he is informed of the sum of money paid in. Now if the sum of money paid in is more than the amount of the judgment, then the Plaintiff can be deprived of his costs. In this case, therefore, we have got to see if the amount of the offer is less or more than the amount of the award. (*Opens the envelope and reads*) —£75. (*Laughter.*)

Now had that been £750 (*more laughter*) the Plaintiff, although succeeding, might well have been deprived of recovering his costs from the Defendant.

(*Applause.*)

MR. CLARKE :

I would like to thank you all for coming along, and particularly Mr. Ronald Ward, Mr. Royce and Mr. Hewitt. We are only so sorry that Mr. Hughes could not have come along, but he is ill, and I am sure you will all join me in wishing him a speedy recovery.

That would seem to be the end of the arbitration. Mr. String is making away with £625, and his mother-in-law doesn't come to see him as often as she used to ! (*Laughter.*)

I would like to thank Mr. Alexander on behalf of us all. Mr. Burke and Mr. Devonshire, the two solicitors, and Mr. Nicholls, who took the part of the builder, and I can assure you that they have been putting in a lot of hard work behind the scenes.

SOLICITOR FOR RESPONDENT :

Thank you very much, and I can assure you we have enjoyed very much coming here this evening, and thank you for putting up with us for so long.

ARBITRATOR :

Thank you very much for your kind references to me and to the team. We have met three or four occasions prior to this to try and iron out the case. I would like to say that whilst these kind words have been addressed to us, a great deal is owed to the Institute of Quantity Surveyors, and particularly to Mr. Clarke, for the work they have done. Their organisation is always impeccable and always so cheerfully given. But for that, I don't think we should have got here this evening.

Thank you very much.

FOOTNOTE :—

As an Institute our thanks are due to Mr. R. F. Clarke for all the unstinted good work and valuable time which he gave to this arbitration. We appreciate his efforts to the full.—*Editor.*

NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

by PROF. P. SANDERS, ROTTERDAM

By courtesy of " Netherlands International Law Review " and the author

1. From May 20 to June 10, 1958, a Conference of Plenipotentiaries met at Headquarters of the United Nations in New York for the purpose of concluding a convention on the recognition and enforcement of foreign arbitral awards.

The Conference had before it the Report of the Committee on the Enforcement of International Arbitral Awards. This Committee was established on April 6, 1954, by resolution of the Economic and Social Council " to study the matter raised by the International Chamber of Commerce . . . and to report its conclusions to the Council, submitting such proposals as it may deem appropriate, including, if it seems fit, a draft convention ". The Committee was composed of representatives of eight Member States and delivered its report with Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards on March 28, 1955 (Document E/2704 and Corr. 1).

At the root of the Conference lies the initiative of the International Chamber of Commerce which submitted its Report and preliminary Draft Convention on the Enforcement of International Arbitral Awards in 1954 to the Ecosoc. The Committee Draft 1955 differs considerably from the I.C.C.-Draft. Broadly speaking the New York Convention approaches again in essential aspects the Draft made by the International Chamber of Commerce.

The Conference elected Mr. C. W. M. Schurmann as its President. On June 10 the Final Act was signed by representatives of 39 States, the Convention by representatives of 10 States, viz. :

Belgium	Israel
Costa Rica	Jordan
El Salvador	Netherlands
Fed. Republic of Germany	Philippines
India	Poland

Since then the Convention has been signed by Argentina, Czecho-Slovakia, Luxemburg, Ecuador and Bulgaria.

2. This Convention does not deal with all problems connected with international arbitration but only with the most important of them : the recognition and enforcement of arbitral awards, as did the Geneva Convention of 1927. At the same time it incorporates in Art. 2 the substance of the Geneva Protocol of 1923. Geneva Protocol and Convention will cease to have effect between Contracting States on their becoming bound by the New York Convention (Art. VII). The international business world, for whom these conventions are made, strongly hopes that Governments will soon ratify the New York Convention or accede to it, as in their opinion the Convention constitutes an important step forward compared with the Geneva Convention. Before briefly commenting upon the separate articles of the Convention, I may try to give a broad outline of the most important differences between the Geneva Convention 1927 and the New York Convention 1958.

3. Under the New York Convention, the party applying for enforcement of a foreign arbitral award has only to supply (a) the original arbitral award or a duly certified copy of it and (b) the original arbitral agreement or a duly certified copy of it, in order to get enforcement of the award. It is up to the party against whom enforcement is sought to prove that there is a ground for refusal of the enforcement. Under the Geneva Convention it is just the other way round and the party seeking enforcement has to prove the negative fact that no reason for refusal exists. The burden of proof, therefore, has been reversed. Exception has only been made for two reasons, mentioned in paragraph 2 of Article V, in which cases the authorities in the country where enforcement is sought may refuse enforcement *ex officio* when (a) the subject-matter of the difference is not capable of settlement by arbitration under the law of that country or (b) in that country the enforcement would be contrary to public policy. Apart from these two reasons it is always the party against whom enforcement is sought who will have to prove there is a ground for refusal. In comparison with the Geneva Convention this system constitutes an important improvement.

The New York text also avoids the double *exequatur* that was practically required under the Geneva Convention. Under this Convention the party seeking enforcement had to prove that the arbitral award was " final " in the country where it had been rendered. Therefore he was practically under the obligation to ask for an exequatur in that country too. Under the New York system he has only to supply the arbitral award and the arbitral agreement and if the defendant wants to forestall the enforcement it is up to him to prove to the Court that " the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made."

Finally I should like to mention as another important advantage of the New York Convention, compared with that of Geneva, that it leaves the parties greater freedom to arrange their arbitration proceedings the way they like. Under the Geneva treaty these proceedings had to be in accordance with both the agreement of the parties and " the law governing the arbitration procedure". According to the New York Convention the enforcement of an arbitral award may—in this respect—be refused only when it has been proved that :

> (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.

This confers upon the parties a considerably greater freedom to have the arbitration conducted in the way they like it. They can in the arbitral clause in their contract refer to existing arbitration rules or draft themselves elaborate rules for the arbitration proceedings and the nomination of arbitrators and be practically certain that the arbitration, if conducted in the way they preferred it, shall be enforceable. It is only when they fail to do so that the law of the country where the arbitration takes place will apply. Since long it has been the wish of international trade to restrict the influence of the rather incidental place of arbitration. Generally speaking this has now been achieved, and there we find another considerable advantage over the Geneva Convention.

We may now turn to take a closer view of the separate articles.

4. *Article I* has been the result of lengthy discussions in a special working group as well as in the plenary sessions of the New York arbitration conference. The first paragraph is the result of a compromise reached within the working group. The first sentence of this paragraph is based upon a territorial criterion :

> 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.

The second sentence introduces the national principle :

> It shall also apply to arbitral awards not considered as domestic awards in the state where their recognition and enforcement is sought.

Let me illustrate this by an example. Germany regards an arbitral award rendered in France under German procedural law as a German arbitral award and an arbitral award rendered in Germany under French procedural law as a non-domestic, French award. Germany applies the criterion of the applicable procedural law and therefore will also apply the Convention when enforcement is sought in Germany of an award rendered in Germany under French procedural law.

The scope of the new Convention is wider than that of the Geneva Convention which applies to awards that have been " made in a territory of one of the High Contracting Parties to which the Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties ". Here we only find the territorial principle and in addition to this the restriction that the award must be made between persons, subject to the jurisdiction of the High Contracting Parties.

The New York Convention applies to awards " arising out of differences between persons, whether physical or legal ", without the restriction that these persons should be subject to the jurisdiction of one of the Parties to the Convention. Does the New York Convention include differences arising out of international contracts between Governments and private companies ?

The wording of the Convention is general and it has certainly not been the intention of this world-conference to exclude enforcement of arbitral awards rendered in consequence of the East-West trade which on the Eastern side is

handled by State organizations or agencies. The discussion on " permanent arbitral bodies ", on which I shall come back later, is there to prove the contrary. In principle I therefore see no reason why a State or State organization should be excluded from the term " legal person " as in Article I.

Although the scope of the Convention is not limited to commercial arbitration, it was international trade the delegates had in view when discussing the contents of the Convention. On many occasions it was asked how the business world would react to some proposal. In so far as States participate in this normal international business, buying or selling goods, I have no doubt the Convention also applies to these contracts. My doubts begin where the State acts in a way not to be compared with private business, e.g. granting an oil concession. Here the solution might be the explicit statement, in the contract, that the New York Convention is applicable. Failing such a provision I would be of the opinion that such is not the case.

Paragraph 2 includes in the Convention arbitral awards made by permanent arbitral bodies to which the parties have submitted. In my opinion the whole paragraph is superfluous. Under the Geneva Convention the question has never been raised whether the term " arbitral award " would include awards made by permanent arbitral bodies. The committee which in 1955 prepared a Draft for this Convention did not include such a provision although it was requested at that time by the representative of the U.S.S.R. The Russian proposal was taken over at the New York Conference by the Czechoslovak Delegate. The Belgian Delegate proposed to add the word " voluntarily " before " submitted ". The Czechoslovak Delegate, who may be quoted from the summary record of the 8th Meeting, accepted this proposal forthwith :

> 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.

In one of the last meetings of the Conference, however, the word " voluntarily " was struck out as being superfluous and the Conference agreed to paragraph 2 in its actual wording.

Paragraph 3 contains, after long discussions, the permissible reservations on the scope of the Convention. These reservations, as appears from par. 14 of the Final Act, are intended to be limitative and are to be found in the said paragraph :

(a) 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.

(b) 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 law of the State making such declaration.

The Conference, generally averse to reservations, originally was not favourably disposed towards clause (b). But the non-adoption would seriously have hampered the adherence to the Convention of several States, e.g. Belgium. For this very reason this reservation was inserted in Article I at the last moment. After all it figures in the Geneva Convention of 1927 and never gave rise to difficulties in practice.

One may ask what might be the use of reservation (a). By virtue of this reservation a State declares " on the basis of reciprocity " to apply the Con-

vention exclusively to arbitral awards made in the territory of another *Contracting* State. A State making this reservation will therefore not apply the Convention to arbitral awards rendered in a State which did not adhere to this Convention. Suppose an arbitral award has been made in Switzerland between a Netherlands and a Belgian firm ; that Switzerland has not adhered to the Convention, that the Netherlands did, but that Belgium did not make the reservation under discussion.

If this were the case the award made in Switzerland could not be enforced under the Convention in the Netherlands, as the Netherlands made the reservation to apply this Convention to awards made only in the territory of another contracting State. But could it be in Belgium ? If so, a Netherlands claimant would be in a better position than a Belgian claimant, the latter not being able to have his award enforced under the Convention in the country of his debtor.

It appears to me that in such a case—even though Belgium has not made the reservation—the enforcement would not be possible in Belgium in view of the words " on the basis of reciprocity " and Article XIV of the Convention.

Consequently, in the illustration, the arbitral award can be enforced neither in the Netherlands, that made the reservation, nor in Belgium, that did not make the reservation. It would appear ill considered therefore, particularly in a period in which the Parties to the new Convention still are few, to make this reservation. States that are willing to make it should keep the said consequence in mind and all the more so as the ultimate aim of the Convention is to facilitate the enforcement of arbitral awards rather than to restrict it.

In making this reservation the country where the award has been made is too much emphasized. This is somewhat in contradiction with the principle underlying Article V under (d) : the composition of the arbitral authority and the arbitral procedure are in the first place left to the agreement of the parties. If, as normally is the case, parties refer to elaborate arbitration rules the role of the country where the arbitration took place is only a secondary one. I do not overlook the fact that the award can be set aside in the country in which it was made. The event of an award being set aside is quite exceptional and it is better to base our argument on normal cases that follow the normal course.

In this line of thought I think it is going too far that an award rendered, in the illustration, in Switzerland between a Belgian and a Netherlands firm could not be enforced under the Convention in Belgium nor in the Netherlands because Switzerland did not become a party to this Convention.

When drafting this reservation the Conference had above all in mind enforcement of arbitral awards rendered in the country of one of the two parties. However, arbitral awards rendered in a third country, as in the illustration, are not unusual in international commercial arbitration. But even in case the award between the Netherlands and Belgian firm would have been rendered in Belgium and supposing that Belgium did not yet adhere to the Convention, I do not see much reason to exclude enforcement in the Netherlands because the arbitral award has been rendered in a country—Belgium—that is not yet a Contracting Party. I fear that, now this reservation has been introduced into the Convention, it will be used rather often. The only remedy seems a general adherence to the Convention, by which the field of application of the reservation would be narrowed accordingly.

5. During the early days of the Conference it was agreed to aim at a Convention and an Additional Protocol, in which—as in the Geneva Protocol of 1923—the validity of the arbitration agreement would be recognized. Working Party No. 2 drafted such a Protocol but when, in the 21st Plenary Meeting, its text was discussed it was decided on proposal of the Netherlands to incorporate the subject matter of the Protocol into the Convention itself and so the present *Article II* of the Convention was born.

Under paragraph 1 of this article each Contracting State undertakes to recognize an arbitration agreement. This read, in the first draft, " recognize *as valid* ", but on proposal of the United Kingdom these words were struck out. Paragraph 1 now contains the obligation to recognize ; paragraph 3 explains what this means for the Contracting States in practice : their Courts shall, when one of the parties invokes an arbitration agreement, refer the parties to arbitration unless they find that the said agreement is not valid (it is quite exhaustively worded, at the end of paragraph 3 : " null and void, inoperative or incapable of being performed ").

Paragraph 3 therefore deals, in an early stage of the arbitration proceedings or even perhaps in a pre-arbitration stage when the arbitration proceedings may not yet have started at all, with similar questions as Article V in a later stage when an arbitral award has been rendered. Article V gives the party against whom an arbitral award is invoked the possibility to prevent enforcement of the award when that party furnishes proof that the arbitration agreement referred to in Article II 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 ". These words within brackets are not found in paragraph 3 of Article II, which is understandable as far as the alternative " or, failing any indication thereon, under the law of the country where the award was made " is concerned. In paragraph 3 there is not yet an arbitral award.

The case the Conference had in view when discussing paragraph 3 was the same as treated in Article 4 of the Geneva Protocol of 1923 which Protocol formed the starting point for the Additional Protocol of New York which, on its turn, was transformed in Article II. Article 4 of the Geneva Protocol reads in its first paragraph :

> The Tribunals of the Contracting Parties, on being seized of a dispute regarding a contract, made between persons to whom Article 1 applies and including an Arbitration Agreement whether referring to present or future differences which is valid in virtue of the said article and capable of being carried into effect, shall refer the Parties on the application of either of them to the decision of the Arbitrator.

Therefore, when an arbitration agreement is invoked before the Courts this means for them a " hands off " unless this agreement is found to be " null and void, inoperative or incapable of being performed ", regardless whether the arbitration proceedings already started or still have to begin.

The Convention as well as the Geneva Protocol do not exclude, in case arbitration proceedings have already begun, the possibility for the defending party in the arbitration to approach the Court with the same matter contending that the necessary basis for every arbitration—a valid arbitration agreement—does not exist with the consequence that arbitrators are not competent and the matter falls under the normal jurisdiction of the Court. In my opinion there is no need for regulating this case. It can be left to the prudence of the Courts whether they prefer to let first the arbitrators give an opinion about their own competence or not. In any case the Court has always the last word in this matter of competence. When arbitrators answer the question about their competence in the affirmative, the Court can still say no. It is not a matter of principle but more a question of practical organization, whether an international convention should enter into a regulation of these rather intricate problems or leave it, as up till now has been done, to practice and last not least to the common sense of the Judges.

The questions about the concurrence between the arbitrators' view on their competence and the Courts' decision on the same question, have not been discussed during the Conference, I do not feel this as an omission and neither that in paragraph 3 it has not been defined—as in Article V as amended later

on—which law must govern the question whether the arbitration agreement is valid or not. This again is left to the decision of the Courts who will probably apply the same principles as those expressed in Article V and first of all the law to which the parties, explicitly or tacitly, have subjected their agreement. Only when this would give no indication whatsoever the Courts will fall back on the law applicable under their rules of private international law.

I may now come back to paragraph 1 according to which each Contracting State " shall recognize an agreement in writing under which . . .". The words " in writing " are new compared with the Geneva Protocol 1923 ; they are explained in paragraph 2 of Article II. These words can already be found in the 1955 Draft of the preparatory Committee and are understandable under the system adopted in the Convention : to obtain recognition and enforcement the party has only to supply the award and " the original agreement referred to in Article II or a duly certified copy thereof " (Article IV). To furnish proof of an orally concluded arbitration agreement would present all kinds of difficulties. Besides, many States require even in national arbitrations the written form of the arbitration agreement. The best solution for this international convention therefore was to introduce here the same requirement and to give it an extensive interpretation.

This was done in paragraph 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. An exchange of a letter and a telegram would, according to the spirit of this paragraph, suffice as well. A proposal by the Netherlands to add—like is done in the recent Hague Convention on the jurisdiction of the chosen Court in matters of international sales of goods—that a confirmation in writing by one of the parties without contradiction by the other would also do, was rejected with 10 votes to 8 after opposition from the U.S.S.R. and the United Kingdom.

After Article II as a whole had been accepted Article VII was amended so as to provide that the Geneva Protocol of 1923 as well as the Geneva Convention of 1927 would cease to have effect between States adhering to the New York Convention.

6. *Article III* reintroduces in its first sentence the same principle as found in Article 1 of the Geneva Convention 1927, reading there : " an arbitral award . . . shall be recognised as binding and shall be enforced in accordance with the rules of procedure of the territory where the award is relied upon . . .". This article is the first out of four in which the real substance of the Convention—the recognition and enforcement of foreign arbitral awards—is embodied. It starts with its declaration of principle : Each Contracting State shall recognize as binding and enforce. . . . Of course this only refers to foreign arbitral awards, as indicated in Article I defining the scope of the Convention.

" In accordance with the rules of procedure of the territory where the award is relied upon ". The United Kingdom proposed to add, that these rules of procedure should not be more complicated than those used for the enforcement of domestic awards and that no higher fees and charges should be demanded for the recognition and enforcement of foreign arbitral awards than for domestic awards. This proposal was favourably received but needed some modification that led to the actual text : There shall not be imposed substantially more onerous conditions or higher fees and charges. . . . A Belgian proposal, to have the same rules of procedure for the recognition and enforcement of foreign awards as for domestic awards, was rejected. In many countries the rules of procedure for enforcement of foreign awards differ from those which apply to domestic awards. This remains possible with the sole restriction that the conditions for enforcement are not substantially more onerous. The same applies to fees and charges. These too cannot be substantially higher for foreign awards. Less onerous conditions for recognition and enforcement of foreign

arbitral awards, i.e. a simpler procedure, or lower fees and charges, including tax, are of course permitted.

The purpose of the British proposal was—I now quote from the summary record of the 10th Meeting—" to ensure that no additional restrictions were imposed which might impede the free enforcement of the arbitral award ". It is left to the States to make procedural provisions for the recognition and enforcement of foreign arbitral awards in their country. The Convention does not give standard rules to that effect. Leaving aside whether, before the British proposal was accepted, it would have been possible to abuse this situation in imposing further restrictions, this seems practically excluded by the text of Article III as amended.

7. I now come to what might be called the heart of the Convention : *Articles IV, V and VI*, and most important of all, Article V. These articles replace Articles III, IV and V of the 1955-draft, from which they differ essentially. When the debate on these articles was opened the Netherlands proposed amendments to all three of them, introducing an entirely different system (Conference document L. 17). These proposals met with approval from many sides and served as a basis for further discussions. A stream of amendments by other countries followed under which amendments from Germany (L. 34) and France (L. 32) followed one day later by a " three-power-draft " by France, Germany and the Netherlands, again dealing with all three articles. After extensive debates during three days Working Party No. 3 was constituted. Its proposals, with some minor changes, were finally adopted by the plenary session.

An essential feature of the system as adopted is the concentration of judicial control in the country of enforcement. The 1955-draft still required " that, in the country where the award was made, the award has become final and operative ", words that imply as I have explained already a double *exequatur*, first in the country where the award was made and secondly in the country where enforcement was sought. Why should an arbitral award be operative in a country where it is not to be executed ? This requirement has, fortunately, not been taken over in the Convention. According to *Article IV* a party seeking enforcement only needs to furnish in the Court :

(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.

In doing so the party seeking recognition or enforcement has produced *prima facie* evidence entitling hin to obtain the recognition and enforcement he is asking for.

According to *Article V* the opposing party can only prevent the recognition and enforcement of the award :

(1) if he furnishes proof of one of five grounds mentioned in paragraph 1, or

(2) the Court finds *ex officio* that one of two grounds mentioned in paragraph 2 apply.

In these cases recognition and enforcement will be refused. I may now, in the sequence of Article V, deal with these seven grounds.

Ground (a) of par. 1 was already mentioned when I dealt, in paragraph 5, with the third paragraph of Article II. The Working Party had worded ground (a) as follows : " the arbitration agreement or the arbitral clause is not valid under the law applicable to it ".

The Soviet Delegate felt this text not sufficiently clear and asked for a definition of " the law applicable to it ". On his proposal (23rd meeting) the following text was adopted : " The arbitration agreement or the arbitration clause is not valid under the national law to which the parties have subjected

their agreement or, failing any indication thereon, under the law of the country where the award was made." On proposal of the Netherlands this text has been amended in the 24th meeting into its actual wording. By virtue of this amendment the capacity of the parties remains subject to " the law applicable to them ". For the rest the Soviet text was unchanged. This means that, apart from the personal status of the parties the validity of the arbitration agreement will have to be judged first of all according to " the law to which the parties have subjected it ". The will of the parties, expressed in so many words or even tacitly, comes first. Only when this criterion leads to nowhere—" failing any indication thereon "—the judge has to apply " the law of the country where the award was made ".

Ground (*b*) has to be compared with Article 2 under (b) of the Geneva Convention. The word " proper " before " notice " has been added according to a Norwegian proposal to cover the rather theoretical case, expressly mentioned in Geneva, that the respondent was under a legal incapacity. The words " or was otherwise unable to present his case " stem from a Netherlands proposal and replace the formula of the 1955-Draft that the notice was not given " in sufficient time to enable him to present his case ". Although the notice has been given in sufficient time before the arbitration session, the defendor might have been unable to appear on account of refusal of visa or, when appearing before arbitrators might not have got sufficient opportunity to defend his case. These and other causes are now covered by the words " or was otherwise unable to present his case ".

Ground (*c*) was accepted after some discussion. The Belgian Delegate feared that the power given to the Court to separate, if possible, the non-submitted part of the award from the submitted part would lead the Court to look into the substance of the award. He therefore proposed the deletion of the provision. Many other Delegates agreed that it would go too far to refuse enforcement solely because some, perhaps very incidental part of the award went beyond the scope of the submission. So the Belgian proposal was rejected. It is now up to the Court to decide whether the decision on matters submitted to arbitration " can be separated " from those not so submitted. This solution, although unknown in the Geneva Convention, can be found in several national legislations and prevents the babe to be thrown away with the soapsuds in these Cases where the Court can easily make the separation.

Ground (*d*) was already mentioned under par. 3 above as an important step forward compared with the Geneva Convention. As it reads now this ground corresponds with the I.C.C.-Draft. The Committee of Experts, who made the 1955-Draft, stated in its Report on this point (par. 43) :

> " This is perhaps the most far-reaching departure of the I.C.C.-Draft from the Geneva Convention, which prescribes that the award must have been made in accordance with the agreement of the parties and in conformity with the law governing the arbitration procedure (art. 1 sub c)."

The 1955-Draft therefore proposed that the composition of the arbitral authority or the arbitral procedure should be

> " in accordance with the agreement of the parties *to the extent that such agreement was lawful in the country where the arbitration took place*, or, failing such agreement between the parties in this respect, was not in accordance with the law of the country where the arbitration took place".

Several Delegations were in favour of the words in italics, others were against. The Yugoslav amendment to add these words was rejected in the 17th Plenary meeting of the Conference.

As it stands now the will of the parties as to the composition of the arbitral tribunal and the arbitral procedure is paramount. Only in case the parties fail to give any provision on these points " the law of the country where the arbitra-

tion took place " will apply. In my opinion this does not mean that the freedom of the parties is unlimited. There is always the safety valve of ground (b) in the second paragraph of Article V in case the enforcement of the award would be contrary to the public policy of the country where enforcement is sought. Parties therefore could in my opinion not validly agree to an appointment of all arbitrators by one of the parties alone (composition of the arbitral tribunal) or grant arbitrators the right to decide the issue without giving the defendant the opportunity to present his views on the case (arbitral procedure).

Ground (*e*) gave rise to exhaustive discussions. Under the Geneva Convention, in order to obtain recognition or enforcement, it was necessary :

> " that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending."

In order to prove that the award had become " final " in the country in which it had been made, it often had appeared to be the easiest way from a practical point of view to produce an *exequatur*, an order of enforcement given in that country. This was exactly what the Conference wanted to avoid. The more so the Conference was against the text proposed by the Committee of Experts 1955 :

> " To obtain the recognition and enforcement mentioned in the preceding article, it will be necessary :
> (*a*) . . .
> (*b*) that, in the country where the award was made, the award had become final and operative and, in particular, that its enforcement had not been suspended."

In its Report the Committee explained that the intention of subparagraph (b) was " to reintroduce the requirement of finality which had been included in the Geneva Convention ", but had been omitted in the I.C.C.-Draft expressly to avoid the double-exequatur.

From " final " in the Geneva Convention, reintroduced in the text of the 1955-Draft as " final and operative " we come to " binding " in the New York Convention. What does this word " binding " mean ? The term is the result of a compromise and will, I fear, cause a diversity of interpretations in countries where enforcement is sought and the defendant tries to prevent execution in proving to the competent authority that " the award has not yet become binding on the parties ".

In the 17th Meeting the Italian Delegate, supported by the Israeli Delegate, said that in the Working Party, which had to draft the Articles IV, V and VI and which invented the word " binding ", this term had been taken to mean that the award would not be open to ordinary means of recourse. I think this interpretation is right. If appeal against the arbitral award is still open, the award of first instance can not be enforced abroad but the time for appeal has first to elapse.

On the other hand, if the award is still open to extraordinary means of recourse like setting aside the award (*opposition en nullité*) this does not prevent execution abroad. These cases are not covered by the words " the award has not yet become binding " but are dealt with partly in the rest of this ground (e) partly in the following Article VI.

If the award " has been set aside " this constitutes according to (e) a ground for refusal of enforcement. Here the Convention is too limited as there is only room for refusal when the defendant invokes this ground for it. Ground (e) has finally found a place in paragraph 1 of Article V. I am of opinion that in the rather theoretical case that the defendant does not raise this ground, the Courts will anyhow refuse the enforcement as there does not longer exist an

arbitral award and enforcing a non-existing arbitral award would be an impossibility or even go against the public policy of the country of enforcement. The Geneva Convention as well as the 1955-Draft treated this case separately and gave the Court the power to refuse enforcement if the Court " is satisfied " —i.e., independently from the proof furnished by the defending party—that this case applies.

If the award has not yet been set aside but an application for the setting aside of the award has been made, Article VI gives the competent authority the possibilities mentioned there. If the application to set aside the award would all by itself constitute a ground for refusal—as is the case under the Geneva Convention and the 1955-Draft—this would give the party, seeking to prevent enforcement, an all too easy means of chicanery. The Conference showed a keen sense of reality in this respect. In international practice—and national arbitration practice as well—nullity proceedings, instituted by a losing party are in many cases purely delaying tactics to postpone enforcement. It is an exception that these proceedings end up with success ; normally the plaintive is dismissed as the Court finds no reason to set aside the award. This is why no longer the nullity proceedings automatically entail suspension of the execution.

The suspension of the award has been treated, like the setting aside, partly in ground (e) partly in Article VI. Here again ground (e) deals with the case that the award " has been suspended " and Article VI with the case that an " application for suspension of the award has been made ". The first case, the award has been suspended, constitutes a ground for refusal of enforcement when the defendant invokes this fact ; in the second case the Court again has the possibilities mentioned under Article VI.

In both cases the suspension must have been ordered by or the application for suspension must have been made to " a competent authority of the country in which, or under the law of which, that award was made ". Here only one competent authority is meant ; either the Court of the country where the award was made, or the Court of the country under the law of which the award was made. These last words were added on a Russian proposal to cover the case that an award has been made f.i. in Germany under French procedural law. In that case the suspension, like the setting aside, according to the Convention should have to be demanded in France and not in Germany.

I now come to the two grounds, mentioned in the second paragraph of Article V, on which the competent authority in the country where recognition and enforcement is sought *ex officio* may refuse recognition and enforcement.

Ground (*a*) repeats the provision of the Geneva Convention that, to obtain recognition of enforcement it is necessary.

> " that the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon ".

It has been asked during the Conference whether this provision is not superfluous next to ground (b), which gives the Court the power to refuse *ex officio* the enforcement, if it finds that the enforcement would be contrary to the public policy of its country. In fact I think this question was justified. Its special mention may be explained for historic reasons : as well the Geneva Convention 1927, as the I.C.C.-Draft, as the 1955-Draft did treat this case separately. I regret this separation as now the distinction, which in my opinion could be made between national and foreign arbitrations—as I will explain hereafter under ground (b)—cannot be made as far as the subject-matter is concerned. When the subject-matter of the difference is not capable of settlement by arbitration under the law of the country of enforcement, the Court will have to refuse the execution of the award although in the country where it was made the subject-matter was capable of settlement by arbitration. Our only consolation may be that these are very exceptional cases.

Ground (*b*) deals with the refusal of the recognition and enforcement if the Court finds " that the recognition or enforcement of the award would be contrary to the public policy of that country ", i.e. the public policy of the country of enforcement. Although some voices were raised to add next to public policy, a reference to " the principles of law " as found in the Geneva Convention, or " the fundamental principles of law " as found in the 1955-Draft, was not accepted. The Conference wanted to limit the scope of the public policy clause as far as possible.

Of course the Courts in different countries can interpret the public policy-exception differently. This presents disadvantages but also creates a possibility for decisions like we have seen in the Netherlands. Here the Courts have decided on several occasions that an English arbitral award made by two arbitrators or omitting to state the reasons on which it is based can be enforced in the Netherlands without prejudice to public policy, although in similar occasions a Dutch arbitral award would be null and void, as Dutch law demands arbitrators to function in odd numbers and prescribes that reasons for the award must be given. Here, therefore, otherwise than under (a), a distinction between national and foreign arbitral awards can be made.

Article VI has already been dealt with to some extent under ground (e) of the first paragraph of Article V. It gives the competent authority as referred to under (e) the possibility, if an application for setting aside or suspension of the award has been made and it considers it proper to do so, to adjourn its decision on the enforcement of the award. An analogy can be found in Article 3 of the Geneva Convention : " adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal ".

New is the addition : " and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security ". Here the practical approach of the Conference shows itself again. Often these applications are only made for delaying purposes. The party seeking enforcement and faced with such an application may now demand the Court to order the other party to give a suitable security which might prevent that other party from continuing proceedings with the only purpose to postpone the execution. On the other hand it is left to the Court to decide whether such security should be given and if so, in what form and to which extent. A party who has good reasons to attack an arbitral award will have nothing to fear from this new invention. The Court will in that case simply adjourn its decision without ordering security.

Article VI first consisted of two paragraphs, the first dealing with the case that an award " has been suspended ". This case has been moved to Article V under (e) where this case together with the case that an award has been set aside gives rise to refusal of enforcement.

Now we are dealing in Article VI only with the application to set aside or to suspend. Contrary to the Geneva Convention, where these cases fall under " has not become final ", the Court can in these cases only adjourn its decision. They do not constitute a ground for refusal as, in my opinion, " binding " in sub-paragraph (e) has another meaning. Practically, I think, this result is satisfactory. It prevents work to be done twice, in case the demand for annulment has been turned down. If the decision has only been adjourned the Court can simply go on afterwards and no new application has to be made.

8. The other Articles of the New York Convention, more formal in character, give hardly rise to any comment. I may therefore limit myself to some brief remarks.

Article VII. The first paragraph is similar to Article VI of the 1955-Draft with the sole exception that the words " the right " has been amended on

a Belgian proposal into " any right " in order to make it clear that the right described was not a right under the Convention but a right enjoyed wholly apart from the Convention. The second paragraph was added, first the reference to the Geneva Convention 1927 and later on, when Article II had been accepted, also the reference to the Geneva Protocol of 1923. The words " and to the extent that they become bound " are added on a British proposal as some Contracting States would not become bound by the Convention in respect of all their territories simultaneously.

Article XI first contained in a second paragraph what is now being said, in exactly the same wording, in a separate *Article XIV*. When this had been done—on a Norwegian proposal for a general reciprocity clause—the second paragraph of Article XI was deleted.

Article XII has been the subject of some discussions in connection with a Yugoslav amendment to add a third paragraph limiting the scope of the Convention to arbitral awards rendered after the entry into force of the Convention. This amendment was not adopted and the Convention therefore applies as well to arbitral awards rendered before its entry into force.

The Draft of the Committee of Experts 1955 contained an Article XIII referring disputes concerning the interpretation or application of the Convention " at the request of any one of the parties " to the International Court of Justice for decision. This article has not been adopted.

9. The Convention as a whole, as amended, was adopted by 35 votes to none with 4 abstentions : United States, Guatemala, Norway and Yugoslavia.

It is difficult to predict its future. Up till now fifteen States signed the Convention. The majority of these States can reasonably be expected to ratify. From the attitude at the Conference of the Russian and the British Delegation a willingness to ratify can be inferred. As for the United States, this matter is much more complicated on account of domestic politics. Certain however is that international commerce, which the Convention intends to favour, is greatly pleased with the results of the Conference. In the interest of the development of international trade it can only be hoped that a significant number of States will soon adhere to the Convention.

LEGAL CASES

By courtesy of " The Times."

HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION COMMERCIAL COURT

Payment made " In Respect of Tax " even if Not Payable

Win of £13 17*s.* 8*d.*

EVERA S.A. COMERCIAL *v.* BANK LINE LTD.

Before MR. JUSTICE DIPLOCK

His Lordship held that 2 per cent. of 2 per cent. of freight paid by shipowners to the Argentine Maritime Pensions Fund to avoid penal sanctions fell within the meaning of " Argentine Maritime Pensions Tax " which was repayable by charterers under a charterparty, even though had the shipowners appealed to the Chamber of Appeal and thence to the Argentine Supreme Court they would not have had to pay that sum as part of the tax.

This appeal by shipowners was allowed on a special case stated by an umpire, Mr. John Roland Adams, Q.C., in a dispute between them and the charterers of the vessel Glenbank over £13 17s. 8d.

By the charterparty dated July 14, 1953, and made in the " Centrocon " form, the vessel was chartered for a single homeward voyage from Argentine ports to Avonmouth. Clause 42 provided : " Argentine Maritime Pensions

Tax to be for Charterers' account, and if in the first instance paid by owners or their agents, to be reimbursed by charterers to owners concurrently with payment of freight. In default of reimbursement as above, owners to have lien on the cargo for any payment made by them in respect of such tax."

UMPIRE FINDS ARGENTINE VIEW OF OWN LAW WRONG

The umpire found that an Argentine Decree Law imposed a tax liability on shipowners to pay a contribution to the pensions fund of 2 per cent. on the sum collected by way of freight on outward voyages from Argentine ports. By a resolution of 1950, a shipowner was authorized to increase freight rates to cover the amount of the contribution for the purpose of reimbursing himself and " the 2 per cent. must be calculated on the freight including the increase authorized . . . by which the tax is to be reimbursed." The Argentine authorities claimed tax on the basis of the resolution, of which the validity had been upheld by a majority of the Chamber of Appeal in 1953. Appeal lay from the Chamber of Appeal to the Supreme Court. The umpire further found, according to the true construction of the Decree Law which the Supreme Court would have applied had an appeal been taken, a shipowner was required by Argentine law to pay a contribution equivalent to 2 per cent. upon the freight collected by him and no more. He accordingly held that the sum of £13 17s. 8d. was not a sum paid in respect of Argentine Maritime Pensions Tax within the meaning of clause 42 of the charterparty.

Sir David Cairns, Q.C., and Mr. John Donaldson appeared for the shipowners, Bank Line Ltd.; Mr. T. G. Roche, Q.C., and Mr. Peter Bristow for the charterers, Evera S.A. Comercial.

JUDGMENT

Mr. Justice Diplock, giving judgment, said that in so far as the umpire had held that the Argentine law was different from that which the Chamber of Appeal had decided, that was a finding of fact which was binding upon his Lordship. Whatever reluctance English courts might show in holding that the law of a foreign country was different from what a duly constituted Court of Appeal in that country had said, no such inhibitions applied to arbitrators, and his Lordship was bound by the finding that had the shipowners taken the matter to the Supreme Court, it would have been held that they were not liable to pay the additional tax.

The case, however, turned not on the construction of Argentine law but on the construction of clause 42 of the charterparty. As a matter of construction, the reference, in respect of the lien, to " any payment made by them in respect of such tax " must mean the original liability in the first sentence of the clause, namely, the Argentine Maritime Pensions Tax: and the words in which the amount of the lien was expressed threw some light on the construction of the clause as a whole, and the meaning of the words " Argentine Maritime Pensions Tax ". His Lordship was construing a commercial document and it seemed to him that if a tax was imposed by a law and was in fact demanded by the appropriate authorities and was enforceable by the immediate sanctions in the absence of an appeal to appellate courts, then, in the ordinary sense of the words, an amount paid in consequence of such a demand would be regarded by an ordinary commercial man as a payment made in respect of the tax. An amount so demanded, paid in good faith, was within the meaning of the expression " Argentine Maritime Pensions Tax to be for Charterers' account."

His Lordship thought that the essential findings of fact were that since May, 1950, the Argentine authorities had collected the contribution on the basis laid down in the resolution; and that they had, in the past, and would, at the time of the charterparty, have invoked the penal provisions of the law if the shipowners had failed to pay at the rate demanded, a rate that had been upheld by the Chamber of Appeal. He did not think that the theoretical consideration that if shipowners had taken the matter to the highest Court in the land they

might—or, in face of the umpire's finding he should say, would—obtain a reversal of the existing decision, made the payment any less a payment " in respect of such tax " and any less a payment of " Argentine Maritime Pensions Tax " within the meaning of clause 42 of the charterparty.

By courtesy of " The Times."

CHANCERY DIVISION

ARBITRATION OR LITIGATION ?
DISPUTE BETWEEN DOCTORS

MELGRAVE AND MELGRAVE *v.* FINER

Before MR. JUSTICE HARMAN

His Lordship refused an application by Dr. Maurice Melgrave, of Gyllyngdune Gardens, Ilford, medical practitioner, and his wife Mrs. Betty Melgrave, that proceedings in an action in the Chancery Division by Dr. Joseph Finer, of Manor Road, Chigwell, Essex, against Dr. Melgrave in relation to a partnership should be stayed so that the matter could go to arbitration. The doctors had entered into partnership under a deed dated May 1, 1948, and this deed contained an arbitration clause.

Mr. R. G. Freeman appeared for the plaintiffs ; Mr. Morris Finer for the defendant.

JUDGMENT

His Lordship, giving judgment, said that Dr. Finer had served on Dr. Melgrave a notice purporting to dissolve the partnership and the question to be decided in the action was whether it was a valid notice. If so Dr. Finer had a right under a restrictive covenant, which if valid would bar Dr. Melgrave from practising within a certain radius of the partnership headquarters and Dr. Finer would also be entitled to purchase a surgery at another address at a valuation price. Mrs. Melgrave, who owned the house containing the surgery, was Dr. Finer's sister. *Prima facie* there should be a stay, but the plaintiffs to succeed must be able to satisfy him (his Lordship) that there was sufficient reason why effect should not be given to the arbitration clause. This being a dispute between professional men it was important that it should be heard without the possible scandal and publicity which might attend a hearing in court. He felt strongly that Mrs. Melgrave ought to be there when the matter was being determined ; although not a party to the partnership deed she was vitally affected by it. The Court was perhaps better able to oblige parties to clear their stumps than an arbitrator, who could not decide whether the restrictive covenant was good, or grant an injunction to enforce it or order specific performance against the wife of a contract to sell the surgery. On balance he was in favour of letting the matter go forward.

In a county court action brought by a landlord against his tenant for £314 8s. 6d. damages for dilapidations there was a reference by consent under section 89 of the County Courts Act, 1934, to an arbitrator. The arbitrator awarded the landlord £92 9s. and gave him only one-third of his costs. The county court judge set aside the award, though he found no error of law on the face of it and misconduct was not alleged, holding that his discretion under the proviso to section 89 (3) to set aside an award was a wider discretion than the High Court had, and that an injustice might have been done to one of the parties. On appeal :—

Held : A county court judge determining whether an award of an arbitrator to whom a matter had been referred should be set aside under the proviso to

section 89 (3) of the County Courts Act, 1934, had no wider discretion than the High Court and should follow the same principles as the High Court followed ; therefore, since in the present case there was no error in law on the face of the award and no misconduct on the part of the arbitrator, the award should not have been set aside.

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