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RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Comments by Governments on the draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards

1. The Secretary-General transmits herewith the comments received from the Netherlands and the United Kingdom on the draft Convention on the Recognition and Enforcement of International Arbitral Awards.^{1/} Comments previously received have been circulated in document E/2822 and Adds. 1, 2 and 3.
2. The views of the Netherlands and the United Kingdom with respect to the desirability of convening a conference are set forth in the comments reproduced in Annex I. As regards participation, the Government of the Netherlands have stated that in the event of a conference being convened, they would be prepared to participate in it. The Government of the United Kingdom have stated that if a substantial number of Governments consider that a conference should be convened, they would be prepared to take part in such a conference.

^{1/} Official Records of the Economic and Social Council, Nineteenth Session, Annexes, agenda item 14, document E/2704 and Corr.1.

ANNEX I

Netherlands

"The Netherlands Government are convinced of the great importance for international trade of international legal regulations concerning the enforcement of foreign arbitral awards. The Netherlands Government are aware that the Geneva Convention of 1927 no longer fully meets the needs of international trade in this field. That is why they welcome the initiative of the International Chamber of Commerce and support the proposal that an international conference be convened for the purpose of drawing up a new convention replacing the Geneva Convention. In the event of such a conference being convened the Netherlands Government would be prepared to participate in it.

"It is with great satisfaction that the Netherlands Government have studied the report of the Ad Hoc Committee set up in virtue of resolution 520 (VII) of the Economic and Social Council (Document E/2704). In the Netherlands Government's view the Draft Convention drawn up by this Committee is an improvement upon the original I.C.C. draft and will constitute an excellent basis for discussion if an international conference as referred to above is held. The Netherlands Government are of the opinion that, at this preliminary stage, detailed comments on the draft are not called for. There will be every opportunity for such comments at an international conference. For the time being - and reserving further comments to a later stage - the Netherlands Government have confined themselves to ascertaining whether the present draft contains anything they cannot possibly accept.

"In doing so the Netherlands Government have come to the conclusion that the Draft does not contain any explicit provision concerning the law determining the validity of the arbitral clause (or the compromis).

"Whilst on the one hand one gets the impression from Article IV (g) that the drafters had in mind that this law should be the law of the country of arbitration (which is in agreement with a view held in Netherlands jurisprudence), it can, on the other hand, not be denied that Article IV in its present wording, as appears from its opening lines, ("... recognition and enforcement of the award may only be refused if ...") sums up exhaustively the grounds on which the enforcement of a foreign arbitral award may be refused, so that only two elements of the arbitral clause, namely the composition of the arbitral tribunal and the arbitral procedure, can be put to the test of the above law.

"The comment in document E/2704 (para. 44) is vague and does not say anything definite about the question whether the idea of the drafters of the I.C.C. text 'that international awards should be completely independent of national laws' has been wholly or partially rejected.

"The Netherlands Government are of the opinion that, so long as this matter has not been clarified, the Convention is unacceptable to them. The Convention should contain an explicit provision enabling the arbitral clause or the compromis at least to be put to the test of the law of the country of arbitration. If this provision is not inserted, difficulties are to be expected in case a Netherlands court should refuse to grant an exequatur on the ground of other defects in the submission to arbitration than those referred to in the Convention and entailing annulment under the law of the country of arbitration. The Netherlands Government wishes to avoid that such refusal should be challenged by the Government of a Contracting State using the argument that the text of paragraph g of Article IV prohibits such a test. In this connexion the Netherlands Government should like to emphasize that they do not deem it advisable to rely on the concept of ordre public in such a case - if this should be possible at all - because, and this requires no explanation, efforts should be directed towards restricting this concept and its use as much as possible.

"In addition, the Netherlands Government would point to the serious consequences which the provision in question may have, having regard to the so-called party arbitration, which has come to be used more and more nowadays. In such a case the result of the Convention might be that, with the exception of the cases mentioned in the Convention or of the circumstances justifying a reliance on ordre public (something which, as has already been stressed, should only rarely be done), the decision given by one of the parties on the question whether the agreement to submit a case to arbitration has been legally valid could never afterwards be put to the test of any legal provision by the judge abroad."

United Kingdom

"Her Majesty's Government recognize that the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards embodies a number of detailed improvements on the current 'Convention on the Execution of Foreign Arbitral Awards' ('the Convention of 1927'). There appears, however, to be no demand from commercial interests in the United Kingdom for the conclusion of a new Convention; the international enforcement of arbitral awards is not found in practice to be a pressing problem and existing arrangements appear to be working reasonably well. Her Majesty's Government do not, therefore, regard the preparation of a new Convention as a matter of urgent practical importance; but, if a substantial number of other Governments consider that a Conference should be convened to prepare a new Convention on the lines of the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards, they would be prepared to take part in such a Conference.

"Her Majesty's Government offer the following observations on the Draft Convention:

"Article I

"Scope

"1. The awards to which the draft Convention applies are described in terms both simpler and wider than those used in the Convention of 1927. The present draft makes no reference to the Protocol of 1923 and each Contracting Party is, subject to two important reservations, required to enforce foreign awards wherever they are made and irrespective of the relationship of the parties to any State bound by the Convention. The reservations are that a Contracting State may limit its obligations to the enforcement of awards made (a) in the territories of other Contracting States and (b) on disputes arising out of contracts regarded as 'commercial' under the national law of that State.

"Reciprocity

"2. The significance of omitting any reference to the Protocol of 1923 is discussed below. Here it is enough to observe that one effect of the omission is to make the nationality or national associations of the parties to the award immaterial for the purposes of the New York Draft. It seems reasonable that

national awards should be enforceable abroad irrespective of the nationality or national associations of the parties to the award.

"3. On the other hand, the United Kingdom could not accept a Convention imposing on it an obligation to enforce awards made in territories where United Kingdom awards are not enforceable under that Convention.

"Awards on 'Commercial' Agreements

"4. The right reserved to a Contracting State to limit its obligations to awards on disputes arising from agreements regarded as 'commercial' under the law of that State is more questionable. It is not new; the Convention of 1927 does not expressly deal with this matter, but the reference already noted to the Protocol of 1923 has the same effect, since each Contracting State was permitted to limit its obligations under the Protocol to contracts 'considered commercial under its national law'. A number of Contracting States did in fact take advantage of this provision. A formal distinction between 'commercial' and 'civil' law is unknown to the laws of the United Kingdom, but Her Majesty's Government recognize that it is familiar to many other legal systems and that it is therefore unlikely that this reservation could be omitted. It seems, however, to be unreasonable for a State whose law does not distinguish between 'commercial' and 'civil' law to be allowed to restrict its obligations to 'commercial' matters without at the same time indicating precisely what it understands by 'commercial'. Failing some such restriction of this right, there would be constant uncertainty about the scope of the obligations undertaken by the Contracting Parties who make the reservation. The United Kingdom is unwilling to be bound to enforce awards on 'civil' agreements made in a country which is bound to enforce United Kingdom awards only if they are made on 'commercial' agreements and it is thought that some reservation to this effect should be possible and that provision should be made accordingly.

"Article III

"5. This Article sets out the conditions which must be fulfilled if an award is to be enforceable, while the next Article sets out the conditions in which a Contracting State may refuse to enforce an award. It is presumed that although

the Convention does not expressly say so, it will be for the party seeking enforcement to establish the conditions set out in Article III and for the Party opposing enforcement to establish the conditions set out in Article IV.

"6. The two positive conditions set out in Article III reproduce with significant changes the conditions set out in Article I of the Convention of 1927. Under head (a) of Article III the arbitration agreement is required to be 'in writing'; this is new and seems right, since it is obviously desirable that there should be satisfactory evidence of the agreement and in any case the vast majority of commercial agreements containing arbitration clauses which might involve the enforcement of an award in some country other than that in which the award is made are made in writing. It seems doubtful whether the words 'in writing' are sufficient, without further clarification to make it clear that they cover not only contracts made by exchange of letter and by telegram but also contracts made for example by teleprinter and by 'telex'; there is also some doubt whether the provision would require the 'writing' to be signed. While it is desirable that there should be no ambiguity about these questions, H.M.G. appreciate that they may be difficulty in finding a form of words which would have precisely the same meaning under the widely differing laws of all the Contracting States, but consider that, if the arbitration agreement is reduced to writing, the parties to an award based on that agreement should be free to take advantage of the Convention whether the writing is signed or not. It is thought too that Article III should make it clear that the award to be enforceable must be based on an arbitration conducted in a country agreed by the parties.

"7. Head (a) of Article III is designed to make it clear that the draft applies not only to ad hoc agreements for the settlement of existing disputes but to agreements providing for the settlement of future disputes. The intention is acceptable but the use of the word 'special', is not altogether happy, since it may have a somewhat different connotation for lawyers in different countries.

"8. Head (b) of Article III provides that awards shall not be enforceable until they have become 'final and operative' in the country in which they were made. There are two dangers to be taken into account. One is that a foreign

award might be in process of being enforced in one country at the very time that it was being set aside in the country in which it was made. The other is that an unsuccessful party might indefinitely delay the enforcement of an award by lodging purely obstructive appeals. Article I (d) of the Convention of 1927, required the award to be 'final in the country in which it is 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'. H.M.G. are informed that this provision is, in fact, used to delay the enforcement of awards by parties who lodge appeals with the sole object of taking advantage of the provision; this device is particularly embarrassing to the successful party where the award is made in a country that imposes no time-limit on the right of appeal. This is regarded as a defect in the Convention of 1927; and the provisions of Article III (b) of the present Draft, though a step in the right direction, do not appear to go far enough. The best solution would be to provide that an award should become enforceable either when the time fixed for appeals by the domestic law has passed or after, say, two months from the delivery of the award (unless proceedings have been instituted to upset or amend the award), whichever happens first. Some doubt is felt too about the precise effect of the words 'and operative'.

"9. There is a significant change in Article IV (d); the corresponding provision in Article II of the Convention of 1927 provides that enforcement may be postponed if the court is satisfied that the award does not cover all matters within the scope of the submission to arbitration. It is thought that this may require further consideration.

"Article IV (g).

"10. It is understood that the provisions of Article IV (g) were the subject of prolonged discussion before the ad hoc Committee of Experts at New York and they have been critically examined by H.M.G., since it was the corresponding provisions of the I.C.C. draft (Article III (b)), that had roused most objection. Article I (c) of the Convention of 1927 provides in effect that for an award

to be enforceable the arbitral procedure must be in accordance with the will of the parties and the law of the country where the arbitration was carried out. The main object of the I.C.C. proposals was to get rid of the requirement that the procedure must be in accordance with the law of the country where the arbitration was carried out and accordingly their draft provided that an award should be enforceable if the procedure followed in the arbitration was as agreed by the parties or failing such agreement in accordance with the law of the country where the arbitration was carried out. The new provision is understood to mean that if the law of the country where the arbitration is carried out permits the parties, in some circumstances, to agree that the procedural rules of that law may be disregarded and the parties do so agree, then enforcement of the award shall not be refused merely on the ground that the procedure is not in accordance with those rules. This appears to be free from objection; in the circumstances described, a court in the United Kingdom would almost certainly say that the procedure was 'in accordance with the law' of the country concerned.

"Article IV (h)

"11. The corresponding provision of the Convention of 1927, Article I (e) requires that enforcement should not be contrary to 'the public policy or the principles of the law' of the country in which the enforcement is sought. Her Majesty's Government consider that some such safeguard is essential in any Convention on this subject; but the provisions of the Convention of 1927 have been criticized by commercial bodies in the United Kingdom on the ground that the reference to 'principles of the law' is occasionally used as a justification for virtually retrying the dispute, and thereby frustrating the purpose of the arbitration agreement. Clause IV (h) of the present Draft provides that enforcement may be refused if it would be 'clearly incompatible with public policy or fundamental principles of the law ('ordre public') of the country in which enforcement is sought'. This simply tries to narrow down the reference by adding 'fundamental' to 'principles of the law' and the new form of words does little to meet the criticism made against Article I (e) of the Convention of 1927. It is thought the reference to 'principles of the law' should be omitted. The

reference to public policy ('ordre public') should enable the courts of the enforcing country to refuse to enforce awards that are fraudulent, oppressive or scandalous.

"Article VIII (Accessions)

"12. It is considered that accessions should be kept in a separate category from signatures and ratifications, and that in accordance with correct treaty practice, they should only be permissible after the Convention has come into force. Accordingly, it is considered that paragraph 1 of Article VIII should be amended by the insertion of the words 'after its entry into force in accordance with Article XI' between the words 'this Convention shall' and 'be open for accession'. This would entail as consequential amendments in Article XI itself the deletion of the words 'or accession' in paragraph 1, and of the same words in paragraph 2. On the other hand, the words 'or acceding' in the first line of paragraph 2, would not be affected.

"Article XIII (Settlement of Disputes)

"13. It is considered that the second paragraph of this Article should be deleted. It is not admissible that if a Convention contains a provision for the compulsory settlement of disputes arising under it, parties should be able to contract out of this unilaterally, and thus escape the control that the Convention was intended to provide by means of this clause. If a Convention contains a provision for the compulsory settlement of disputes, this should apply to all the parties without exception. If this is not to be the case, then it would be preferable to eliminate the provision altogether.

"Omissions

"14. It will be convenient here to indicate three matters that are expressly covered by the Convention of 1927 and omitted from the present Draft:

"15. The 'Proper Law'. The Convention of 1927 required that, for an award to be enforceable the agreement on which it was based should be valid under its proper law. There is no such provision in the New York Draft. The omission does not seem to have any significance. No Court in the United Kingdom would enforce an award based on an agreement invalid under its proper law. It is understood that this view was shared by the other members of the ad hoc Committee and that the provision was omitted because it was regarded as otiose.

"16. Discretion to refuse Enforcement. Article III of the Convention of 1927 gives the Courts of the enforcing country a discretionary power to refuse enforcement or to adjourn the proceedings if the party opposing enforcement proves that there are certain specified grounds entitling him to contest the validity of the award in a court of law. It is thought that the present Draft contains all the safeguards that can reasonably be expected in a multi-lateral Convention and that the insertion of anything corresponding to Article III of the Convention of 1927 would tend to make enforcement more difficult.

"17. Protocol of 1923. The Convention of 1927 applies only to awards made on disputes arising on agreements to which the Protocol of 1923 applied: a State could become a Party to the Convention only if it were a Party to the Protocol. The Protocol in fact forms the necessary substratum of the Convention. To recognize the validity of arbitration agreements and then to enforce awards based on such agreements; such was the sequence of the Protocol and Convention. It has been argued with some force that the New York Draft should either have been linked with the Protocol of 1923 or have included provisions similar to those of the Protocol. It seems that the point was debated at some length before the ad hoc Committee of Legal Experts and that the majority view was that such a provision would be unnecessary. Her Majesty's Government have, however, not yet formed any final view on the matter. There is some force in the argument that the present Draft is incomplete without some reference to the recognition of arbitration agreements. On the other hand there might be serious difficulties in writing anything like the provisions of the Protocol into the context of the present Draft. The essential difficulty is that the Protocol of 1923, and therefore, the Convention of 1927, are confined to 'international' agreements and awards based on such agreements. The present Draft relates simply to 'foreign' awards. It might be possible to devise some compromise whereby 'recognition' of arbitration agreements and the consequent ouster of the jurisdiction of the courts could be confined to 'international' agreements, although it will not be easy to define such agreements. Generally, Her Majesty's Government consider that this matter would require further discussion at any conference called by the Economic and Social Council to discuss the present Draft."