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CONVENTION ON THE RECOGNITION AND ENFORCEMENT

OF FOREIGN ARBITRAL AWARDS

Summary Analysis of Record

of

United Nations Conference

May/June 1958

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INTRODUCTION

This analysis is designed to provide background material on the work of the recent U.N. Conference on International Commercial Arbitration relating to the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although many aspects are covered, no attempt has been made to deal with every point at issue, nor to describe all that was said on such points as have been selected for review. The aim has been, however, to cover in some detail those points that might be of particular interest to those concerned with this matter.

The material is divided into three parts. Part I deals with the scope of the Convention: that is, the kind of arbitral award to which the Convention relates and the reservations which states are permitted to make when signing, ratifying or acceding to it. These matters are all covered in Article I. Article II, also dealt with in this Part, is concerned with the recognition of arbitral agreements and the duties of courts to refer parties to such agreements to arbitration when requested to do so. Part II deals with the provisions of Articles II to VI inclusive. These are concerned with the obligations of contracting states to recognize and enforce awards and the conditions therefor. Part III deals, in more summary fashion, with the remaining Articles. A Part IV is added in which the texts of the Convention and the Final Act are set out, together with the names of the delegates.*

* *In citing the Record of this Conference and the amendments and reports submitted to it only the last symbol will be used in each case. Thus "SR.4,p.2" will refer to page 2 of the document designated "E/CONF.26/SR.4" and "L.6" to that designated "E/CONF.26/L.6."*

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PART I

SCOPE OF THE CONVENTION

A. Definition of Arbitral Awards

ARTICLE I

"1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

"2. The term 'arbitral awards' shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

1. Territoriality/Non-Domestic Awards (paragraph 1)

The first sentence of paragraph 1 is substantially the same as paragraph 1 of Article I of the draft of the Ad Hoc Committee appointed by the E.C.O.S.O.C. (E/2704 and Corr.1, Annex). The second sentence is new.

Although it was recognized that a definition of the arbitral awards to which the Convention applied would probably have to include a territorial criterion, this was unsatisfactory to a number of delegates and various alternatives were considered. Eventually that now embodied in the second sentence was adopted, but to meet the objections of many states a provision was later added permitting a state to limit recognition and enforcement to awards made only in the territory of another contracting state. The I.C.C. proposals to include also awards made between parties having their principal establishments or usual residences in different

countries and those dealing with disputes arising from contracts which qualify as international not because of the nationalities or residences of the parties but because they involve legal relationships implemented in whole or in part in the territories of different states (E/2822, Annex II B) were not adopted.

At the outset of the Conference, the delegate from Italy said that

> "... the Conference should reconsider the definition of the awards to which the Convention would apply. The mere fact that an award had been made in a country other than that in which it was sought to be relied upon was not enough to make it a foreign award from the point of view of the country of enforcement. The Conference should seek other criteria better suited to the purpose of the Convention..." (SR.2,p.7)

And the German delegate said that

> "If it was agreed that the place where an award was made should not be considered a determining factor* ... whether an award was to be regarded as national or foreign could be made dependent on the nationality of the parties, the subject of the dispute, or the rules of procedure applied. The last seemed to constitute the most appropriate determining factor." (SR.4,p.4)

These statements were followed by debate on an amendment sponsored by Austria, Belgium, Germany, France, Italy, the Netherlands, Sweden and Switzerland which proposed the following as paragraph 1 of Article I:

> "This Convention shall apply to the recognition and enforcement of arbitral awards other than those considered as domestic in the country in which they are relied upon." (L.6)

* Presumably this should read "the sole determining factor."

The delegate of France said this was prompted by the belief that the definition in the Ad Hoc Committee's draft

> "placed undue emphasis on the place in which the award was made ... The place of the award was often fortuitous or artificial and, unlike the place of a court judgment, which was governed by unequivocal court rules, might often prove difficult to determine ... (A)s was shown by the ruling of the French Court of Cassation that an arbitration conducted under foreign law in Paris was not a French arbitration, certain legal systems regarded the place where the award was made as only a secondary factor." (SR.5,p.8)

However, it was quickly pointed out that in common law countries such a definition would not be appropriate and to define a foreign award as one not "domestic" produced no better result than a provision which said the Convention applied to awards "considered as foreign in the country in which they are relied upon" (id.,p.10)

In reply it was said that this proposal was not complete in itself, but that its sponsors were discussing an additional clause which would provide criteria for determining the nationality of an award and which would take into account the law under which it was made (id.,p.11) The German delegate pointed out that locus was not the determining criterion under German law as the application of German procedural law to an arbitration held in another country rendered the award domestic under German law (SR.6,p.8).

In Colombia, it was said, the proposed criterion would be "much too vague" and the least the Conference should do was to determine to which awards the Convention should apply. A proposal by Turkey that the criterion should be the law which governed the arbitration was equally unsatisfactory, as Colombia could not recognize an award made internally under a foreign

law as anything but a Colombian award (SR.6,p.9). Even more emphatic was the delegate of Israel who said the Turkish proposal "raised legal questions of all kinds which would no doubt be the joy of jurists, but might be a torment to plaintiffs" (id.,p.10).

During this debate Italy submitted a proposal that the Convention apply to "arbitral awards made in accordance with a procedural law other than that of the state in which the award is relied upon" (substantially the proposal of Turkey in L.9/Rev.1), that any state have the right to declare that it would not apply the Convention to such awards if all the parties were its nationals or habitual residents in its territory, and that any state have the right to declare that it would apply the Convention only to awards between parties one of whom was a national or habitual resident of one of the contracting states or made in accordance with the procedural law of one of the contracting states. At the same time the parties were to be free to choose the law governing the arbitral procedure, but in the absence of agreement the procedure was to be governed by the law of the place where the arbitration takes place (L.13; SR.7,p.5).

In the Working Party of ten states* appointed to deal with this problem, it was decided to leave in both criteria: that which determines whether an award is foreign by the place where it is made and that which leaves it to the state where enforcement is sought to determine whether or not the award is domestic. Despite some misgivings the text proposed by the Working Party (L.42) was adopted by 35 votes to none, with 3 abstentions, on the understanding that the final text would be prepared by a committee to be set up for that purpose (SR.16,p.7). In effect this

* Colombia, Czechoslovakia, France, Germany, India, Israel, Italy, Turkey, U.S.S.R. and United Kingdom (SR.7,p.8).

deferred final decision until after decision on the difficult matter of Reservations, but the text remained unaltered in the final document except for two minor changes.

2. "persons, whether physical or legal" (paragraph 1)

In paragraph 24 of the Report of the Ad Hoc Committee (E/2704 and Corr.1, Sec.E) it was said that Belgium had proposed an express provision that public enterprises and public utilities should be deemed to be legal persons if their activities were governed by private law, but the Committee had considered that such a provision would be superfluous. In its comment on this Report, Austria said

> "Since the term 'legal persons' includes States, the draft Convention seems admittedly to cover arbitral awards made in their favour or against them in cases of disputes with subjects of private law. Nevertheless, it would be desirable to provide expressly that the Convention is also applicable in cases in which corporate bodies under public law, and particularly States, in their capacity as entities having rights and duties under private law, have entered into an arbitration convention for the purpose of the settlement of disputes." (E/2822, Annex I B)

agreement

The Society of Comparative Legislation suggested an appropriate addition to implement the Belgian proposal (E/2822, Annex II B).

At the Conference the Czechoslovakian delegate said that his delegation would not object to an express provision that the Convention was applicable to cases where corporate bodies under public law, "in their capacity as entities having rights and duties under private law," entered into arbitration agreements (SR.7,p.3). Such a position was to be expected of a state that conducted its trade through state-owned corporations or

government departments.* In fact the very participation of totalitarian states in the preparation of the Convention foreshadowed a document that would cover their trading entities. Acceptance of the Czechoslovakian amendment, providing that the term "arbitral award" should include awards "made by permanent arbitral bodies" (L.10), underscores this aspect.

At the same time, delegates did not evidence any desire to debate this question. Instead, they appeared willing to assume that the point was adequately covered by the expression used in the draft of the Working Party: "arising out of disputes or differences between physical or legal persons" (L.42,para.5). A proposal by Israel to delete this phrase, when the report of the Working Party was introduced (SR.16,p.2), was supported by Austria and Australia (id.,pp.4-5). The Italian delegate wondered whether the words

> "might not furnish grounds for invoking the Convention in a dispute between States submitted to the Permanent Court of Arbitration at The Hague" (id.,p.5),

but the President of the Conference thought the Ad Hoc Committee "had had no such intention when it had prepared the draft Convention" (ibid.).

Rejection of the Israeli proposal by 21 votes to 7 with 9 abstentions (id.,p.6) might be interpreted as affirming the view that the Convention applies to awards against states where they act in a private law capacity, but the matter was not discussed.

When the text of the Convention proposed by the Drafting Committee came before the twenty-third plenary session, the Italian delegate observed

* Compare also the statement made by the Iranian delegate that "arbitral clauses were usually included in contracts between the Iranian Government and foreign firms relating to the country's economic development programmes" (SR.4,p.2).

that the title referred to "foreign" arbitral awards although the word "foreign" did not appear in the body of the Convention. He thought it would be sufficient to refer simply to "arbitral awards." The Swiss delegate suggested "arbitral awards in private law" (SR.23,p.5), to which the United Kingdom delegate replied that the term "in private law" was not appropriate as the Convention "might apply to public arbitral bodies" (ibid.).*

On the whole, the better view would appear to be that the expression "persons, whether physical or legal" should be given effect according to its ordinary meaning, so as to classify a state or department or agency thereof or a state-owned corporation as a legal person. The only necessary qualification, and one suggested by the Philippine delegate (SR.19,p.6), would appear to be the exclusion of political matters. But where a state has agreed in a commercial contract to submit differences to arbitration, it would seem unlikely that a court asked to enforce an award made in accordance with such agreement would refuse enforcement on the ground that the state was not a legal person. At least, so far as the Conference was concerned, the intention appears to have been to include such awards. Otherwise, the long debate on permanent arbitral bodies of totalitarian states, and even participation by such states in the Conference as a whole, would have been a waste of time.

3. Permanent Arbitral Bodies (paragraph 2)

As defined in paragraph 2 of Article I the term "arbitral awards"

* The reference to "arbitral bodies" appears to be an error in transcription. The writer's note records the U.K. delegate as saying: "Things have moved - public bodies will be subject to the Convention" and the Israeli delegate as saying he agreed.

includes

> "not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted."

In the Report of the Ad Hoc Committee it was said that the last part of this definition, as then proposed by the U.S.S.R., was unnecessary and a reference in the Report would suffice (E/2704 and Corr.1, Sec. F, para. 25). At an early stage in the Conference, the Czechoslovakian delegate said in support of his amendment to add this part (L.10):

> "The system of institutional arbitration was well established in countries with a planned economy. In other countries permanent courts of arbitration had been working with considerable success, and he had no doubt that the practice would continue to spread. However, as there were some countries in which institutional arbitration was not known, it might be well to add an appropriate provision ..." (SR.7,p.3)

An entire plenary session was devoted to a debate on this proposal (SR.8). The Israeli delegate considered it superfluous:

> "If the procedure followed by the permanent bodies referred to therein was genuinely arbitral, the Convention would apply to the resulting awards in any event. On the other hand, if those bodies were really courts of justice, exercising compulsory jurisdiction, the fact that they were described as arbitral would be wholly meaningless and they could never come within the scope of the Convention.
>
> "He agreed with the U.S.S.R. representative that international trade was of vital importance to the promotion of understanding between States. Equally important, however, was the acceptance of the true nature of international arbitration ... Real international arbitration presupposed the existence of a universal arbitral body composed of all States or the appointment of neutral arbitrators freely selected by the parties to the dispute. There could be no such arbitration in a tribunal imposed by one State alone." (SR.8,p.2)

In the opinion of the Italian delegate the crucial question was not whether the body was permanent or specially appointed, but whether there was an element of compulsion in the submission. Agreeing with this view, the French delegate said that

> "During all the years of the application of the Geneva Protocol and 1927 Convention, no suggestion had ever been made that the term 'arbitral award' did not include an award made by a private permanent arbitral body.
>
> "If, however, the purpose was to cover awards made by permanent bodies which might call themselves arbitral bodies but which were really courts because the parties were compelled to have recourse to them, the Czechoslovak amendment was open to serious question. The awards made by such bodies were the same as judicial decisions." (SR.8,p.4)

The Belgian delegate proposed the insertion of "voluntarily" before "submitted" (id.,p.5).

In reply to these and other criticisms the Czechoslovakian delegate said that

> "Not only did his delegation not question the principle of voluntary submission, but it strongly supported it. The awards of the Court of Arbitration of the Czechoslovak Chamber of Commerce were made by independent arbitrators, and the parties were free to decide whether or not they wished to make use of its services. It had the great advantage that the parties knew in advance its rules of procedure and its legal status. Moreover, Czechoslovak trading bodies were under no obligation to submit their disputes to that institution. In maritime disputes, for example, the Czechoslovak party usually submitted to arbitration in London. There was, therefore, no question of compulsory jurisdiction." (ibid.)

The voluntary nature of the submission having thus been settled (the Belgian amendment was accepted), the only question was whether the

amendment was necessary. The Turkish delegate thought it was not; the delegate from Ceylon considered it was in view of the doubts expressed in the Conference; and the Swiss delegate pointed to the recent judgment of the Zurich court as justification for it. On a vote, the Conference decided by 25 votes to 8, with 6 abstentions, to include this provision in the Convention (SR.8,p.8).

When the Drafting Committee reported to the Conference, they questioned the need of "voluntarily" and, on a motion by Israel, this was dropped by a vote of 24 to 2, with 7 abstentions (SR.23,p.6).

It was thus accepted that awards made by the permanent arbitration bodies of totalitarian states are covered by the Convention even though, as pointed out in the Swiss case referred to at the Conference, the panels are appointed by state organs and the tribunals themselves are state institutions.

SCOPE OF THE CONVENTION
(continued)

B. Reservations

"3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declaration."
(Article I, paragraph 3)

Italy proposed four reservations (L.41). These would permit a state to declare that it would apply the Convention only to the recognition and enforcement of awards

(a) made in the territory of another contracting state;

and to declare that it would not apply the Convention to the recognition and enforcement of awards

(b) considered as domestic by the law of the state making such declaration although made in the territory of another state;

(c) where the parties were all nationals of, were domiciled in or usual residents of the declaring state and the dispute had no reasonable connexion outside the national territory;

(d) where none of the parties was a national of a contracting state or domiciled or usually resident in its territory.

These were all eliminated except the first, but at the end of

the Conference the German delegate said he regretted the omission of (b). An award made abroad under German procedural law would under the Convention have to be regarded as a foreign award, but under German law it would be regarded as domestic and could be annulled in Germany, whereas other types of "foreign" awards could only be annulled in foreign courts (SR.23,p.12).

The Italian effort to devise a formula that would meet the needs of all the various systems represented at the Conference provoked the comment from the delegate of Ceylon that this tendency

> "to give consideration to the internal laws of various countries and to attempt to adapt the text of the Conference to them ... was contrary to the very aim of the Convention, which should be to bring closer together the different national arbitration laws, thereby facilitating the recognition and enforcement of foreign awards." (SR.15,p.4)

In the Working Party appointed to deal with this matter, being the same Party as that which dealt with paragraph 1 of Article I, plus the addition of Ceylon, most of the delegates felt that no reservations should be permitted (SR.21,p.9). The amendment proposed, however, set out the first two grounds of the Italian proposal, omitting the third and fourth based on nationality and residence (L.49). As the third was the only one Italy would have been compelled to make because of its own legislation, the Italian delegate said he was not satisfied and would have preferred no reservations at all, "for then all States would find themselves in the same position" (id.,p.10). At the end of the Conference he said that this failure to meet Italy's requirements might make it difficult for his government to accede to the Convention (SR.23,p.13). Possibly, however, as in the case of Germany, the difficulties could be overcome by changes in domestic legislation.

During the debate on the subject of reservations, two extreme views emerged: that expressed in the Report of the Working Party (L.49) that there should be no reservations at all and that put forward by Israel that any state could make such reservations as it saw fit and that other states would not be bound vis-a-vis that state to any greater extent than it was. The latter proposal, it was felt, would ensure genuine reciprocity and at the same time would offer less encouragement to make reservations than would a list, would meet the requirements of all states and would thus lead to the greatest number of accessions (SR.21,p.10). Germany, Bulgaria, Italy, Colombia and the Philippines supported this view; Japan and the U.S.S.R. felt it would be better to have no reservations at all. Ceylon commented that, if domestic legislation were to be given expression in a variety of reservations, the result would be disastrous for international business (id.,p.11) and added "are we going to write away the labor of the last 14 days?"

The Working Party's proposal that there should be no reservations was defeated by 24 votes to 2, with 9 abstentions (id.,p.13). The Israeli proposal, confined as suggested by Italy to Article I, was defeated by 22 votes to 9, with 6 abstentions (id.,p.14).

Both Italy and Norway still felt it was essential to exclude disputes which had no international character and the Italian delegate stressed the possibility of Italian nationals arbitrating across the border to escape taxes. It was suggested that the enforcement of such awards in Italy might be refused on the grounds of public policy (ibid.).

A number of delegates were concerned with the principle of reciprocity. The representative of the U.S.S.R. moved the insertion of the

words "on the basis of reciprocity" in the introductory phrase both in the Working Party and in the plenary sessions. This was adopted by 16 votes to 1, with 14 abstentions (SR.21,p.15). The territorial reservation thus modified was adopted by 29 votes to 1, with 3 abstentions (ibid.).

The Italian delegate then asked for a vote on (c) of his amendment (L.41) which would have permitted a state to declare that it would not apply the Convention to awards "considered as non-domestic by the law of the State" making the declaration when the parties were all nationals or domiciliaries or habitual residents and the dispute had "no reasonable connexion outside the national territory." This was defeated by 16 votes to 6, with 8 abstentions (ibid.).

More significant, however, was the contest over the reservation in the Working Party's draft which would have permitted non-application to awards "considered as domestic by the law of the State making such declaration" even though they might be made in the territory of another state. The German delegate, in support of this, said that under German law (as noted above) an award made in the territory of another state, but in accordance with German procedural law, would be considered a domestic award and the Convention should not apply to it. The provision, however, received only 11 votes in favor and as 11 states voted against it, with 10 abstentions, it failed of adoption (id.,p.16).

The third reservation contained in the draft of the Working Party which would have permitted states to limit application to "disputes arising out of contracts which are considered as commercial under the domestic law" also failed at this stage to receive the requisite support (13 to 11, with 7 abstentions: id.,p.17). It was, however, resurrected by the Netherlands

on the next to the last day of the Conference on the ground that its omission would cause great difficulties for countries like Belgium. The proposal was supported by Norway and Turkey and on being put to a vote received 24 votes in favor with only 2 against, and 6 abstentions (SR.23,p.12). As the Turkish delegate said, the provision could do no harm and it was not really a reservation but rather an accommodation to those legal systems in which commercial law was distinct from civil. If the Conference accepted the clause, he said, "the Convention could obtain world-wide acceptance and thus make a great advance over previous conventions." It was also said that the concept of reciprocity could not apply to this clause (id.,pp.10-11).

As reported by the Chairman of the Drafting Committee it was felt that some states might interpret paragraph 3 of Article I as authorizing them to apply the Convention only to the recognition and enforcement of awards and not to the recognition of arbitration agreements under Article II (id.,p.5). The delegate from the United Kingdom said that

> "The provisions of article II must be binding on States; otherwise, a party to a dispute might have recourse to the courts, even if it had signed an arbitral agreement. In order to avoid that difficulty, all that was necessary was to change the position of the word 'only' in the English text ... In that way one could be sure that every State recognized the validity of arbitral agreements, and the principle of reciprocity would also be safeguarded." (id.,pp.6-7)

This opened the door to a proposal by Belgium, supported by Argentina and Guatemala, that Article II be dropped entirely ("The Conference had first voted in this sense by a large majority and had reversed its vote by a much smaller majority" id.,p.8), but the U. K. delegate stood firm, repeating that

> "Countries should not be permitted to sign the Convention under the impression that they could then avoid its application by refusing to recognize the validity of arbitral agreements ... (I)t would be better to have no convention at all than to have one greatly inferior to the 1927 instrument." (SR.23,pp.8-9)

On the vote the U.K. proposal was adopted by 22 votes to 8, with 6 abstentions, and "only" was moved from its place in the draft of the Drafting Committee ("declare that it will apply the Convention only to the recognition and enforcement of awards made in the territory of another Contracting State" L.61) to its present position after "made" (L.63).

Whatever criticism may be leveled at the consequent drafting of this sentence, it is clear from the record that the Conference did not intend that a state could make any reservations as regards Article II and rejected the interpretation suggested by the Chairman of the Drafting Committee. At the same time the Belgian delegate was most emphatic that if Article II stayed in without any right of reservation his country could not accede (id.,p.7). It was hoped, however, that the concession made regarding a reservation to commercial relationships would enable Belgium to overcome its objections.

In the Drafting Committee it was concluded that a general clause prohibiting all reservations not provided for in the Convention should appear in the Final Act and paragraph 14 of that document contains such a provision. Doubts were expressed as to its effect. The delegate of the U.S.S.R. said his delegation would sign the Final Act on the understanding that this statement would not serve as a precedent (SR.24,p.12). The delegate of Israel moved to reconsider it "on the ground that it might lead to confusion." When his motion was defeated 18 to 11, he said his

delegation would sign "without prejudice to its attitude on the admissibility of reservations under the general principles of public international law" (SR.24,p.12). Others made general "without prejudice" reservations. It was clearly the sense of the Conference, however, that no other reservations would be admissible and, although this provision might lack binding force, it is conclusive evidence of the intention (id.,p.13) and might be cited in refusing to accept reservations put forward by states which had participated in the Conference.

At the close of the debate on Reservations on the 5th June the Italian delegate said: "I note we have eliminated reservations. We only have a reciprocity clause." Perhaps this is a more accurate description of the first sentence of paragraph 3, but there were other aspects of "reciprocity" which came up for consideration.

SCOPE OF THE CONVENTION
(continued)

C. Reciprocity

ARTICLE XIV

> " A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention."

At an early stage in the Conference the Norwegian delegate had introduced what he called "a general reciprocity clause" which would provide that a contracting state could not avail itself of the Convention against other contracting states except to the extent that it was itself bound (L.28). This was first brought up in connection with the federal clause (SR.20,p.6), when it was argued that the special reciprocity clause in that Article should be made general. Although supported by a number of states (Bulgaria, Belgium, the U.K. and Ceylon; it was opposed by Israel), the proposal was not voted on until the last day of the Conference when it was again brought forward, opposed by Sweden as "unnecessary" ("Due provision for reciprocity had already been made in all the contexts where it had some significance") and adopted by the small vote of 13 to 5, with 16 abstentions (SR.24,p.7).

During the discussion of this in the debate on the federal clause, the delegate from Israel had pointed out that

> "... the Ad Hoc Committee's idea had been that the States parties to the Convention should not be able to take

> advantage of the reservations made by other States. That was not in conformity with current practice but in the case of arbitration there were sound reasons for departing from custom. If a State made a reservation because of the special features of its domestic legislation -- for example, because it regarded certain awards made abroad as domestic -- other States were obviously not compelled to adopt these special features. The Ad Hoc Committee had therefore been quite right in not basing the draft Convention on the idea of reciprocity, at least with regard to the possible reservations." (SR.20,p.7)

The inclusion of this clause (Article XIV in the final text) does not, of course, require a state to limit its own recognitions and enforcements of awards and agreements to the same extent as other states (for example, a common law state does not have to adopt the reservation on commercial relationships), but it does give a defensive right, and a state which does make reservations, whether as regards territory or its federal composition or otherwise, can expect to receive no more than it is prepared to give.

What significance the phrase "on the basis of reciprocity" in paragraph 3 of Article I may have is not altogether clear. If it means that a state which limits recognition and enforcement to awards made in the territories of other states can require such states to recognize and enforce awards rendered in its territory, the words add nothing to the obligations imposed by paragraph 1, for all contracting states are thereby required to recognize and enforce awards rendered in the territories of other states. If it means that such a state may by its own declaration exact similar declarations from other states, the liberty granted by paragraph 3 would become an instrument of repression, defeating the liberal objects of the Convention. Such a construction is hardly tenable. Perhaps the explanation lies in the fact that these words were inserted at a time when it was not

clear whether the reservation with respect to awards considered as domestic by internal law might be adopted and no serious attempt was made to remove them when the domestic reservation clause failed to win acceptance.

One other effort to impose "reciprocity" was defeated. Although rejected by the Ad Hoc Committee as "rather vague and ambiguous" (E/2704 and Corr.1, Sec. D, para. 23), Yugoslavia introduced (SR.7,p.9) an amendment to paragraph 1 which would limit the Convention to awards made between persons "subject to the jurisdiction of one of the Contracting States" (L.12). This was opposed by Japan as "needlessly restrictive" if the territorial criterion was adopted (id.,p.11) and was not adopted by the Working Party in their formulation of paragraph 1 (SR.16,p.3). The principle seemed nevertheless essential to the Yugoslav delegate and

> "... its omission would have undesirable and inequitable consequences. For instance, a Yugoslav undertaking and a French company might submit a dispute to an arbitral tribunal, which made its award in Switzerland. If France had signed the Convention but Yugoslavia had not, the Yugoslav undertaking could request enforcement of the award in France, whereas the French company would have no remedy in Yugoslavia. The Yugoslav draft was designed to prevent such anomalies." (id.,p.3)

On the vote, the proposal received 16 votes to 14, with 5 abstentions, but because an amendment to the draft of the Working Party required a two-thirds vote it failed of adoption (id.,p.6). As a result of this failure, the Yugoslav delegate said he was compelled to abstain from the final vote on the Convention as a whole, although this would not prejudge the attitude of his Government with regard to accession (SR.24,p.11).

SCOPE OF THE CONVENTION
(continued)

D. Arbitral Agreements

ARTICLE II

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

"2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

"3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

1. Proposals by Sweden and Poland

In the Report of the Ad Hoc Committee it was said that the representative of Sweden had proposed an Article in the Convention that would reproduce essentially Article I of the 1923 Protocol and provide that contracting states would undertake to recognize the validity of written agreements to submit differences to arbitration. The Committee decided not to adopt this proposal. India and the United Kingdom voted in favor of it, Ecuador thought it already implied, Egypt and the U.S.S.R. opposed it, Belgium considered it imprecise and superfluous (E/2704 and Corr.1, Sec.F, paras. 18 and 19). In the subsequent Report of the Secretary-General setting out comments by governments (E/2822), Sweden again pressed

for the addition of such a provision (E/2822/Add.1) and the United Kingdom urged that the matter be discussed at the Conference (E/2822/Add.4,para.17).

There Poland submitted a proposed draft to cover the matter (E/CONF.26/7), and Sweden led off the initial discussion, with support from Italy, Norway, Ceylon, France and India (SR.7,pp.8-12). The delegate from El Salvador doubted that such a statement of principle properly belonged in the body of the Convention and thought it might be embodied in a subsidiary agreement. He also pointed out that the subject was complex and considerable detail would be required in order to avoid difficult questions of conflicts of laws (id.,pp.9-10). In reply to this the French delegate said "the case law developed over a period of thirty-five years should afford a sufficient safeguard for the future," but he doubted the wisdom of requiring that agreements be "in writing" (id.,p.11). Turkey supported El Salvador, and Japan thought the provision redundant "and could cause only difficulties in the future" (ibid.).

There were, however, obvious difficulties in trying to fit the provisions of the 1923 Protocol into the Convention. As the German delegate said, the clause proposed by Sweden (L.8) "must be connected in some way with arbitral procedure." Some definition of "in writing" would also be desirable (SR.9,p.3).

The Belgian delegate doubted the wisdom of including any provision on this subject. He thought it would "in any case be useless, as it would overlap with article III, sub-paragraph (a) of the draft and might lead to some confusion..." The best course, he thought, would be to leave the 1923 Protocol undisturbed and to provide in the Convention that every contracting state would be deemed to have adhered

to the Protocol (SR.9,pp.3-4). Turkey thought the Swedish proposal was an attempt to establish a uniform law and "the text would have to be limited to international arbitration clauses and agreements" (id.,p.4). Although this was obviously the intention, the clause as finally drafted (Article II) does not in terms limit its provisions to international or "foreign" agreements.

As the debate proceeded, support came from the U.S.S.R., Peru, Switzerland and Ceylon, but India had second thoughts and concluded that the provision was superfluous having regard to the fact that the Convention was applicable only to awards that had passed beyond the stage of finality (id.,p.6). More disconcerting were the doubts expressed by France regarding the competence of the Conference to go beyond the scope of the draft Convention and deal with the subject matter of the 1923 Protocol. Although the Colombian delegate supported the Swedish proposal in principle he, too, thought there was "great force" in this objection on the matter of competence (id.,pp.9-10). Turkey and Ceylon disagreed and Switzerland suggested that the subject might be relegated to an annex, which might be signed separately (id.,pp.10-11). On a vote the Conference decided by 25 to 9, with 6 abstentions, that it was competent to deal with the matter (id.,p.12).

The delegates from Argentina, El Salvador, Guatemala, Belgium, the United Kingdom and Yugoslavia announced their opposition to dealing with the matter at the Conference, but on the vote it was decided by 25 to 8, with 6 abstentions, "that a clause of that nature should be elaborated." It was then decided by 19 votes to 13, with 9 abstentions, not to insert a clause in the Convention itself (id.,p.13) and a Working Party

composed of Belgium, Germany, Poland, Sweden, Turkey, U.S.S.R. and the United Kingdom was appointed to prepare a new text (SR.9,p.14).

2. Protocol versus Article

When the Report of the Working Party (L.52) was introduced, the delegate from the Netherlands suggested that the Conference might reconsider its decision not to include these provisions in the Convention itself. He felt that the subject could conveniently be covered in a single article and with that end in view he submitted a draft (L.54) for consideration (SR.21,p.17). The Belgian delegate promptly opposed this suggestion, saying that mandatory provisions of Belgian law would prevent it from ratifying a convention containing an article such as that proposed. On a vote, however, the Conference decided by 18 to 8, with 4 abstentions, to reconsider the matter.

3. Reservation

As soon as the debate on this subject was renewed, the Israeli delegate proposed the addition of a reservation which would permit a state at the time of signature, ratification or accession to declare that this article would not apply to it (id.,p.18). Both the United Kingdom and the U.S.S.R. opposed this proposal, the former saying that this would permit a court which was asked to enforce an award to refuse to recognize a valid submission to arbitration, and this would defeat the whole purpose of the Convention: "A validity clause was essential if the Convention was to be viable" (id.,p.19). The Israeli delegate accepted this criticism, but said that, if the Netherlands draft were adopted,

> "... matters might be referred to arbitration which were wholly within the purview of domestic courts.

> Those paragraphs had nothing to do with the recognition and enforcement of arbitral awards and were beyond the scope of the Convention. Moreover, they would require a court to treat as valid an agreement resulting in an arbitral award that could not be enforced under article IV (1) of the Convention, or to refer to arbitrators cases which could not have been enforced if an award had been given." (SR.21,p.19)

These arguments were supported by Belgium and Turkey and doubtless would have had the support of the Latin American delegations if other engagements had not prevented their attendance at this late hour (the session lasted from 2:45 P.M. until 9:25 P.M. without a break). The proposal was rejected by the close and small vote of 13 to 9, with 4 abstentions (id.,p.20).

The United Kingdom delegate felt strongly, however, that these provisions for the recognition of agreements were necessary, particularly after hearing the debate on the subject. It was apparent, he said, that states might kill an arbitration before it was even born by permitting litigation in their courts in spite of agreements to arbitrate. As part of the fire had centered on the requirement that states recognize agreements "as valid," he proposed the deletion of these words and this was adopted by 14 votes to 1, with 8 abstentions (ibid.). It was also agreed, by a vote of 21 to 0, with 3 abstentions, to refer to differences arising from legal relationships instead of merely to contracts.

As noted above, the question of reserving on this undertaking to recognize agreements was again brought up in connection with the Report of the Drafting Committee and Belgium again said it would be impossible for it to accede to the Convention if it could not do this. Guatemala also objected:

> "By inserting a clause on the validity of arbitral agreements, the Conference had exceeded the terms of reference given to it by the Economic and Social Council." (SR.23,p.7)

And Argentina said that the Conference had first voted to drop the Article

> "by a large majority and had reversed its vote by a much smaller majority. It seems logical, consequently, to permit States to make reservations concerning the provisions of article II ..." (id.,p.8)

The effort at this stage to permit a reservation was defeated, however, and Article II remained firmly imbedded in the Convention, the final vote on the whole Article being 27 to 2, with 5 abstentions (SR.24,p.10).

4. Agreement "in writing"

Before leaving this subject, it is worth noting the debate on the requirement that agreements must be "in writing" in order to qualify for recognition. The Netherlands had proposed that this term be defined to include an

> "... exchange of letters or telegrammes between the parties and confirmation in writing by one of the parties without contestation by the other party." (L.54)

The U.S.S.R., however, said they could not accept the last part of this proposal (SR.21,p.20) and the U.K. agreed with this. On a vote, paragraph 2 of the Working Party's draft (L.52) was adopted by 19 to 0, with 5 abstentions, and the last part of the Netherlands draft ("and confirmation in writing by one of the parties without contestation by the other party") was defeated by 10 votes to 8, with 5 abstentions (SR.21,p.21).

5. Giving Effect to Agreements

Finally, notice should be taken of the undertaking by contracting states to give effect to arbitral agreements. In the Geneva Protocol of 1923 it was provided that the tribunals of the contracting states, on being seized of disputes regarding contracts covered by the Protocol and containing arbitration agreements, should refer the parties to the decision of the arbitrators. The Netherlands draft reproduced the substance of this in its paragraph 3 (L.54).

In objecting to this the Israeli delegate pointed out that under Article IV (2) of the draft Convention as it then was (see L.48) the court could of its own motion refuse the enforcement of an award which was not capable of settlement under the law of the court or which was incompatible with public policy:

> "However, under paragraph 3 of the Netherlands draft, the court had to refer parties to arbitration whether or not such reference was lawful or incompatible with public policy. The same situation applied, mutatis mutandis, to the grounds for refusing enforcement specified in article IV (1) ..." (SR.21,p.21)

The German delegate observed that this difficulty arose from the omission in paragraphs 1 and 3 "of any words which would relate the arbitral agreement to an arbitral award capable of enforcement under the Convention."

The U.K. delegate suggested that it would be better to use Article III of the Working Party's draft (L.52) as the basis for paragraph 3 and to add the words "of their own motion" with reference to the courts which were seized of actions involving arbitration agreements, so that a court might on its own initiative refer parties to arbitration as well as where requested to do so by one of the parties. This first

suggestion was adopted, but the addition of the words "of their own motion" aroused the indignation of the Israeli delegate who said that

> "the situation was now worse than ever. The United Kingdom amendment could not only deprive a party of its protection under the law but enable courts to engage in Star-chamber proceedings." (SR.21,p.22)

When the German proposal was put to a vote, it failed to obtain a two-thirds majority (13 to 9) and the Article was thus adopted without any words linking agreements to the awards enforceable under the Convention. Nor was this omission corrected in the Report of the Drafting Committee (L.61), although the obligation to refer parties to arbitration was (and still is) qualified by the clause

> "unless it finds that the agreement is null and void, inoperative or incapable of being performed."

As the applicable law is not indicated, courts may under this wording be allowed some latitude; they may find an agreement incapable of performance if it offends the law or the public policy of the forum. Apart from this limited opening, the Conference appeared unwilling to qualify the broad undertaking not only to recognize but also to give effect to arbitral agreements.

The words objected to by Israel in paragraph 3 ("of its own motion") were finally deleted on the last day of the Conference as striking "at the very roots of contractual freedom" (SR.24,p.9), but no attempt was made at this late stage to define the agreements which under the Convention contracting states would be required to recognize and enforce.

PART II

RECOGNITION AND ENFORCEMENT OF AWARDS

A. General Provisions

ARTICLE III

> " Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

The basic obligation imposed upon contracting states to recognize and enforce arbitral awards is contained in Article III of the final text (E/CONF.26/8/Rev.1). The awards referred to are those described in paragraph 1 of Article I; i.e., those made in the territory of another state and those not considered as domestic under the local law. Such "foreign" awards, although they are not specifically so denominated outside the title of the Convention, are to be recognized as "binding" and to be enforced in accordance with local rules of procedure and under the conditions laid down in the Convention. No more onerous conditions and no higher fees or charges may be imposed than are imposed on the recognition or enforcement of domestic awards.

As pointed out in the Note by the Secretary General (E/CONF.26/2) some governments in commenting on the corresponding provision in the draft of the Ad Hoc Committee had suggested for foreign awards a system of "standard procedural rules," summary procedures or the procedures applicable

to domestic awards. There were objections to all of these suggestions, but a possible solution, it was pointed out, might be to provide that the enforcement of foreign awards should not be subjected to more onerous conditions than domestic (E/CONF.26/2,para.8).

At the Conference this suggestion was taken up by the United Kingdom in a proposal which used the expression "not more complicated" with reference to rules of procedure and which limited fees and charges to those imposed in the case of domestic awards (L.11). An Israeli proposal suggested the expression "substantially similar" in relation to rules of procedure (L.21). During the debate the United States representative said that "the principle of national treatment" deserved serious consideration as it was essentially a rule of non-discrimination. The experience of his government in connection with bilateral treaties had been that this standard assured the desired result with a minimum of legal or technical complexity (SR.10,p.3).

It was found, however, that in many states the procedures for enforcing foreign awards differed from those applicable to domestic (id.,p.4). Thus in El Salvador

> "... there was no difference in the manner in which the two types of award were enforced once the exequatur had been obtained. Before that order was issued, however, the procedures were necessarily distinct, for in the case of foreign awards the court had to be satisfied that the requirements stipulated in the relevant international instruments had been satisfied." (id.,p.5)

And in Sweden

> "... the provisions applicable to the two types of award differed considerably. A Swedish award could be rendered enforceable by the chief enforcement officer

> without preliminary formalities. By contrast, a foreign award had to be submitted first to the Court of Appeal, which ascertained whether the conditions of the international agreements in force had been complied with. Leave to proceed could be requested from the chief enforcement officer only after the court had rendered a favourable opinion." (SR.10,p.6)

During the discussion differences in the use of the term "exequatur" were apparent. Belgium regarded Article II as concerned more with the procedure required for making a foreign award operative, "in other words with the issuing of the exequatur," than with the resulting enforcement itself. In Israel, on the other hand, unless the foreign award had been the object of a judgment in the country in which it was made, no "exequatur" was needed. "The term 'enforcement' included the issuing of an enforcement order" (id.,p.7). Turkey warned against the use of the term "exequatur," pointing out that it had been considered by the authors of the Geneva Convention but not used and it was not to be found in the Ad Hoc Committee's draft (id.,p.8).

It was obvious that there was confusion between a court order authorizing the execution of a foreign award and the proceedings in execution thereof (SR.11,p.2). Belgium was quick to point out that the Convention was not concerned with "enforcement measures," but merely with the issuance of the enforcement order (or "exequatur") which would make the foreign award domestic (id.,p.3). What was to be avoided, however, was review by the local judge of the content of the foreign award (id.,p.4). On a vote, the Belgian proposal that the same rules of procedure apply to foreign as to domestic awards was rejected by 23 votes to 3, with 8 abstentions (id.,p.5).

The matter having been referred to Working Party No. 1, the opposing views were found to be irreconcilable and alternative texts were

accordingly reported (L.42 and L.42/Corr.1), the first containing a simple provision for enforcement in accordance with local rules of procedure and the other adding a proviso that substantially no more onerous conditions nor higher fees or charges should be imposed than are imposed in connection with domestic awards. On a vote, the second alternative was adopted by 25 votes to 5, with 8 abstentions, and the whole Article by 30 votes to 3, with 4 abstentions (SR.16,p.7).

In the Drafting Committee some slight changes were made and the proviso was transformed from a condition into a separate sentence so that the limitations on conditions, fees and charges should become an obligation of contracting states. A proposal by Belgium in the plenary session to change "more onerous conditions" to "more onerous rules of procedure" was not adopted, receiving only 12 votes in favor and 8 against. Of the two sentences, the first was adopted by 25 votes to none and the second by 25 votes to 3, with 4 abstentions (SR.23,p.14).

RECOGNITION AND ENFORCEMENT OF AWARDS (continued)

B. Enforcement Conditions

ARTICLE IV

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

(a) the duly authenticated original award or a duly certified copy thereof;

(b) the original agreement referred to in article II or a duly certified copy thereof.

"2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

ARTICLE V

"1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:"

[*for clauses (a) to (e) see pages 47 through 59*]

"2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:"

[*for clauses (a) and (b) see pages 66 and 67*]

ARTICLE VI

" If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security."

1. Principle Issues

(a) Problem of Judicial Control

Articles IV, V and VI of the final text contain the conditions for the recognition and enforcement of foreign awards. They include in Article V the grounds for refusing recognition and enforcement and in Article VI a general provision to deal with the situation where an application is made in the country where or under the laws of which the award has been made to set it aside or to have it suspended.

As pointed out in the Note by the Secretary General (E/CONF.26/2) the central problem of these Articles was the definition of the conditions which would govern judicial control in the country where recognition and enforcement were sought:

> "The extent of judicial control ... must be defined with precision, so as to avoid the possibility that a losing party could invoke without adequate justification a multiplicity of possible grounds for objections in order to frustrate the enforcement of awards rendered against it." (id.,p.5)

It was suggested that the Conference might wish to consider three possible alternative methods of control. It might, first, be provided that sole judicial control over the regularity of an award would be exercised by the competent authorities of the country of enforcement. A second alternative would be to divide judicial control between the authorities of the country where the award was rendered and the country where enforcement was sought, by enumerating the grounds on which the award could be annulled by the former and those on which enforcement could be refused by the latter. A third alternative would be to leave full judicial control in the hands of the authorities of the country where the award was made, but to provide

that under certain circumstances some of the grounds for annulment might be subjected to time limits (E/CONF.26/2,p.8).

After considerable debate the Conference came down mainly on the side of the first of these alternatives. At the same time, it did not prohibit judicial proceedings at the place where the award is rendered. It recognized that, if an award is suspended or set aside by a competent authority in the country in which, or under the law of which, the award was made, recognition and enforcement "may be refused" at the request of the losing party if that party furnishes proof of either such fact [Article V, 1(e)]. When an application is made to such an authority to set aside the award, the authority requested to enforce the award may, if it considers it proper to do so, adjourn decision on enforcement and may also require the losing party "to give suitable security" (Article VI).

Unless the losing party makes an application to set the award aside in the country where, or under the law of which, it was rendered, his only recourse so far as the Convention is concerned is, in effect, to ask for annulment by the court requested to enforce the award. It was felt at the Conference that this system would be more in accord with present day needs of international commerce than one which vests control at the place where the arbitration has been held. If a party has agreed to arbitrate differences, if an arbitration has taken place pursuant to such agreement and if an award has been rendered, he should not object to resisting enforcement wherever the successful party chooses to seek enforcement. In many instances the place of arbitration is fortuitous and the parties may have selected as the governing law that of an entirely different jurisdiction. In such event nullity proceedings at the place where the award has been made would have little justification.

(b) Contractual Autonomy

The extent to which the parties to a contract might be free to choose their own law or to arbitrate disputes without reference to any law was also one of the main issues at the Conference. As early as May 1950 the I.C.C. Commission on International Arbitration had expressed the view that "for an international award to obtain legal sanction, it should be sufficient for it to conform to the procedure laid down in the parties' contract." And the Report adopted in March 1953 asserted that "an award completely independent of national laws corresponds precisely to an economic requirement."

This concept was pressed before the E.C.O.S.O.C. and before the Ad Hoc Committee in March 1954. At the Conference it encountered stiff opposition. On the second day, the delegate from Italy observed that

> "At the present time there was no possibility of securing acceptance of a solution founded solely on the principle of contractual autonomy, in which the law would be relegated to a secondary position and would be resorted to only in the absence of an agreement between the parties. Application would have to be made to the courts for the enforcement of arbitral awards and for psychological reasons the courts could hardly be expected to have confidence in an award which had not been made within the framework of a legal system and whose form or substance did not respect the mandatory provisions of the law ... (A)bsolute liberalism was a thing of the past ... If the Convention was to be ratified by a greater number of States than the 1927 Geneva Convention, it would be necessary to eschew unduly revolutionary solutions whose acceptance would be impeded by the conservatism of jurists." (SR.2,p.7)

And later the Belgian delegate said that

> "... constructive results could be attained only if the delegations present recognized the dangers of trying to do away with the traditional powers of

> the courts and refrained from pressing proposals designed to kill private international law." (SR.3,p.4)

Such views were, however, countered by strong assertions in favor of contractual freedom. Thus in view of the French delegate:

> "... international arbitration could not be truly effective unless there was greater emphasis on the principle of freedom of contract. That did not apply solely in the context of the arbitration agreement, but to the arbitration operation as a whole ... (H)e could not share the anxieties of the Italian representative that courts might prove reluctant to attribute to the will of the parties the role that it deserved. Judicial records, at least in the countries with a classical tradition, showed that there was nothing to fear on that score." (id.,pp.3-4)

And the delegate from Switzerland said that

> "Switzerland would have no objection to the adoption of the idea of an 'international award' put forward by the ICC. The Swiss economy in fact depended upon foreign trade, and the Swiss Government considered that the best means for encouraging such trade was to allow the parties thereto the greatest possible measure of freedom." (SR.4,p.9)

(c) Scheme Proposed by the Netherlands

When the matter of enforcement procedures came before the Conference at its eleventh meeting, the Netherlands submitted a redraft of what were then Articles III, IV and V (in the final text the corresponding Articles are IV, V and VI) which, it was explained, was designed to accomplish the following (SR.11,p.5):

> (1) The avoidance of a double "exequatur"; that is, an order for the enforcement of an award both in the country where it was rendered and in the country where

enforcement was sought (it was felt that the requirement that an award be "operative" in a country where no request to enforce it had been made was an "unnecessary complication");

(2) The avoidance of delaying tactics in the country where an award is made as the result of the burden a plaintiff has of showing that an award has become "final" (but the proposal still provided as a ground for refusal that the award "was still open to ordinary means of recourse");

(3) Freedom for the judge in the country of enforcement to grant an "exequatur" immediately or to await the outcome of annulment proceedings in the country where the award was made (the grounds for refusing an "exequatur" were set out in a redraft of Article IV and were essentially the same as those for a nullity proceeding, so that control over nullity would in effect be switched to the judge asked to enforce an award);

(4) A clearer distinction between grounds for refusing enforcement (Art. IV) and the procedure to be followed (Art. V);

(5) A new and more logical list of grounds for refusing recognition, based on the Note by the Secretary General (E/CONF.26/2,para.17);

(6) A more equitable division of the burden of proof.

Amendments were also submitted by other delegations: Japan (L.15/Rev.1), Pakistan (L.16), United Kingdom (L.22, L.23 and L.24), Austria (L.25 and L.26), Switzerland (L.30), Israel (L.31), France (L.32), Germany (L.34), Yugoslavia (L.35, L.39 and L.45), Brazil (L.37/Rev.1), Italy (L.38) and a "three-power draft" by France, Germany and the Netherlands together (L.40).

After three days of debate on these various proposals, a

Working Party composed of representatives of Czechoslovakia, El Salvador, Germany, Guatemala, Italy, Japan, the Netherlands, Pakistan, Sweden, Switzerland, Tunisia, the U.S.S.R. and the U.K. was appointed to endeavor to reconcile the different points of view and to agree on a text for these three Articles (SR.14,p.10). The Report of this Party was given to the Seventeenth Meeting in a verbal submission by the Chairman (SR.17,p.2) together with a revised text which had been agreed except for the two items noted (L.43). As stated in the Summary Record, the text

> "... represented a compromise, arrived at after exhaustive consideration of the views advanced at the Conference and of the requirements of the various legal systems governing arbitration proceedings in different countries" (SR.17,p.2).

The main aspects of this text, the discussions about it and the changes that were made in it are dealt with below in the order of their appearance. Before this is done, however, the following summary is given of the main features of the problem of "double exequatur." This problem, that of the autonomy to be allowed the parties as regards the arbitral agreement and procedure, and the problem of applicable law constituted the main issues in the debate. Because they permeated a number of different aspects, there is some overlapping in the summaries which follow of the discussions on these aspects.

(d) Problem of the Double Exequatur

In introducing his proposal the Netherlands' delegate said (referring to the draft of the Ad Hoc Committee):

> "The Draft introduces again the double exequatur in demanding that the arbitral award must be operative in the country where it has been rendered. This requirement is not understandable

> for international trade. Why should an arbitral award be operative in a country where it is not to be executed? Compared with the Geneva Convention, which in practice requires a double exequatur, it would constitute a step forward if we could agree on a single exequatur." (Unreported Oral Statement)

He had therefore provided that control over enforcement be vested in the court requested to recognize and enforce an award, although one of the grounds for refusing such request would be that

> "(f) the award has been annulled in the country in which it was made or has not become final in the sense that it is still open to ordinary means of recourse." (L.17)

According to the Italian delegate, this

> "contained ... a very bold innovation ... It was proposed to concentrate judicial control of the recognition and enforcement of arbitral awards in the hands of the competent authorities of the country in which the award was sought to be relied upon ... Such a reform was not unduly radical, but it might prove unacceptable to jurists and to the competent administrative authorities." (SR.13,p.3)

He suggested also the risk of parallel proceedings in two jurisdictions, but this was dealt with in a subsequent Article.

The opposition to the Netherlands' proposals came mainly from Belgium, the Latin American countries and the United States. In the view of Belgium, these amendments

> "... conferred upon a foreign judge extensive powers virtually enabling him to re-examine the substance of the case. They credited him with a knowledge of another country's law which he generally did not possess. In short, the Netherlands amendments would enable the losing

> party at the very last moment to invoke objections which it might very well have raised at an earlier stage. To take an extreme case, the losing party might raise before the judge in the country of enforcement pleas which had been rejected by the competent judge of the country where the award had been made. The possibility of permitting a double exequatur had been rejected, yet such a procedure would save time." (SR.13,p.6)

To the delegate of the United States there appeared a danger that

> "... the Conference might lose sight of some of the broad principles on which arbitration was based. Much of the discussion had centred on the question of the so-called double exequatur. Some of the proposals tended to minimize judicial supervision of the arbitral procedure. In the view of his delegation, judicial supervision was of the utmost importance, for it alone could ensure that justice was done.
>
> "The proper place for the exercise of judicial supervision would appear to be the country in which the arbitration took place. That country had arbitration laws and procedural rules governing arbitration. Whatever the motives of the parties might be in choosing to conduct their arbitration in a particular country, by that very act of selection they brought the arbitration within the purview of that country's laws. In particular, the parties were entitled to a review of the award by the country's courts." (SR.14,pp.5-6)

If this position regarding judicial review at the place where an award is made had prevailed, the Conference would, as the Netherlands delegate had said, have progressed no further in this respect than the Geneva Convention of 1927. The sense of the Conference was not, however, with this course. As the French delegate put it:

> "A double exequatur would be considered catastrophic by practising jurists, because it would greatly lengthen the proceedings and entail considerable expense." (SR.13,p.7)

and the Swiss delegate asserted:

> "The new Convention had to go much further than the 1927 Convention -- that was the whole purpose of the Conference -- and in particular the requirement of a double exequatur had to be eliminated." (SR.11,p.10)

There was also, however, the problem of allowing for proceedings in the country where the award was made. As noted above, the Netherlands' proposal recognized, as a ground for refusing recognition and enforcement, that the award had been annulled or was still "open to ordinary means of recourse" (L.17).

No differences arose regarding annulment. If that should happen, there would be no award to recognize or enforce, but the situation was much more difficult where an award had been made and under the law of the country where this had happened proceedings to set it aside or to appeal could still be taken. If the law of that country prescribed limited periods for review, it could be argued that these periods should be allowed to lapse before a court in another country should give effect to the award there. On the other hand, if there were objections to the award, would it not be simpler and more expeditious to put them forward in the court where enforcement was sought? These and other considerations, so clearly set out in paragraphs 13 to 24 of the Note by the Secretary General (E/CONF.26/2), were put forward during the debates on this aspect.

The Japanese delegate felt there should be a maximum period of two months within which proceedings should be instituted in the country where the award was made (SR.11,p.6) and he submitted an amendment to this effect (L.15/Rev.1). A similar amendment was tabled by the

United Kingdom (L.24). Switzerland went even further and proposed that recognition and enforcement be refused simply on the grounds of annulment or suspension in the country of the award (L.30). In his comment the delegate said that

> "... the amendment submitted by the Netherlands ... would not prevent the losing party from having recourse to delaying tactics. Therefore, his delegation was submitting an amendment ... which omitted any reference to the recourse open to the parties in the country where the award had been made. Indeed, the least that could be required of the losing party was that it should not wait to lodge an appeal against the award until the other party was requesting its enforcement." (SR.11,p.10)

In the Working Party the basic contentions of the Netherlands survived. It was proposed that recognition and enforcement might be refused where

> "the award, recognition and enforcement of which is sought, has not yet become binding on the parties, or has been set aside in the country in which it was made." (L.43)

As the Working Party thus rejected the requirement of the Ad Hoc Committee's draft that the successful party must show, as a condition to obtaining recognition and enforcement, that the award has become "final and operative" in the country where it was made, and provided instead a negative condition, to be established by the losing party, that the award had not become "binding" or had been set aside, the problem of "double exequatur" was resolved in favor of a single "exequatur" to be issued by the court where recognition and enforcement was sought, provided the conditions set out in the Convention were met.

The opponents of this solution continued their efforts to preserve some measure of control for the "competent authority" at the place where the award was made or, where the parties had chosen some other law to govern their proceedings, in the country whose law had been chosen. The further development of this aspect of recognition and enforcement is reviewed below in relation to paragraph 1(e) of Article V.

B. Enforcement Conditions (continued)

2. Grounds for Refusing Recognition and Enforcement

With some slight modifications all five of the grounds for refusing recognition and enforcement which were set out in paragraph 17 of the Note by the Secretary General (E/CONF.26/2) were included in the Article IV proposed by the Netherlands (L.17). Subparagraph "(f)" of that proposal was added to allow refusal where "the award has been annulled ... or has not become final ..." Essentially, as the delegate of the Netherlands pointed out in his oral exposition, these would be the same grounds for nullity proceedings in the country where the award was rendered. The real issue, therefore, was (as noted above) where the judicial control should lie, and it is a significant advance over the 1927 Convention that the Conference decided to vest this control mainly in the court requested to recognize and enforce an award.

It is also significant that in the final text of the refusal section (Article V) the words "nullity," "annul" and "annulled" have been avoided. As the Netherlands' delegate said

> "We must not forget that normally arbitral awards do not suffer from nullity. Nullity is a great exception. From the thousands of awards which are yearly rendered in the Netherlands only a very few can be contested." (Unreported Oral Statement)

(a) Burden of Proof

In the perspective of the new Convention the opposition to an award takes the form of establishing a ground for refusing enforcement. As in a nullity proceeding, the burden here is placed squarely on the losing party. Once an award has been obtained all the successful party need do under

Article IV of the final text* is to supply with his application the award itself, duly authenticated, or a certified copy, and the original agreement to submit the dispute to arbitration or a certified copy. Having thus made out a prima facie case, enforcement may be refused only if the losing party furnishes proof of one of the grounds for refusal set out in paragraph 1 of Article V or if the court itself finds one of the grounds set out in paragraph 2.

Having decided to allocate the burden of proof in this way, the Working Party came to the conclusion that it would be appropriate to divide the grounds for refusing recognition and enforcement into two paragraphs, one containing the grounds to be invoked by the party opposing enforcement and the other (the) grounds which the enforcement authority might take into account ex officio.

> "It was felt that that would clarify and considerably facilitate the task of the enforcement authority which in practice may find it difficult, if not impossible, to take into account some of the grounds for refusal unless their existence was first brought to its knowledge and substantiated by the party opposing enforcement." (SR.17,pp.2-3)

There was only one difference of view regarding this. That was whether the fact that the award had not become binding or had been set aside should be proved by the party opposing enforcement or whether it should be one of the grounds to be ascertained by the court itself. As will be seen, the Conference concluded in favor of the former.

As the Working Party had concluded to leave grounds (b) ("not capable of settlement" under the local law) and (e) ("contrary to public

*See page 33.