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INTERNATIONAL COMMERCIAL ARBITRATION

Comments by the Secretariat on the decision by the Asian-African Legal Consultative Committee on international commercial arbitration taken at its seventeenth session

Note by the Secretariat

1. At its seventeenth session, held at Kuala Lumpur from 30 June to 5 July 1976, the Asian-African Legal Consultative Committee (AALCC), in its Standing Sub-Committee on International Trade Law Matters, discussed several aspects of international commercial arbitration. These discussions led AALCC to adopt a decision, by which the Commission is invited to consider the possibility of preparing a protocol to be annexed to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards that would clarify a number of issues considered to be of special importance in the Asian-African region. These issues are the following:

(a) Where the parties have themselves chosen the arbitration rules for settling their disputes, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in the law applicable to the arbitral procedure and the award rendered should be recognized and enforced by Contracting States to the 1958 New York Convention;

(b) Where an arbitral award has been rendered under procedures which operate unfairly against a party, recognition and enforcement may be refused;

(c) Where a governmental agency is a party to a commercial transaction and it has entered in respect of that transaction into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration commenced pursuant to that agreement.

2. Following inquiries by the secretariat of the Commission, AALCC's Trade Law

Sub-Committee, at AALCC's eighteenth session held at Baghdad from 19 to 26 February 1977, specified that the issues set forth under (a) and (b) above were interrelated, and that the primary intention of paragraph (c) was to prevent a governmental agency from invoking sovereign immunity, at all stages of arbitration, including the stage of the recognition and enforcement of the award.

3. There are thus basically two issues:

(a) Ensuring party autonomy to agree on arbitration rules whilst safeguarding fairness in arbitral proceedings, and

(b) The exclusion in international arbitration of reliance on sovereign immunity.

These two issues will be briefly commented upon separately and in turn.

(a) Ensuring party autonomy to agree on arbitration rules whilst safeguarding fairness in arbitral proceedings

4. The thrust of the AALCC proposal is that the procedural arbitration rules agreed upon by the parties should be given full effect, provided that these rules are fair to both parties, even if they are in conflict with the mandatory provisions of the law applicable at the place of arbitration or at the place where recognition and enforcement of the arbitral award is sought. The proposal pertains both to the conduct of arbitration proceedings and to the recognition and enforcement of the award. Thus, by way of example, if the applicable law provides for the exclusive jurisdiction of the court in the case of challenge of an arbitrator and the arbitration rules chosen by the parties provide that the decision on the challenge will be made by an appointing authority (cf. article 12 of the UNCITRAL Arbitration Rules), the rule agreed upon by the parties should, under the AALCC proposal, prevail, and non-compliance with the applicable law in this respect should not as such be a ground on which recognition and enforcement could be refused. As mentioned, the vehicle suggested by AALCC for clarifying these issues is a protocol to the 1958 New York Convention on the Recognition and Enforcement of Arbitral Awards, and the Commission is invited by AALCC to consider the possibility of preparing such a protocol.

5. It is relevant to note that the 1958 New York Convention has primarily been conceived from the point of view of the State where recognition and enforcement of an arbitral award rendered in another State is sought. The Convention does not purport to deal with the conduct of arbitral proceedings as such (although some provisions of the Convention (cf. article 5 (1)) can be said to deal with procedural aspects).

It would appear, therefore, that, unless the scope of the Convention were substantially modified, the adoption of a protocol to the Convention would only partially cover the issues raised by AALCC.

6. As a general rule, the parties cannot deviate by agreement from the mandatory provisions of the law applicable at the place of arbitration. That rule is reflected in article 1 (2) of the UNCITRAL Arbitration Rules:

> "These rules shall govern the arbitration except that where any of these rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail."

7. Under article III of the 1958 New York Convention

> "Each Contracting Party 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 ...".

The grounds upon which recognition and enforcement of an award may be refused are set forth in article V of the Convention. Paragraph 1 of that article lists five separate grounds which must however be raised by the losing party. Paragraph 2 permits refusal if the competent authority in the country where enforcement is sought finds (a) that the subject-matter of the dispute is not arbitrable under the law of that country, or (b) that recognition or enforcement would be contrary to the public policy of that country.

8. The 1958 New York Convention, it should be noted, goes a long way towards the recognition of party autonomy. Under article V (1)(d), recognition and enforcement may be refused only if "... 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". It follows that, under the Convention, recognition and enforcement of an award, that is not open to attack under paragraph (1)(e), may not be refused if the arbitral procedure, although not in conformity with the law applicable at the place of arbitration, was in fact in accordance with the agreement of the parties. If such is the case, a refusal to recognize and enforce the award can, if none of the other grounds listed in article V (1) are alleged by the losing party, be justified only under the provisions of paragraph 2 of that article, i.e. the subject-matter is not arbitrable under the law of the State of enforcement or recognition or enforcement would be contrary to the public policy of the forum.

9. The main practical effect of the AALCC proposal, if channelled through a protocol to the 1958 New York Convention, would thus be to replace the ground of public policy, as a ground for refusing recognition or enforcement, by minimum standards of fairness.

(b) Exclusion in international arbitration of reliance on sovereign immunity

10. The report of the AALCC Sub-Committee on Trade Law, adopted at the seventeenth session (1976) of AALCC, notes that "many governmental agencies engage in commercial activities throughout the Asian-African region. The availability of arbitration for settlement of disputes is indispensable for such transactions

because of the obvious difficulty in submitting claims to a national court. However, it was pointed out that the doctrine of sovereign immunity had successfully been invoked even in arbitration. In view of the fact that the invoking of sovereign immunity where a governmental agency is a party to a commercial transaction would bring in an element of uncertainty to the transaction, the Sub-Committee was of the view that this point should be clarified ...", possibly through a protocol annexed to the 1958 New York Convention.

11. At the eighteenth session of AALCC (1977), the Sub-Committee specified that the primary intention of the above proposal was "to prevent a governmental agency from invoking sovereign immunity, at all stages of arbitration, including the stage of recognition and enforcement of the arbitral award".

12. The thrust of the AALCC proposal, as it appears from the discussions held in its Sub-Committee on Trade Law, is that the plea of jurisdictional immunity should not be admissible in cases where a governmental agency had entered into a valid arbitration agreement in a commercial transaction. The proposal does not therefore seek to modify the law of States as to whether governmental agencies have the right to conclude valid arbitration agreements.

13. It may be thought that the issue raised is an important one. Commercial contracts of various types, ranging from the simple sales transaction to complex economic development contracts, are increasingly being concluded between a State, State-owned agencies or other entities of public law and foreign private firms. The phenomenon is global; it encompasses commercial transactions between developing countries and foreign private enterprises and between such enterprises and foreign trade organizations of socialist countries, and is not uncommon in transactions between industrialized Western countries. Where such contracts include an agreement to arbitrate in the event that a dispute arises as to interpretation of the contract or its performance, a number of issues arise. Some of these issues are the following:

(i) Under the law of a number of countries State agencies or other legal persons of public law lack capacity to enter into valid arbitration agreements.

The AALCC proposal is apparently not concerned with this issue, although it may be considered a basic question. It may be noted that article II (1) of the 1961 European Convention on International Commercial Arbitration provides expressly that

> "legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements." 1/

1/ Para. 2 of that article permits a Contracting State "to declare that it limits the above faculty to such conditions as may be stated in its declaration." At the time of writing this note, only Belgium made a declaration under article II (2), to the effect that in Belgium only the State has the faculty to conclude arbitration agreements.

(ii) There may be uncertainty whether an agreement to arbitrate implies a waiver of the claim to jurisdictional immunity and whether such waiver extends to submission to the jurisdiction of the courts of the place of arbitration to whose control the arbitral procedure is subject.

The AALCC proposal clearly intends to cover this issue, but it is doubtful, for the reasons stated in paragraph 5 above, whether a protocol to the 1958 New York Convention is the appropriate vehicle.

(iii) There may be uncertainty whether the claim to sovereign immunity could be raised at the place where the recognition and enforcement of the award rendered against a legal person of public law is sought.

The AALCC proposal clearly covers this issue and a protocol to the 1958 New York Convention could possibly clarify this issue.

Conclusion

14. The Commission may wish to reach the view that the proposals of AALCC raise important issues which merit further study and consideration.

15. It is submitted that the preparation of a protocol to the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards may not be the most adequate way of dealing with these issues and that, instead, the possibility should be considered of preparing a new international convention or a uniform law on arbitration, taking as a model the 1961 European Convention on International Commercial Arbitration or the 1966 European Convention providing a Uniform Law on Arbitration, respectively.

16. It should be noted that the proposals by AALCC regarding the issues of international commercial arbitration that might be considered by the Commission were not intended to foreclose consideration by it of other topics as well.
