convention shall be set aside, with international effect under article V 1(e) of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, of 10 June 1958, only where the party requesting the setting aside furnishes to the competent authority of the country where or under whose law the award has been made proof that:

(a) the parties to the arbitration agreement were under the law applicable to them, under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made, or

(b) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) that the award was obtained by fraud.

Article X et seq

Final provisions

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