UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/21
26 February 1969

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Second session
Geneva, 3 March 1969
Item 6 (a) of the provisional agenda

INTERNATIONAL COMMERCIAL ARBITRATION

Report of the Secretary-General

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INTRODUCTION

1. The United Nations Commission on International Trade Law, at its first session, decided to include in its work programme, as a priority topic, the law of international commercial arbitration.[1/] The Commission requested the Secretary-General "to prepare a preliminary study of steps that might be taken with a view to promoting the harmonization and unification of law in this field, having particularly in mind the desirability of avoiding divergencies among the different instruments on this subject".[2/] This preliminary study, prepared by the Secretariat,[3/] is submitted pursuant to the Commission's request.

2. This report consists of four chapters. Chapter I contains a review, on a comparative basis, of the provisions of certain international instruments in the field of international commercial arbitration. The provisions of the instruments have been grouped and compared from the point of view of the principal phases of the process of arbitration: the arbitration agreement, the arbitration proceedings, the award, and the recognition and enforcement of awards. Chapter II discusses similarities and dissimilarities found in the instruments examined and, on certain matters, contains preliminary suggestions as to what would appear to be desirable solutions. Chapter III reviews the relationship between national law and international commercial arbitration. Chapter IV discusses certain measures recommended by United Nations organs and other possible measures which might be adopted for the purpose of promoting the harmonization and unification of law in this field and reducing or eliminating divergencies among the different instruments on the subject.

3. The review is not intended to be an exhaustive study of the provisions of all instruments relating to international commercial arbitration. A number of

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1/ See Official Records of the General Assembly, Twenty-third Session, Supplement No. 17 (A/7217), para. 2 at p. 19.

2/ Ibid., para. 32 at pp. 23-24.

3/ In the preparation of this preliminary study, Dr. Martin Domke, Professor of Law at New York University and formerly Vice-President of the American Arbitration Association and Vice-Chairman of the Inter-American Commercial Arbitration Commission, served as consultant to the Secretariat.

instruments, for instance, have not been considered,[4] and no attempt has been made to identify all questions relating to the instruments reviewed.

4. The international instruments reviewed in chapter I of this report are listed below. They are grouped as follows: (a) International agreements and other instruments in force, (b) International agreements not yet in force, draft international agreements, and other draft instruments, and (c) Arbitration rules.

(a) International agreements and other instruments in force

International agreements

(1) Treaty on the Law of Procedure approved by the South American Congress at Montevideo on 4 January 1889 and revised at Montevideo on 19 March 1940 (hereinafter called the Montevideo Agreement).

(2) Geneva Protocol on Arbitration Clauses of 24 September 1923 prepared under the auspices of the League of Nations (hereinafter called the Geneva Protocol).

(3) Geneva Convention on the Execution of Foreign Arbitral Awards of 26 September 1927 prepared under the auspices of the League of Nations (hereinafter called the Geneva Convention).

(4) Bustamante Code of 1928 (hereinafter called the Bustamante Code).

(5) Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10 June 1958 prepared under the auspices of the United Nations (hereinafter called the UN Convention).

(6) European Convention on International Commercial Arbitration of 21 April 1961 prepared under the auspices of the United Nations Economic Commission for Europe (hereinafter called the European Convention).

(7) Agreement relating to Application of the European Convention on International Commercial Arbitration of 17 December 1962 prepared under the auspices of the Council of Europe (hereinafter called the CE Agreement).

(8) Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 prepared under the auspices of the International Bank for Reconstruction and Development (hereinafter called the IBRD Convention).

4/ E.G., the various bilateral agreements concerning judicial assistance and the enforcement of judgements and arbitral awards; the arbitration rules of institutions, such as the International Chamber of Commerce and the Inter-American Commercial Arbitration Commission, and the arbitration rules of trade associations and chambers of commerce.

Other instruments

(9) The General Conditions for Delivery of Goods Between Organizations of the Member States of Comecon of 1968, prepared by the Council of Mutual Economic Assistance (hereinafter called the Comecon GCD).

(b) International agreements not yet in force, draft international agreements and other draft instruments

(1) Draft of a Uniform Law on Arbitration in respect of International Relations of Private Law prepared in 1937 and revised in 1953 by the International Institute for the Unification of Private Law (UNIDROIT) (hereinafter called the UNIDROIT Draft).

(2) Draft Convention on International Commercial Arbitration of 1956, prepared by the Inter-American Juridical Committee (hereinafter called the OAS Draft Convention).

(3) Draft Uniform Law on Inter-American Commercial Arbitration of 1956, prepared by the Inter-American Juridical Committee (hereinafter called the OAS Draft Uniform Law).

(4) European Convention providing a Uniform Law on Arbitration of 1966, prepared by the Council of Europe (hereinafter called the CE Uniform Law).

(5) The Annex to the Draft Convention on the Protection of Foreign Property of 1967, prepared by the Organization for Economic Co-operation and Development. (The Annex relates to the Statute of an Arbitral Tribunal and is referred to hereinafter as the Annex to the OECD Draft).

(6) Protocol on the Recognition and Enforcement of Arbitral Awards of 1967, prepared by the Council of Europe (hereinafter called the CE Protocol).

(c) Arbitration rules

(1) Rules on International Commercial Arbitration of 1950, prepared by the International Law Association (hereinafter called the Copenhagen Rules).

(2) Rules on Arbitration in International Private Law contained in the resolutions of the International Law Institute adopted in Amsterdam in 1957 (Amsterdam Rules) and in Neuchâtel in 1959 (Neuchâtel Rules). (The unified text of the rules contained in both resolutions is referred to herein after as the Neuchâtel Rules).

(3) ECAFE Rules for International Commercial Arbitration of 1966, prepared by the United Nations Economic Commission for Asia and the Far East (hereinafter called the ECAFE Rules).

(4) Arbitration Rules of the United Nations Economic Commission for Europe of 1966 (hereinafter called the European Rules).

I. REVIEW OF INTERNATIONAL COMMERCIAL ARBITRATION INSTRUMENTS

A. PRELIMINARY QUESTIONS

5. The concept of international commercial arbitration is not specifically defined in any of the international instruments on the subject. The basic elements of the concept, however, are reflected in the initial or preliminary articles of some international arbitration instruments, in those provisions which define the scope of application of such instruments.

6. The scope of application of an international arbitration instrument is usually defined by a description of the types of arbitration agreements which are to be covered by the instrument. Such a description is generally twofold, involving (1) a reference to who might be parties to such arbitration agreements, and (2) a reference to the disputes to be covered by such arbitration agreements. For example, article I.1 of the European Convention states, on the question of the scope of application of the Convention, that the Convention shall apply "to arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States".

7. Some aspects of the provisions of international arbitration instruments relating to the question of their scope of application are referred to in Part A and Part B below.

8. Part A refers to the provisions which concern the question of who might be parties to the arbitration agreements covered by a particular instrument. Part B refers to the provisions which concern the disputes to be covered by such arbitration agreements.

1. Provisions in international instruments concerning their scope of application - parties to arbitration agreements

(a) Persons

9. The European Convention in article I.1 (a) and the United Nations Convention in Article I (1) state that the arbitration agreements to which the Conventions

apply should, among other requirements, be arbitration agreements concluded between "physical and legal persons".

10. The European Convention in article II.1 expressly includes within its scope of application arbitration agreements to which "legal persons considered by the law which is applicable to them as 'legal persons of public law'" are parties.

11. The ECAFE Rules in article 13 contain specific provisions to the effect that disputes referable to arbitration under the Rules may include those to which a Government or state trading agency is party.

12. The jurisdiction of the International Centre for Settlement of Investment Disputes established under the IBRD Convention applies, in terms of Article 25 of the Convention, to a dispute between "a Contracting State (or any constituent sub-division or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State".

13. The commonly accepted meaning of the expression "legal persons" would seem to include States and state agencies, as well as state-owned or state-controlled institutions.5/ A matter to be noted in this connexion is that, in cases where States or state agencies or state-owned or state-controlled institutions are involved, questions may arise as to the applicability of the principle of sovereign immunity. Where the defence of sovereign immunity is invoked, the question is usually one of some difficulty, as views differ as to the scope of the defence.6/

(b) Residence or seat of parties

14. A number of international instruments limit the scope of their application to arbitration agreements concluded between parties who have their place of residence or seat in different countries.

5/ E/CONF.26/SR.23, p. 5. See P. Contini, "International Commercial Arbitration - The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" in the American Journal of Comparative Law (1959), Vol. 8, p. 284.

6/ For a discussion of such differences in view, see "Symposium on State Trading" in Law and Contemporary Problems (1959), Vol 24, pp. 241-528; H. Battifol, "Arbitration Clauses Concluded between French Government-Owned Enterprises and Foreign Private Parties" in Columbia Journal of Transnational Law (1968), Vol. 7, p. 32; and R. David, "The Methods of Unification" in American Journal of Comparative Law (1968), Vol. 16, p. 25.

15. The ECAFE Rules require in article I.1 (c) that the parties should be residents of different countries. The Geneva Protocol in article 1 requires that the parties should be "subject respectively to the jurisdiction of different Contracting States".

16. Article I.1 (a) of the European Convention provides that the parties should have "when concluding the agreement, their habitual place of residence or seat in different Contracting States". Article 1 of UNIDROIT's Draft Uniform Law states that the Uniform Law "shall apply when, at the time an arbitration agreement is concluded, the parties thereto have their respective habitual residences in different countries where the present law [the Uniform Law] is in force".

17. The European Convention and the UNIDROIT Draft, therefore, would also seem to apply in a case where parties resident in different States at the time of the agreement are at the time of the dispute resident in the same country, or in countries where the Convention is not in force.

(c) Nationality of the parties

18. The only international instrument which contains a reference to the nationality of the parties is the UNIDROIT Draft. Article 1 of the Draft, when dealing with the question of the residence of the parties in relation to the subject of the scope of application of the Uniform Law, states that the nationality of the parties shall not be taken into consideration.

2. Provisions in international instruments concerning their scope of application - disputes referable to arbitration

(a) Existing and future disputes

19. The question whether an international instrument is applicable both to the arbitration of existing disputes and to the arbitration of future disputes assumes importance because of the fact that in a number of countries the requirements for the conclusion of arbitration agreements relating to existing disputes (the "submission" or the "compromis") differ from the requirements for the conclusion of arbitration agreements relating to future disputes. 7/

7/ István Szászy, International Civil Procedure (A.W. Sijthoff - Leyden) (1967) p. 604.

20. A number of international instruments pointedly include within their scope of application existing and future disputes. The expressions used in the instruments for this purpose vary.

21. The OAS Draft Uniform Law in Article 1 and the Comecon GCD in paragraph 90 used the expression "differences that may arise".

22. The CE Uniform Law in article 1, the ECAFE rules in article I (2) and the United Nations Convention in article II (1) refer to any dispute which has arisen or may arise. The expressions used in the Geneva Protocol in article 1 are "existing or future differences" as well as "all or any differences that may arise".

23. The Copenhagen Rules also expressly include within their scope of application both existing and future disputes. According to rule 9 of the Copenhagen Rules, in the case of an existing dispute, a special submission to arbitration should be signed if "legally required in the country where the arbiyration takes place or where the award is to take effect".

24. The European Convention in article I.1 (a) uses the expression "disputes arising from...", and article 25 of the IBRD Convention uses the expression "any legal dispute arising out of...". The expressions would seem to include both existing and future disputes.

25. Other international instruments, however, such as the Montevideo Agreement, the European Rules and the UNIDROIT Draft, do not seem to make special reference to existing and future disputes, or any differentation between such disputes.

(b) Subject-matter of disputes

26. The disputes to which the various international arbitration instruments are intended to apply are characterized in broad terms from the point of view of the nature of their subject-matter.

27. The relevant provision of article 3 of the UNIDROIT Draft, for example, reads as follows: "Any person may submit to arbitration any right which he is competent to dispose of." The Geneva Protocol in article 1 refers to disputes "relating to commercial matters or to any other matter capable of settlement by arbitration". The reference in article II.1 of the United Nations Convention is to differences "in respect to a defined legal relationship whether contractual or not concerning a subject matter capable of settlement by arbitration". The CE Uniform Law in

article 1 speaks of disputes arising out of a specific legal relationship and "in respect of which it is permissible to compromise".

28. The corresponding provisions of other instruments contain the qualification that the disputes should relate to commercial matters or should arise out of international trade, or contain other qualifications to similar effect. The expression used in article 5 of the Montevideo Agreement is "civil and commercial" matters. The European Convention in article I.1 (a) refers to "disputes arising from international trade"; the CAS Draft Convention in article 1 and the OAS Draft Uniform Law in articles 1 and 20, to controversies on "a mercantile matter"; and the Comecon GCD in paragraph 90, disputes arising out of or in connexion with contracts of international sale of goods.

29. The provisions contained in the ECAFE rules are rather different. Article 1 of the ECAFE rules states that the rules are applicable to the arbitration of "disputes arising from the international trade of the ECAFE region", but article 1 also contains the clarification that "disputes arising from international trade would include disputes arising out of contracts concerning industrial, financial, engineering services or related subjects involving residents of different countries".

30. Article I.3 of the United Nations Convention permits States to make declarations to the effect that they "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". A similar provision is contained in the Geneva Protocol. Article 1 of the Protocol enables each Contracting State to restrict its obligation to enforce foreign arbitral awards to awards relating to contracts "considered as commercial under /its/ national law".

31. A matter to be noted, in this connexion, is the fact that differences may exist between national laws on, for example, such a question as whether a particular matter should be regarded as falling within the scope of "international trade"; and such differences could on occasion lead to uncertainty as to the arbitrability of a particular dispute. For instance, in some countries

anti-trust disputes may not be referred to arbitration,[8/] whereas in other countries the arbitration of such disputes is permissible. Similarly, there are differences in national laws on the question whether a dispute associated with a contract but involving a tort may be referred to arbitration.

8/ For examples of statutory provisions to that effect, see section 91 of the German Law against Restriction of Competition of 1957. See also F. Kind, Staatsrechtliche Aspekte der Vertragsschiedsgerichtsbarkeit im Kartellwesen (Bern, 1958). For examples of case law, see C. Farber, "The Antitrust Claimants and Compulsory Arbitration Clauses" in Federal Bar Journal (1963), vol. 23, p. 90.

B. THE ARBITRATION AGREEMENT

1. Form of arbitration agreement

32. The majority of international arbitration instruments relate only to arbitration agreements which are in written form. As a matter of fact, arbitration agreements are in practice generally expressed in written form.

(a) No requirement as to written form

33. The ECAFE rules and the Geneva Protocol are, however, exceptional in this respect. They are not applicable solely to written arbitration agreements.

34. Article I.2 of the ECAFE rules states that the rules apply in cases where parties have "agreed" that disputes shall be referred to arbitration under the ECAFE rules. The agreement of the parties may be included in their contract or, if not so included, may be concluded separately by the parties after a dispute has arisen.

35. Article 1 of the Geneva Protocol refers only to "an agreement by which the parties to a contract agree to submit all or any differences that may arise in connexion with such a contract".

36. The provisions of the European Convention are also exceptional in this connexion. Article I.2 (a) of the Convention provides that "in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement /may be/ concluded in the form authorized by these laws". It is the only international arbitration instrument which contains such a provision.

(b) Requirement as to written form

37. Among instruments which contain requirements as to written form, noticeable differences exist.

38. Some instruments merely require that an arbitration agreement should be "in writing". A provision to this effect is contained in article 20 of the OAS Draft Uniform Law. A similar provision is contained in article 25 (1) of the IBRD Convention. Under article 25 (1) the jurisdiction of the International Centre for Settlement of Investment Disputes would extend to disputes which the parties "consent in writing to submit to the Centre".

39. Signature of the arbitration agreement is a specific requirement in certain instruments. The European Convention in article I.2 (a) requires that the agreement be "signed by the parties". The CE Uniform Law in article 2 and the United Nations Convention in article II.2 require that the agreement be "in writing and signed by the parties".

40. A different formulation contained in article 4 of the UNIDROIT Draft reads thus: "An arbitration agreement or any modification thereof must be proved by documents demonstrating directly or indirectly the intention of the parties to submit their differences to arbitration." A similar provision is also contained in article 2 of the CE Uniform Law.

(c) Definition of notion of "in writing"

41. The United Nations Convention in article II.2 defines the expression "agreement in writing" in these terms: "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."

42. The expression "arbitration agreement" is defined in article I.2 (a) of the European Convention. The definition mentions the forms referred to in the definition contained in the United Nations Convention, but also includes an additional form, namely, communication by teleprinter.

(d) Interpretation of requirements as to written form

43. Uncertainties may, of course, arise from time to time as to the exact meanings of these provisions as to form in international arbitration instruments, which may affect the validity of an arbitration agreement.

44. For example, in a recent decision a court in Geneva refused to enforce in Switzerland, under the United Nations Convention, an award made in the Netherlands, on the ground that the expression "an exchange of letters" contained in article II.2 of the Convention required that a proposal made in a written offer to the effect that disputes be referred to arbitration should have been accepted expressly, and not, impliedly, through the opening of a letter of credit.9/

9/ Martin Schwartz, "La Forme Écrite de l'Art. II, al. 2 de la Convention de New York pour la Reconnaissance et l'Execution des Sentences Arbitrates Étrangères du 10 juin 1958" in Revue Suisse de Jurisprudence (1968), vol. 64, p. 49; and for the text of the decision of 5 June 1967, in the case of J.A. van Walsum, N.V. v. Chevalines S.A., ibid., p. 56.

45. An element of uncertainty, as to the forms of agreement required under international conventions, may also be present where the provisions of international instruments make reference to requirements under "national laws". The exact requirements of "national laws" may not always be apparent. One example of such a reference to "national laws" is contained in article I.2 (a) of the European Convention. (See paragraph 36 above.)

2. The content of the arbitration agreement

(a) Equality of the parties

46. A provision to the effect that an arbitration agreement shall not be valid if it gives one of the parties a privileged position with regard to the appointment of arbitrators is contained in article 3 of the CE Uniform Law.

47. It is possible that a requirement of this kind might lead to a reduction in the number of cases where contracts formulated by economically stronger parties must usually be accepted by economically weaker parties without modification - contracts usually referred to as "adhesion" contracts.

48. Some national arbitration laws also declare arbitration agreements void for other reasons as well.[10/]

(b) Content of the arbitration agreement: general

49. The particular terms that should be included in an arbitration agreement depend, in large measure, on whether it is the intention of the parties to submit their dispute to institutional arbitration or to an ad hoc arbitration tribunal.

50. The many institutional tribunals, or permanent arbitration tribunals which have been established by international or national organizations (principally by chambers of commerce, commodity exchanges and trade associations) have their own established rules of arbitration procedure; and the mere submission of disputes to arbitration by this type of tribunal generally implies an acceptance of the rules of the tribunal. Accordingly, in such cases, the parties do not have to consider and agree expressly upon the various specific questions that are involved in an arbitration proceeding.

10/ For references to such national laws, see M. Domke, The Law and Practice of Commercial Arbitration (Chicago, 1968), p. 32, n. 31-33.

51. If the parties, however, choose to submit their dispute to an ad hoc or private arbitration tribunal, the situation is quite different. It then becomes necessary for them to provide in their agreement for a number of procedural matters, and to refer also to those rules which they would like to see applied. If they do not do so, and if they merely record the fact that disputes will be referred to arbitration (the "blank" arbitration clause), they are likely to experience considerable difficulty, should a dispute arise, in establishing an arbitration tribunal, in deciding on what rules of procedure should apply, and on other procedural and substantive matters. Moreover, substantial differences exist between national laws in regard to particular aspects.

52. These difficulties are not likely to arise where the parties agree to apply to their arbitration a set of established rules of arbitration procedure which provide for the necessary procedural and substantive matters, or should an international convention which provides for the necessary substantive and procedural matters be applicable to the arbitration.

53. Among the principal substantive and procedural matters involved in an arbitration proceeding are the following: the question of the number and the method of appointment of the arbitrators, the question of the place of arbitration, the question of rules of procedure that should apply to the arbitration proceeding, and the question of the applicable law. The provisions of international arbitration instruments in so far as they relate to these questions are referred to in sections (c) to (f) below.

(c) Number and appointment of arbitrators

Number of arbitrators

54. All international arbitration instruments which deal with the matter leave the question of the number of arbitrators to the parties, in the first instance, although a certain limitation on the number of arbitrators that might be appointed by agreement between the parties is contained in the CE Uniform Law. Article 5 (2) of the Uniform Law requires that "if the arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed".

55. However, these instruments also contain provisions prescribing the number of arbitrators to be appointed in cases where the parties have not agreed on the number.

56. The usual provision calls for an uneven number of arbitrators, where the parties do not agree on the number. The European rules in article 4, the CE Uniform Law in article 5 (3), the CAS Draft Uniform Law in article 7 and the IBRD Convention in article 37 (2) (b) provide for an arbitral tribunal consisting of three members.

57. The European rules and the CAS Draft Uniform Law specify that of the three arbitrators one is to be appointed by the two other arbitrators as presiding arbitrator. A similar provision is contained in article 9 of the CE Uniform Law. The IBRD Convention in article 37 (2) (b) provides for the third arbitrator, the president of the tribunal, to be appointed by agreement of the parties.

58. According to the UNIDROIT Draft in article 7, each party shall appoint one arbitrator, and when there is an even number of arbitrators,[11] they "shall appoint another arbitrator who shall, as of right, be president of the arbitral tribunal".

59. Article IV (4) of the European Convention provides for the appointment of a "sole arbitrator, presiding arbitrator, umpire, or referee". These terms are not defined in the Convention nor in the European rules nor in any other international instrument on arbitration. It is of interest to note, however, that, in the course of the preparation of the European Convention, a suggestion[12] was made to the effect that the expressions "presiding arbitrator", "umpire" and "referee" be defined as follows: the "presiding arbitrator" is "an arbitrator who forms with the other arbitrators an odd-numbered collegium over which he presides"; an "umpire" is "an arbitrator who gives a ruling as sole arbitrator where the two arbitrators appointed by the parties disagree on the merits of the dispute"; the "referee" is "an arbitrator who gives a casting vote between the other two arbitrators appointed, although he is bound to agree with one of the opinions expressed by the arbitrators who disagree on the merits of the dispute".

Method of appointment

60. The method of appointment of arbitrators under all instruments is left in the first instance to the parties to determine.

11/ It may happen that an arbitration involves more than two parties.

12/ United Nations document E/ECE/424 - E/ECE/TRADE/47, para. 7.

61. The parties may, under certain instruments, either make the appointment themselves or, alternatively, establish another method for the appointment. The European Convention in article IV (1) (i), for example, provides that where parties submit their disputes to an ad hoc arbitral procedure they shall be free "to appoint arbitrators or to establish means for their appointment". Under article 6 of the CE Uniform Law they might "entrust the appointment to a third person". A similar provision is contained in article 6 of the CAS Draft Uniform Law.

62. All instruments also include provision for the appointment of an arbitrator by an "appointing authority" in a case where the appointment of an arbitrator might not otherwise be possible; where for instance, a party having agreed to appoint an arbitrator fails to make the appointment or the arbitrators appointed by the parties fail to appoint the third arbitrator. The "appointing authorities" are also entrusted with the function of naming substitute arbitrators, should that become necessary and should the appointment of the substitute arbitrator not otherwise be effected. The "appointing authorities" under the instruments include the following: (a) the president of the competent Chamber of Commerce of the country of the defaulting party's habitual place of residence or seat or, where a sole arbitrator or the third arbitrator should be appointed, of the country of the place of arbitration or of the respondent's habitual place of residence or seat or, in some cases, the Special Committee[17/] composed of three members elected by the Chambers of Commerce of the States parties to the European Convention (article IV.3 of the European Convention); (b) the judicial authority (article 8 of the CE Uniform Law, articles 7 and 9 of the UNIDROIT Draft); (c) the Special Committee of ECAFE, composed of seven persons selected by the Executive Secretary of ECAFE from among all the representatives on ECAFE or the authority selected by the Special Committee (article II.5 of the ECAFE rules); (d) the judge of the place of performance of the contract (article 11 of the CAS Draft Uniform Law).

17/ United Nations document ECE/TRADE/19, dated 18 September 1967, states, at page 3, that since the first organizational meeting of the Special Committee on 18 October 1966, no party had recourse to the Special Committee.

Foreigners as arbitrators

63. While a prohibition against the appointment of foreigners as arbitrators is not contained in any of the instruments examined, such appointments are expressly made permissible in some instruments to resolve uncertainties that arise from the fact that some national laws provide that foreigners may not act as arbitrators. The European Convention in article III, the OAS Draft Uniform Law in article 3, the OAS Draft Convention in article 2 and the ECAFE rules in article II (2) provide expressly that foreigners may act as arbitrators.

64. Article 39 of the IBRD Convention requires that, unless stipulated otherwise by the parties, the majority of the arbitrators "shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute".

(d) The place of arbitration

65. The selection of a place of arbitration is generally a matter for agreement between the parties, under the majority of national laws as well as under international instruments.

66. The selection of a place of arbitration, however, is often a considerably difficult matter in practice. An obvious reason for this, of course, is that each party quite understandably has strong preference for arbitration in his own country. Accordingly, arbitration clauses in standard forms of contract providing for arbitration in the country of one party, usually the economically stronger, may be found to be unacceptable.[14/] Moreover, even where a party may be prepared to agree to arbitration outside his own country, arbitration in a third country may be strongly preferred by him if it offers better opportunity for the enforcement of the award.

14/ For proposals as to how the choice of the place of arbitration may be made more satisfactory and useful to countries outside the Western sphere, see the six papers on Venue of Arbitration in International Commercial Disputes, submitted to the International Seminar on Commercial Arbitration, New Delhi, 18-19 March 1968, published by the Indian Council of Arbitration, pp. 169-224.

67. Of the international arbitral instruments reviewed, the majority acknowledge the right of parties to determine the place of arbitration, either when concluding their arbitration agreement or at a later stage. No restriction on the place which may be selected is generally imposed.

68. A degree of limitation on the choice of parties, however, is to be found under the OAS Draft Uniform Law. Article 13 of the Uniform Law provides that if the arbitration agreement does not provide for the location of the Arbitration Tribunal, the parties may subsequently decide that the tribunal should be established (a) in the State in which the parties have a common domicile, (b) at the place where the contract was entered into or performed or where the events at issue took place, or (c) at the place "where the thing is located that is the object of the difference", provided the transfer of jurisdiction is permissible under the law of the place of performance of the contract.

69. The European rules in article 14, the CE Uniform Law in article 15.1, the OAS Draft Uniform Law in article 13 and the UNIDROIT Draft in article 15 require that the place of arbitration be determined by the arbitrators, if the parties are unable to do so.

70. Article IV.2 of the ECAFE rules entrusts such a function, where the parties cannot agree, to a Special Committee. The rules require that the Special Committee should in reaching its decision take into consideration the following: (a) the convenience of the parties; (b) the location of the goods and relevant documents; (c) the availability of witnesses, surveys and of pre-investigation reports; (d) the recognition and enforcement of the arbitration agreement and the award; and (e) the advantages, if any, of the arbitration being held in the country of the respondent.

71. A different provision is contained in the Neuchâtel rules. Article 1 of the rules reads as follows: "If the parties have expressly chosen the law applicable to the arbitral agreement, without settling the seat of the arbitral tribunal, they shall be deemed tacitly to have agreed that the tribunal shall sit in the territory of the country the law of which has been chosen by them."

(e) Rules of procedure

72. National laws generally require that the rules of procedure to be followed by an arbitral tribunal should be determined by the laws of the country in which the tribunal has its seat. However, priority is accorded, in several countries, to the rules of procedure agreed upon between the parties.15/

73. The majority of international instruments also accord priority to the rules of procedure agreed upon by the parties. The position under international instruments may be summarized as follows:

(a) Where parties submit a dispute to an institutional arbitral tribunal, the rules of procedure of that tribunal will apply (European Convention in article IV.1 (a), Comecon GCD in paragraph 91 and IBRD Convention in article 44);

(b) Where parties agree to an already established set of rules of procedure, such rules will apply (CE Uniform Law in article 2.2);

(c) Where parties may establish their own rules of procedure, such rules will apply /European Convention in article IV.1 (b), CE Uniform Law in article 15.1, OAS Draft Uniform Law in article 15, the UNIDROIT Draft in article 15/. Article 9 of the Neuchâtel rules, which contains a similar provision but with certain differences, reads thus: "The law of the place of the seat of the arbitral tribunal shall determine whether the procedure to be followed by the arbitrators may be freely established by the parties, and whether, failing agreement on this subject between the contracting parties, it may be settled by the arbitrators or should be replaced by the provisions applicable to procedure before the ordinary courts.";

(d) The arbitral procedure shall be governed by the will of the parties and also by the law of the country in whose territory the arbitration takes place (article 2 of the Geneva Protocol);

(e) The arbitrators and not the parties shall be entitled to conduct the arbitration in such manner as they deem fit (the European rules in article 22, the ECAFE rules in article VI.1 and the Copenhagen rules in Rule 11).

15/ See, for example, the German Code of Civil Procedure, §1034; the Italian Civil Code, Art. 816; the Luxembourg Civil Code, Art. 1009; the Civil Code of Norway, Art. 459; the Arbitration Act of Ghana (1961), section 13 (1) and (2).

(f) The applicable law

74. A number of instruments provide that the question of the law applicable to the substance of a dispute is a matter for determination by the parties. They also provide, however, for the possibility that the parties may not reach agreement on the matter. The European Convention in article VII, the European rules in article 38, the ECAFE rules in article VII.4 (a), the IBRD Convention in article 42 (1) and the Neuchâtel rules in articles 1 and 2 are examples of such instruments.

75. In practice, it is seldom that the applicable law is specified in an arbitration agreement. This, perhaps, is due to the fact that the parties are unaware of the provisions of foreign laws or believe that technical questions are likely to be involved in the choice of a particular law and that, therefore, such a choice should rather be left to the arbitrators.

76. One example of what would appear to be only a partial solution to the problem is article VII.4 (a) of the ECAFE rules. The article states that in the absence of an indication by the parties as to the applicable law, the arbitrators are bound to apply the law "they consider applicable in accordance with the rules of conflict of laws". The question as to which particular country's (conflict-of-laws) rules are to apply is unresolved.

77. The position seems similar under article VII of the European Convention and under article 38 of the European rules, which require, in the absence of agreement between the parties that "the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable".

78. A partial solution of this kind does not appear to provide the arbitrators with sufficient guidance and leaves parties uncertain as to how they might test the merits of their claims.

79. On the other hand, the provisions of the CAS Draft Uniform Law, the IBRD Convention and the Neuchâtel rules seem to be complete in this respect. The CAS Draft Uniform Law, in article 3, provides that the "laws of the country in which the contractual obligations at issue are being carried out, or have been carried out" are to apply. The IBRD Convention provides in article 42 (1) that "the law of the Contracting State[16] party to the dispute (including its rules on the

16/ The IBRD Convention applies to a dispute between a State party to the Convention and a national of another State party to the Convention.

conflict of laws)" applies. Article 11 of the Neuchâtel rules provides that "the rules of choice of law in force in the state of the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference".

80. Some of the instruments, in addition to providing for the law applicable to the substance of a dispute, stipulate also which law should apply to certain other specific matters such as the following:

(a) The capacity of the parties to submit a dispute to arbitration (the Neuchâtel rules in article 4);

(b) The validity of the arbitration agreement (the UN Convention in article V.1 (a), the European Convention in article VI.2, the Neuchâtel rules in article 5, the CAS Draft Uniform Law in article 3);

(c) The form of the arbitration agreement and the appointment of the arbitrators (Neuchâtel rules in article 7).

81. The European Convention and rules, the ECAFE rules, the OAS Draft Uniform Law and the CE Uniform Law contain provisions on the question whether arbitrators may act as amiables compositeurs and determine issues ex aequo et bono and not on the basis of rules of law.[17]

82. The provisions of article VII.2 of the European Convention, of article 39 of the European rules and of article VII.4 (b) of the ECAFE rules are similar. They require that "the arbitrators shall act as amiables compositeurs if the parties so decide and if they may do so under the law applicable to the arbitration".

83. Article 16 of the OAS Draft Uniform Law states that "the arbitrators shall decide the controversy as amiables compositeurs unless the parties have agreed upon another basis for the decision".

84. Article 21 of the CE Uniform Law requires that "except where otherwise stipulated, arbitrators shall make their awards in accordance with the rules of law".[18]

17/ J. Robert, Arbitrage Civil et Commercial, Droit Interne et Droit International Privé, 4th ed. (Paris, 1967), p. 90.

18/ The principle of observance of the rules of law instead of the requirements of equity has been also elsewhere strongly advocated. See F.A. Mann, Lex Facit Arbitrum, l.c.n.3, p. 157; J. Robert, De la Place de la loi dans l'Arbitrage, ibid., p. 226.

85. Among international arbitration instruments, therefore, there would seem to be a fundamental uniformity of approach in the sense that they clearly acknowledge the competence of parties to determine what law is to be applied by the arbitrators to the substance of a dispute.

C. ARBITRATION PROCEEDINGS

1. Rules applicable to arbitral procedure

86. The provisions contained in international arbitration instruments on the question of how the rules of procedure to be applied to an arbitration proceeding are to be determined have been referred to in section B (2) (e) above. The present chapter refers to the provisions of international arbitration instruments in so far as they relate to certain other aspects of the arbitration proceeding.

(a) Examples of mandatory rules of procedure

87. The observance of certain basic procedural provisions is made mandatory under a number of instruments, to ensure that parties obtain a fair hearing.

88. The European Rules, for instance, in article 22 require that "the arbitrators shall in every case give the parties a fair hearing on the basis of absolute equality". The Rules do not stipulate, however, what consequences are entailed by a non-observance of such a requirement.

89. Other examples are to be found in articles dealing with the grounds for the annulment of awards or the conditions for their recognition and enforcement. Article IX.1 (b) of the European Convention states that an award may be set aside if, among other grounds, "the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case". In terms of article V.1 (b) of the UN Convention, the enforcement of an award might be refused for the same reason.

90. Similarly, in terms of article 2 (b) of the CE Protocol, the recognition and enforcement of an award may be refused if "the party against whom the award is invoked did not appear before the arbitral tribunal, having not been given notice of the arbitral proceedings in due time to enable him to defend the proceedings". Article 25 (g) of the CE Uniform Law allows the annulment of an award on the following conditions: "if the parties have not been given an opportunity of substantiating their claims and presenting their case, or if there has been disregard of any other obligatory rule of the arbitral procedure, in so far as such disregard has had an influence on the arbitral award". Article 29 (4) of the UNIDROIT Draft is similar.

91. Recognition of an arbitral award may be denied under article III.5 (c) of the Montevideo Agreement if the party against whom the award was pronounced had not been "legally summoned, or represented or declared in default, in conformity with the law of the country in which the trial was held".

92. The enforcement of an award might be refused under article 423.2 of the Bustamante Code if the parties had not been "summoned for the trial either personally or through their legal representative".

93. The provisions of article 2 of the Geneva Convention read as follows: "recognition and enforcement of the award shall be refused if the court is satisfied: ... (b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that being under a legal incapacity, he was not properly represented".

94. A matter for consideration, however, is whether an international instrument should not also, when setting out a mandatory rule of procedure, stipulate in every case what specific consequences would be entailed if the mandatory rule was not observed.

(b) Participation in proceedings

95. It is a basic requirement, in several of the instruments reviewed, that the parties should receive adequate notice of a proposed arbitration proceeding and be granted adequate opportunity to present their cases.

Failure to participate in proceedings

96. Aside from the requirement that parties should receive adequate notice of a proposed arbitration proceeding and be granted adequate opportunity to present their cases, a number of instruments also provide for the situation in which a party may fail to appear or, having appeared, may fail to present his case.

97. Article 31 of the European Rules provides, for example, that "should either party fail to appear at a hearing properly arranged without showing sufficient cause, the arbitrators shall be entitled to proceed with the arbitration in its absence".

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98. Article 17 of the CE Uniform Law is similar: "if without legitimate cause a party properly summoned does not appear or does not present his case within the period fixed, the arbitral tribunal may, unless the other party requests an adjournment, investigate the matter in dispute and make an award".

99. The provisions of article 17 of the UNIDROIT Draft and of article 45 (2) of the IBRD Convention are to the same effect.

100. The IBRD Convention also contains the additional requirement in article 45 (2) that "before rendering an award, the Tribunal shall notify, and grant a period of grace to the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so"; and the requirement in article 45 (1) that the "failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions".[19/]

Representation of parties

101. It is not obligatory, under any of the instruments examined, that parties should appear in person before an arbitration tribunal. Some instruments, however, contain express provisions on the matter.

102. For example, article 30 of the European Rules provides that "either party shall be entitled to appear in the arbitration by a duly accredited agent". Article 16.4 of the CE Uniform Law mades representation by "an advocate or by a duly accredited representative" permissable.

103. The language in article VI.8 of the ECAFE Rules and in article 17 of the UNIDROIT Draft is very broad. Parties may be represented "by persons of their choice" or "by others".

104. It would seem, therefore, that all instruments agree in principle that

(a) Parties do not need to appear in person before an arbitral tribunal and may designate a representative to appear for them, and

(b) The default of a party to appear at a hearing or to present his case does not prevent the arbitral tribunal from proceeding with the arbitration and rendering an award.

19/ It may be observed, in this connexion, that article 25 of the draft adopted in 1958 by the International Law Commission concerning "Model Rules of Arbitral Procedure" provides that after the expiry of a period of grace granted to the party failing to appear, the arbitral tribunal "may only decide in favour of the submissions of the party appearing, if satisfied that they are well-founded in fact and in law". The Model Rules deal with the settlement of disputes between States.

2. Rules applicable to the arbitrators

(a) Resignation and inability of arbitrators to perform their functions

105. The satisfactory progress of an arbitration is dependent obviously on the willingness and ability of the arbitrators to continue to act as arbitrators throughout the proceedings. The possibility, however, that an arbitrator might, in the course of an arbitration, resign or become incapable of acting cannot be excluded.

106. The majority of instruments provide for such an eventuality and prescribe the method by which a substitute arbitrator might be appointed should an arbitrator resign, become incapable of continuing to act, or die in the course of an arbitration. Among the instruments which do so are the European Convention in article IV.2, the European Rules in articles 6-12, the CE Uniform Law in articles 10.1 and 13.3, the ECAFE Rules in articles III.3 and 4, the OAS Draft Uniform Law in article 10, the IBRD Convention in article 56 (1), the UNIDROIT Draft in article 10 and the Copenhagen Rules in rule 7.

107. Some of these instruments also contain certain other rules which should be mentioned. Article 14 of the UNIDROIT Draft states that "if an arbitrator, having accepted his office, shall unduly delay to fulfil it, the authority settled by the agreement of the parties or, in default of such agreement, the court may, at the request of one of the parties, remove such arbitrator".

108. Article 13.3 of the CE Uniform Law provides that should an arbitrator resign voluntarily or otherwise the arbitration agreement shall, in cases where the arbitrator has been named in the arbitration agreement, terminate ipso jure. Article 10.1 of the Uniform Law provides also for ipso jure termination of the agreement "if an arbitrator dies or cannot for a reason of law or of fact perform his office, or if he refuses to accept it or does not carry it out, or if his office is terminated by mutual agreement of the parties". Whether it is desirable that an arbitration agreement should terminate in such circumstances seems open to doubt. The principal purpose of an arbitration agreement would appear to be the expeditious settlement of a dispute, the designation of an arbitrator being one of the many steps involved in the process of arbitration.

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109. The question whether an arbitration proceeding should take place de novo upon the appointment of a substitute arbitrator is dealt with only in the ECE Rules. Article 13 requires that "after the hearing has commenced, it shall be the duty of the arbitrators at the request of the substitute to recommence such hearing ab initio".

(b) Challenging of the arbitrators

110. It often happens that a party is reluctant to refer a dispute to an arbitration tribunal because of the belief that the arbitrator appointed by the other party might act as an advocate of the interests of the party by whom he was appointed rather than as an independent judge. A party may also be concerned about the impartiality of the third arbitrator should he believe that the election of the third arbitrator was influenced by the other party. Accordingly, a number of international instruments contain provisions permitting the challenging of arbitrators. There are, however, differences between these instruments with respect to such matters as (a) the grounds upon which challenges may be made, (b) who may determine the validity of a challenge and (c) when challenges may be made.

Grounds for challenge

111. Article 6 of the European Rules and, with minor differences in language, article III (1) of the ECAFE Rules permit the challenge of an arbitrator if "any circumstance exists capable of casting justifiable doubts as to his impartiality or independence".

112. Arbitrators may be challenged under article 12 of the CE Uniform Law "on the same grounds as judges" but "a party may not challenge an arbitrator appointed by him except on a ground of which the party becomes aware after the appointment".

113. A differentiation is made in article 12 of the CAS Draft Uniform Law between arbitrators appointed from panels of the Inter-American Arbitration Committee and those appointed "by the litigants themselves or by a natural or a juridical person". The former may be challenged "provided that the grounds alleged are among those that, according to the local law, justify the challenge of judges". The latter may be challenged on the grounds listed in article 9 of the Uniform Law, such grounds being similar to those on which judges usually may be challenged.

Who may determine validity of challenge

114. Article 6 of the European Rules and article 13 of the UNIDROIT Draft provide that the validity of a challenge shall be a matter for the arbitral tribunal to determine.

115. The provisions of the IBRD Convention are somewhat different. Article 58 of the Convention requires that the decision on any proposal to disqualify an arbitrator be taken by the other members of the tribunal. However, in cases where the other members of the tribunal are equally divided, the decision is to be made by the Chairman of the Administrative Council of the International Centre for Settlement of Investment Disputes established under the Convention. (In terms of article 5 of the Convention, the President of the Bank shall be ex officio Chairman of the Administrative Council.) The decision is also to be made by the Chairman of the Administrative Council of the Centre in cases of proposals to disqualify a sole arbitrator or a majority of arbitrators.[20/]

116. The ECAFE Rules in article III (1) and (2) state that challenges shall be passed on in the first instance by the arbitrator concerned, and that should the challenge be rejected by the arbitrator an appeal may be made to the ECAFE Centre for Commercial Arbitration, which shall for this purpose utilize the Special Committee (established under its rules) to determine whether or not the challenge is justified. The decision of the Special Committee is final.

117. A quite different procedure is embodied in article 13 of the CE Uniform Law, which authorizes "the judicial authority" to decide on the challenge.

When challenges may be made

118. The UNIDROIT Draft and the CE Uniform Law are the only instruments containing provisions imposing a time limitation on challenges, obviously with a view to preventing unjustifiable delays.

20/ It may be observed in this connexion that the Arbitration Rules of the International Centre for Settlement of Investment Disputes, prepared pursuant to the IBRD Convention, require in rule 9 (4) that a proposal concerning the disqualification of any arbitrator is to be considered and voted on in the absence of the arbitrator concerned.

119. The UNIDROIT Draft in article 13 requires "that a challenge must be addressed by a party to the arbitral tribunal before the award is made".
120. The CE Uniform Law in article 13 (1) and (2) requires that a challenge should be made "as soon as the challenger becomes aware of the ground of challenge". If within a period of ten days the arbitrator challenged has not resigned "the challenger shall, on pain of being barred, bring the matter before the judicial authority within a period of ten days".

3. Jurisdiction

(a) Jurisdiction of the arbitration tribunal

121. Questions as to the jurisdiction of an arbitration tribunal over a particular dispute are usually based either (a) on the contention that the arbitration agreement is invalid, or (b) on the contention that, although the agreement is valid, the particular dispute is not within the jurisdiction of the tribunal.
122. The principal procedural issues which arise in that connexion appear to be, firstly, when should a plea to the effect that the arbitration tribunal is without jurisdiction be made; and secondly, who should determine the validity of such a plea.

When pleas as to jurisdiction of the arbitration tribunal should be made

123. The question of the appropriate time for pleas relating to jurisdiction is dealt with only in the European Convention and the European Rules.
124. The European Convention in article V.1 requires that pleas as to jurisdiction, based on the fact that the arbitration agreement was either non-existent or null and void or had lapsed, should be made during the arbitration proceedings, not later than the delivery, by the party making the plea, of his statement of claim or defence relating to the substance of the dispute. It is also required that pleas as to jurisdiction, based on the fact that an arbitrator has exceeded his terms of reference, shall be raised during the arbitration proceedings as soon as the question on which the arbitrator is alleged to have no jurisdiction is raised during the arbitral proceedings.
125. The European Rules in article 17 provide that a party which intends to raise a plea as to jurisdiction based on the fact that the arbitration agreement

was non-existent or null and void or had lapsed "shall do so not later than the delivery of its statement of claim or defence relating to the substance of the dispute". As to pleas based on the fact that an arbitrator has exceeded his terms of reference, the provisions of article IV of the European Rules are identical to those of article V.1 of the European Convention.

Who may determine the validity of pleas as to jurisdiction

126. All instruments which contain provisions on the matter authorize the arbitration tribunal to determine questions which may arise as to their jurisdiction (i.e., the arbitrators have the so-called Kompetenz-Kompetenz).

127. The European Convention in article V.3 and the European Rules in article 18 provide that "the arbitrator(s) whose jurisdiction is called in question shall be entitled ... to rule on his (their) own jurisdiction". However, the competence of the arbitrators to do so is made subject to the European Rules "to any control provided for under the law applicable to the arbitral proceedings". The general reference in the European Rules to the "law applicable to the arbitral proceedings" may give rise to some uncertainty, as the European Rules do not, in article 18 or in any other provision, indicate which law is applicable to the arbitral proceedings.

128. The provisions of the CE Uniform Law, the ECAFE Rules and the IBRD Convention are similar. The CE Uniform Law in article 10.1 states that "the arbitral tribunal may rule in respect of its own jurisdiction". The ECAFE Rules in article VI.3 state that "the arbitrator/s shall be entitled to ... determine his/their own competence and jurisdiction". The IBRD Convention in article 41 provides that "the Tribunal shall be the judge of its own competence".

129. A plea as to the jurisdiction of an arbitration tribunal, if such a plea is not based on the contention that the arbitration agreement is invalid, does not imply that the party making the plea denies either the existence of a valid arbitration agreement or the competence of the tribunal to rule on disputes referred to in the arbitration agreement. Accordingly, the generally accepted solution, in terms of which the arbitration tribunal and not the courts would have the authority to decide on such pleas, seems to be in accordance with the agreement of the parties that disputes falling within the arbitration agreement should be decided upon by the arbitration tribunal.

130. It is to be noted, however, that under the majority of international instruments the fact that an arbitral tribunal has exceeded its jurisdiction is ground for refusal to recognize and enforce an award or ground for its annulment. Provisions permitting a refusal to recognize and enforce an award, in such circumstances, are contained in the OAS Draft Uniform Law in article 19.III, the Bustamante Code in article 423.1, the Geneva Convention in article 2 (c), the UN Convention in Article V (c), the Neuchâtel Rules in article 3 (c) and the European Convention in article IX.1 (c). Provisions permitting annulment are contained in the CE Uniform Law in article 25.2 (d), the IBRD Convention in article 52 (1) (b) and the UNIDROIT Draft in article 29 (3).

(b) Jurisdiction over questions relating to the validity of the arbitration agreement

131. There are substantial differences between the instruments examined on the question of the authority responsible for deciding issues relating to the validity of an arbitration agreement. Under some instruments, the arbitration tribunal is authorized to do so; under other instruments such issues are made subject to judicial decision.

132. The European Convention provides in article VI.2 that "in taking a decision concerning the existence or the validity of an arbitration agreement, courts of Contracting States shall examine the validity of such agreement ...".

133. The provisions of the European Rules are different in that they vest the necessary authority in the arbitration tribunal. Article 18 of the rules states that "the arbitrators ... shall be entitled ... to decide upon the existence or the validity of the arbitration agreement, or of the contract of which the agreement forms part".

134. In this respect, the ECAFE Rules are similar to the European Rules. Article VI.3 states that "the arbitrator/s shall be entitled to decide on the existence and validity of the arbitration agreement". The CE Uniform Law also provides in article 16.1 that "the arbitral tribunal may ... examine the validity of the arbitration agreement".

135. In contrast, the OAS Draft Uniform Law provides in article 5 that "any question between the parties to the agreement with reference to the existence of a valid contractual obligation to submit a difference to arbitral decision

may be settled by the judge of the place of performance of the contract at the request of one of the parties, before proceeding with the arbitration".

136. Under article 13 of the Neuchâtel Rules a plea as to the validity of an arbitration agreement is to be made before the courts. The judge, however, "may also refer the parties to the arbitral tribunal, subject to any right of appeal to the courts laid down by the law of the seat of the arbitral tribunal".

137. In connexion with the question of the validity of an arbitration agreement, it should be noted that it often happens that a party pleading the invalidity of a contract also contends that as a consequence of the invalidity of the contract the arbitration clause it contains should also be considered void. An argument advanced to the contrary is that the question of the validity of the arbitration clause should be regarded as independent of and separable from the question of the validity of the contract. The principle of separability has been recently recognized by the highest courts of France[21/] and the United States.[22/]

138. Of the international arbitration agreements examined, however, only the CE Uniform Law deals with this matter. In terms of article 18.2 of the Uniform Law, which reflects the principle of separability, "a ruling that the contract is invalid shall not entail ipso jure the nullity of the arbitration agreement contained in it".

139. The jurisdiction of the courts to decide on the validity of an arbitration agreement, after the conclusion of the arbitration proceedings, is also recognized in most of the international arbitration agreements, as under these agreements decisions of tribunals on the validity of the arbitration agreement can be reviewed when recognition or enforcement of the award is sought. For instance, the recognition and enforcement of an award may be refused "where the arbitration clause is invalid or vacated" (the CAS Draft Uniform Law in article 19.I), in cases where "the award has /not/ been made in pursuance of a submission to arbitration

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21/ Cour de Cassation, 7 May 1963, Etablissements Gosset; Dalloz 1963, 545, note Robert; Jurisclasseur Periodique 1963 II 13405, note Goldman; Revue Critique de Droit International (1963), vol. 53, p. 735, note Motulsky; Journal du Droit International (1964), vol. 91, p. 82, note Bredin.

22/ Supreme Court of the United States, 12 June 1967, Prima Paint Corp. vs. Flood and Conklin Manufacturing Co., 388 U.S. 395. See also E. Mezger, "Vers la consécration aux Etats Unis de l'Autonomie de la Clause Compromissoire dans l'Arbitrage International" in Revue Critique de Droit International Privé (1968), vol. 57, p. 25.

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which is valid under the law applicable thereto" [the Geneva Convention in article 1 (a)], or if "the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made" [UN Convention in article V (a)]. The award can be annulled "if there is no valid arbitration agreement" [the CE Uniform Law in article 25 (c); the UNIDROIT Draft in article 29 (1)].

(c) Jurisdiction of courts

Jurisdiction of courts with respect to disputes subject to arbitration agreements

140. A fundamental question is whether a court may entertain an action with respect to a dispute which is subject to an arbitration agreement between the parties.

141. National laws in some instances give courts a discretion in such cases, either to proceed with the action or to stay court proceedings pending the arbitration award.[23]

142. The majority of international instruments require that a court should, in such circumstances, declare that, in view of the existence of an arbitration agreement, it has no jurisdiction to entertain the action. The Geneva Protocol states, for example, that a court in such a case "shall refer the parties on the application of either of them to the decision of the arbitrators". A similar provision is contained in article II.3 of the UN Convention.

143. Article 13 of the Neuchâtel Rules states that "every court before which one party begins judicial proceedings in violation of a submission to arbitrate or of an arbitral clause shall disseize itself of the matter at the request of the other party", and article 4.1 of the CE Uniform Law requires that "the judicial authority ... shall, at the request of either party, declare that it has no jurisdiction".

144. The provisions of the IBRD Convention are formulated somewhat differently. In terms of article 26, "consent of the parties to arbitration under this Convention shall, unless otherwise stated be deemed consent to such arbitration to the exclusion of any other remedy".

23/ See, in this connexion, A. Nussbaum, "Treaties on Commercial Arbitration - A Test of International Private Law Legislation", Harvard Law Review (1942), vol. 56, p. 242, and Russell on the Law of Arbitration, 17th ed. (London, 1963), p. 71.

145. The provisions of article 90 (i) of the Common GCD state explicitly that "the jurisdiction of general courts is excluded".

146. The period within which a plea as to the jurisdiction of a court should be made is dealt with in the OAS Draft Uniform Law. Article 4 provides that "the judge ... shall, if he considers that the matter before him should be submitted to arbitration under the said agreement, order the suspension of proceedings until arbitration has taken place in conformity with the agreement, when requested to do so by the other party within the period allowed by the law of the forum to plead lack of jurisdiction".

147. The relevant provisions of the European Convention are contained in article VI.1 and 4 and are to the following effect: a plea as to the jurisdiction of the court, made on the basis that an arbitration agreement exists, shall be presented by the respondent before or at the same time as the presentation of his substantial defence, depending upon whether the law of the court seised regards this plea as one of procedure or of substance. However, in a case where arbitration proceedings have been initiated before any resort is had to a court, the ruling of the court as to the jurisdiction of the arbitration tribunal shall be stayed until the award is made, unless there is good and substantial reason to the contrary.

148. As is apparent, therefore, all the instruments referred to seem to contain some provision to the effect that courts should have no authority to deal with a matter which, under a valid arbitration agreement, should be submitted to arbitration. Accordingly, on this question, there seems to be no basic difference in concept between the instruments examined.

Matters referred to courts for decision

149. In several instruments it is provided that certain matters (aside from the jurisdiction of the courts with respect to the recognition and enforcement of arbitration awards which is discussed in section E below) should be referred to courts for decision.

150. As has been noted in paragraph 62 and paragraphs 131, et seq., above, there are provisions to this effect, in certain instruments, in connexion with such matters as the appointment of arbitrators and the question of the validity of an arbitration agreement.

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151. A reference to the courts for the fixing of a date for the award is required under article 19.2 of the CE Uniform Law "if the arbitral tribunal delays in making the award and if a period of six months has elapsed from the date on which all the arbitrators accepted office".

152. Article 19 of the UNIDROIT Draft provides that "if the arbitral tribunal cannot perform an act that it deems necessary, such act may be accomplished by the competent authority at the request of one of the parties to the arbitration agreement".

153. In certain instruments, applications for interim measures are matters for judicial determination. Under article VI.4 of the European Convention, for instance, "a request for interim measures or measures of conservation addressed to a judicial authority shall not be deemed incompatible with the arbitration agreement, or regarded as a submission of the substance of the case to the court". A similar principle is expressed in article 4.2 of the CE Uniform Law and in article 5 of the UNIDROIT Draft.[24/]

154. Other instruments, however, such as the European Rules in article 27, the ECAFE Rules in article VI.6, the IBRD Convention in article 47, authorize arbitration tribunals to take interim measures of protection in respect of the subject-matter of the dispute.

24/ The rules of institutional arbitration tribunals often refer to interim measures to be granted by judicial authorities. E.g., the Rules of the International Chamber of Commerce, article 23 (5): "The parties may, in case of urgency, whether prior to or during the proceedings before the arbitrator, apply to any competent judicial authority for interim measures of protection, without thereby contravening the arbitration clause binding them".

D. THE AWARD

155. There are certain formal requirements with which an award must comply if it is to be recognized and enforced. Such requirements may be set out in the arbitration agreement itself, in the applicable international convention or, in the absence of an applicable international convention, in the laws of the country where the award was rendered or its recognition and enforcement sought.

156. The observance of such requirements are not always simple. It may happen that the pertinent provisions of national laws are unfamiliar to the parties and to the arbitrators, as is very likely to be the case when the award is rendered in a country other than the country in which the arbitration was conducted.[25/] The very identification of the place where an award was made may also prove difficult when arbitrators reside in different countries and an award prepared by one arbitrator is signed elsewhere by another arbitrator.[26/]

157. Some of the principal formal requirements for awards as prescribed in the international arbitration instruments reviewed are referred to below.

1. Time-limit for making the award

(a) Time-limits prescribed

158. A number of instruments state explicitly the period within which an award is to be rendered. A number leave it to the parties to determine, though they make provision for cases where the parties do not agree.

159. The European Rules in Article 34, the ECAFE Rules in Article VII.1, the Copenhagen Rules in Rule 15 and the UNIDROIT Draft in Article 21 specify the period within which an award is to be made. They differ, however, with respect to the date from which the period is to be calculated.

25/ It is permissible, for instance, under Article 37 of the European Convention for awards to be so rendered.

26/ The only instrument that deals with this question is the Neuchâtel Rules. According to Article 3 of the Rules, the award is considered to be rendered at the place of arbitration and on the date of its signature by the arbitrators, regardless of where the signatures were subscribed.

160. The provisions of Article 34 of the European Rules and Article VII.1 of the ECAFE Rules are in that connexion similar. They prescribe a period of nine months to be calculated from the appointment of the presiding arbitrator or the sole arbitrator as the case may be.

161. The Copenhagen Rules in rule 15 require the tribunal to deliver its award within four months from the date of the constitution of the tribunal. The time taken for interlocutory proceedings is excluded in calculating the period.

162. The UNIDROIT Draft in Article 21 stipulates a period of two years, computed from the date on which the arbitration agreement was concluded; and in cases of arbitration agreements relating to future differences, from the date on which the arbitration agreement was invoked.

163. Under Article 19.1 of the CE Uniform Law, the parties may, up to the time of acceptance of office by the first arbitrator, settle the period within which the award is to be made or provide for a method according to which the period is to be settled. If they do not do so and if a period of six months has elapsed from the date on which all the arbitrators have accepted office, the judicial authority may, at the request of one of the parties, decide the matter.

164. Article 17 of the OAS Draft Uniform Law stipulates that "the award shall be made in writing within the period specified by the agreement between the parties, the local law, or the Rules of Procedure of the Inter-American Commercial Arbitration Commission, whichever may apply".

(b) Extension of time-limits

165. A number of instruments provide for the possibility that the time-limit prescribed may prove inadequate in certain cases.

166. Article 35 of the European Rules permits the extension of the time-limit by agreement between the parties. The time-limit may also be extended by the arbitrators to the extent that such extension is justified by reason of the replacement of an arbitrator, the necessity of hearing witnesses, the taking of expert opinion or any other valid reason.

167. Article VII.1 of the ECAFE Rules provides for extensions by agreement between the parties or by the arbitrator or the arbitrators "should he/they consider such an extension essential".

168. While the establishment of a time-limit for the making of an award is desirable from the point of view of eliminating unnecessary delays, it is apparent that cases may exist where a fixed time-limit may prove to be inadequate in fact.

169. To permit the extension of a time-limit only by way of agreement between the parties may not be an entirely satisfactory solution. Parties are not likely to agree easily on whether an extension is in fact essential or sufficiently adequate for the arbitrators. Reference of the matter to judicial decision may not also be entirely appropriate, as a court may not wish to determine the matter without a relatively substantial hearing which may be time-consuming. It may be, however, that a solution similar to that contained in the European Rules, in terms of which the parties and within certain limits the arbitrators have authority to extend the time-limit for rendering the award will be satisfactory.

2. Rendering of the award

(a) Majority for award

170. There are differences in the instruments considered on the question of the majority required for decisions of the arbitrators in cases of tribunals involving three or more arbitrators.

171. A common provision is that a simple majority is required. This is the solution to be found in the European Rules in Article 33, the ECAFE Rules in Article VI.9, the CAS Draft Uniform Law in Article 17, the IBRD Convention in Article 48 (1), the Copenhagen Rules in Rule 14 and the annex to the OECD Draft in paragraph 6 (d).

172. The CE Uniform Law in Article 22.1 and the UNIDROIT Draft in Article 22 are somewhat different. They require an "absolute majority of votes". The CE Uniform Law, however, allows the parties to agree "on another majority".

173. Some instruments deal also with the question of the casting vote of the presiding arbitrator, or of the president of the arbitration tribunal. The CE Uniform Law, for example, in Article 22.2 states that the parties may agree that "when a majority cannot be obtained, the president of the arbitral tribunal shall have a casting vote".

174. The European Rules in Article 33 and the ECAFE Rules in Article VII.3 provide, without however requiring the agreement of the parties for the purpose, that "failing a majority, the presiding arbitrator alone shall make the award".

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175. Article 22 of the UNIDROIT Draft deals with the matter as follows: if an absolute majority cannot be obtained, "the president's vote shall prevail. If, however, the president is an arbitrator who has been appointed by one party only, the arbitration agreement shall, so far as that particular dispute is concerned become inoperative. The same rule shall apply if the arbitral tribunal is composed of two arbitrators who fail to agree".

176. The following provisions in Article 22.3 of the CE Uniform Law seem noteworthy: "if the arbitrators are to award a sum of money, and a majority cannot be obtained for any particular sum, the votes for the highest sum shall be counted as votes for the next highest sum until a majority is obtained".

(b) Awards on the basis of documents alone

177. Awards made on the basis of documentary evidence alone are authorized under certain instruments. Article 23 of the European Rules provides that, subject to the agreement of the parties, "the arbitrators shall be entitled to render an award on documentary evidence without an oral hearing". The Copenhagen Rules in Rule 12 also authorize the arbitrators to decide a case upon documents only.

178. Some instruments expressly permit arbitrators to render an award on the basis of documentary evidence, should a party not appear at the hearing. It may be noted, in this connexion, however, that the annex of the OECD Draft in paragraph 7 permits arbitrators to render an award against the defaulting party and does not seem to require that the arbitrators should act on the basis of evidence.27/

179. The relevant provisions of the instruments examined concerning the general question of the making of ex parte awards have been referred to in paragraphs above.

180. In a case where a party absents himself from an arbitration proceeding without good reason, it seems reasonable to permit the arbitration proceeding to continue to its conclusion, notwithstanding the party's absence. It would also seem reasonable in such circumstances to permit arbitrators to render an award on the basis of

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27/ It may be observed in this connexion that the Rules of Procedure of the Inter-American Commercial Arbitration Commission provide in Article 28 (in contrast to the provisions of paragraph 7 of the annex of the OECD Draft that an award shall not be made in favour of one party solely on the basis that the other party is in default.

documentary evidence alone, should the arbitrators be of the opinion that it would be unnecessary for them to examine such oral evidence as may have already been adduced or to require the party present to adduce any further oral evidence. However, to permit arbitrators, in a case where a party absents himself without good reason, to render an award in favour of the non-defaulting party solely on the ground that the other party is in default may not be an appropriate procedure from the point of view of promoting the wider use of arbitration.

(c) Form of award

181. Article 22.4 of the CE Uniform Law requires that awards be "set down in writing and signed by the arbitrators". If one or more arbitrators are unable or unwilling to sign, the fact shall be recorded in the award. The award, however, shall bear a number of signatures which is at least equal to a majority of the arbitrators.
182. The ECAFE Rules in Article VII.5 also require that awards be made in writing and stipulate that "in the case of an arbitral tribunal, the signature of the majority, or if no majority is obtainable, that of the presiding arbitrator shall suffice, provided the award states the reason for the absence of the signatures of the other arbitrators".
183. Awards under the IBRD Convention [Article 48 (2)] are to be in writing and are to be signed by the members of the tribunal who were in favour of the award.
184. Article 22 of the UNIDROIT Draft requires that "the award shall be reduced to writing and signed by the arbitrators".

3. Content of the award

(a) Interim, interlocutory and partial awards

185. Some instruments deal with the question of interim, interlocutory, or partial awards. One example is Article 36 of the European Rules, which states that "the arbitrators shall be entitled to make interim, interlocutory or partial awards". The ECAFE Rules contain similar provisions in Article VII.2.
186. Article 23 of the UNIDROIT Draft provides that "the arbitral tribunal may, if it can do so without prejudice to the parties to the arbitration agreement, make a partial award, reserving some disputed questions for a further award".

(b) Awards on agreed terms

187. The question whether a settlement, arrived at between the parties to an arbitration proceeding, should be confirmed by the arbitrators in the form of an award is dealt with in some instruments, though not always in the same terms.

188. Article VIII.1 of the ECAFE Rules states that a settlement "shall be recorded by the arbitrators in the form of an arbitral award made on agreed terms".

189. The European Rules in Article 36 authorize the arbitrators, but do not require them, "to make an award on agreed terms".

190. The provisions of Article 31.1 of the CE Uniform Law are rather different. They provide that a "compromise may be recorded in an instrument" (which is not necessarily in the form of an award) "prepared by the arbitral tribunal and signed by the arbitrators as well as by the parties".

191. The fact that, in general, national laws and international arbitration conventions provide only for the enforcement of "awards" is an important reason for requiring that a settlement reached between parties to an arbitration should be confirmed by the arbitral tribunal in the form of an award. It should be noted, however, that Article 9 of the CE Protocol requires that "compromises", recorded as required under the CE Uniform Law (see paragraph 190), "be recognized and enforced". A matter which might be considered in this connexion is whether settlements recorded in a formal manner, but not in the form of awards, might not also be recognized and enforced in the manner in which "compromises" are recognized and enforced under the CE Protocol.

(c) Reasons for awards

192. Under the law of certain countries, such as the United Kingdom and the United States, a statement of the reasons on which an arbitration award is based does not seem to be obligatory and appears in practice to be generally omitted.[28/] In other countries, however, such as France, Hungary, the Netherlands, Portugal and Spain, reasons are generally given; and in some countries it is made compulsory.[29/]

28/ I. Szászy, International Civil Procedure (1967), p. 606.

29/ E.g., Article 823 (3) of the Civil Code of Italy; § 1041 (5) of the German Code of Civil Procedure.

193. As regards the provisions of international instruments, a number of them require that the reasons for an award be stated. Provisions to this effect are found in the CE Uniform Law in Article 22.6, the IBRD Convention in Article 48 (3) and the Copenhagen Rules in Rule 13.

194. The European Convention in Article VIII and the European Rules in Article 40 require reasons, unless the parties (a) either expressly declare that reasons shall not be given or (b) have assented to an arbitral procedure under which it is not customary to give reasons for awards. If this is not the case, "the parties shall be presumed to have agreed that reasons shall be given for the award".

195. Article 25.2 (i) of the CE Uniform Law and Article 52 (1) (e) of the IBRD Convention provide that an award shall be annulled if the reasons are not stated.

196. Article 29 (i) of the UNIDROIT Draft provides that the award be set aside if the parties have agreed that the award should contain reasons and no reasons are given.

197. The ECAFE Rules and the OAS Draft Uniform Law do not contain any provisions on the matter.

198. A pertinent question is whether the enforcement of an award without reasons is possible in a country whose law requires that reasons be given. In recent decisions, courts in both France and the Federal Republic of Germany[30/] have recognized the validity of foreign awards not incorporating reasons in cases where the law of the place where the award was rendered did not require that reasons be given and where it was generally known that arbitral tribunals located there usually rendered awards without reasons.

(d) Costs of arbitration

199. A question which though not relevant to the substance of the arbitration process but nevertheless of practical significance is how the costs of the arbitration proceeding should be borne by the parties.

200. The ECAFE Rules in Article VII.7 and the IBRD Convention in Article 61 (2) require that the costs of the arbitration be fixed in the award.

201. The European Rules in Article 43 also require the arbitrators to "determine in every case the costs payable", but do not specify whether this determination should be recorded in the award.

30/ M. Domke, The Law and Practice of Commercial Arbitration (1968), p. 379.

202. Article 43 of the European Rules and Article VII.7 of the ECAFE Rules provide that the costs shall be borne by the unsuccessful party, but permit the arbitrators in their discretion to apportion the costs between the parties.

203. Article 61 (2) of the IBRD Convention states that the arbitration tribunal may decide how and by whom the expenses shall be paid.

204. The question whether the arbitration tribunal has the authority to assess the fees of the legal representatives of the parties, and to decide by which of the parties these fees shall be borne, is not dealt with in any of the instruments considered. It is a matter, therefore, that is often determined in accordance with the lex fori. The law of many countries requires that the fees of the legal representatives of both parties be borne by the unsuccessful party; in some countries, on the other hand, each party is required to meet the costs of its own legal representative.

4. Notification of parties, deposit, interpretation, revision and publication of awards

(a) Notification of parties

205. Several international instruments require that the parties should be "notified" of the award. Requirements as to the manner of notification, however, differ.

206. The OAS Draft Uniform Law in Article 17 provides merely that "the parties shall be duly notified of the arbitration award".

207. The ECAFE Rules in Article VII.6 provide that the notification should be effected by communicating authentic copies to the parties. The annex of the OECD Draft in paragraph 7 provides for the transmission of signed counterparts.

208. The European Rules in Article 41 require that the "awards shall be communicated by registered letter".

209. Under the CE Uniform Law in Article 23, the president of the tribunal is required to communicate a copy of the award to each party; and under the UNIDROIT Draft in Article 24, the president of the tribunal is to communicate to each party the operative provisions of the award.

210. The Copenhagen Rules associate the communication of the award with the payment of costs. Rule 17 provides that "the award... shall be delivered upon payment of the costs".

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(b) Deposit of awards

211. Provisions requiring the deposit of awards are contained in some instruments. Article 23 (2) of the CE Uniform Law, for example, requires that "the president of the arbitral tribunal shall deposit the original of the award with the registry of the court having jurisdiction" and "shall inform the parties of the deposit". The UNIDROIT Draft provides in Article 24 for the deposit of the award, not in court, but "in the place provided by the arbitration agreement, or if such place is not indicated therein, at some place settled by the arbitral tribunal itself".

212. As taxes or other charges in proportion to the amount of the award are payable under some national laws, the practice of deposit may not be observed as regularly as it might otherwise be. Whether the validity of an award is conditional upon its deposit, in countries where such deposit is made mandatory, seems questionable. In any event, courts do not seem to refuse the enforcement of a foreign award on the ground that the country where it was rendered required deposit and no deposit was made.

(c) Interpretation of award

213. The most appropriate procedure for the interpretation of an award would be for the award to be interpreted by the arbitrators who rendered it. The rendering of an award, however, generally marks the termination of the office of an arbitrator, and accordingly, specific authorization from the parties is necessary if an arbitrator is to be required to take any steps subsequent to the award.

214. The ECAFE Rules in Article VIII.2 specifically authorize the arbitrators to give, if requested by either party within a period of thirty days after the making of the award, an authentic interpretation of the award.

215. Article 50 (2) of the IBRD Convention, which also deals with the question, provides that a request by a party for an interpretation should be submitted to the tribunal which rendered the award. However, if that is not possible, a new tribunal is to be constituted for the purpose.

(d) Revision of awards

216. The interpretation of an award and the correction of clerical errors, errors in compilation or typographical errors[31] are to be distinguished from the "revision" of an award. A revision of an award is generally permitted within specified time-limits on the ground of the discovery of facts unknown at the time of the proceedings.

217. The IBRD Convention requires in Article 51 (1) that the new evidence required in this connexion should be "of such a nature as decisively to affect the award".[32]

218. The revision of an award by the arbitrators who rendered the award appears to be a very useful procedure which would normally involve considerably less delay than judicial review.

(e) Publication of awards

219. The publication of arbitral awards has become a regular practice in a number of countries, including Japan,[33] the Netherlands,[34] and the Eastern European States.[35]

31/ See Article VIII.3 of the ECAFE Rules.

32/ It may be observed in this connexion that Article 38 (1) of the draft adopted in 1958 by the International Law Commission concerning "Model Rules of Arbitral Procedure" makes a party's entitlement to request a revision subject to the qualification that the new facts discovered are "of such a nature as to constitute a decisive factor, provided that when the award was rendered that fact was unknown to the tribunal and to the party contesting revision and that such ignorance was not due to the negligence of the party requesting revision".

33/ Bulletin of the Japan Shipping Exchange (1967), No. 4, pp. 1, 19.

34/ Arbitrale Rechtspraak, No. 569, October 1968.

35/ D.F. Ramzaitsev, "La Jurisprudence en Matière de Droit International Privé de la Commission Arbitrale Soviétique pour le Commerce Extérieur", Revue Critique de Droit International Privé (1953), p. 459; I. Szaszy, "Arbitration of Foreign Trade Transactions in the Popular Democracies", American Journal of Comparative Law (1964), vol. 13, p. 441; Jakubowski, "The Settlement of Foreign Trade Disputes", International Comparative Law Quarterly (1962), vol. 11, p. 806; L. Farago, "Decisions of the Hungarian Chamber of Commerce in 'Comecon' Arbitrations", ibid. (1964), vol. 14, p. 112; as to Czechoslovakia, see S. Hanak in Journal du Droit International (1966), vol. 93, p. 886; as to Romania, see J. Nestor and C. Capitana, ibid. (1968), vol. 95, p. 412; as to Bulgaria, see Al. Kojoucharoff, ibid. (1967), vol. 94, p. 152.

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220. The only international instrument, however, which contains a provision on the matter is the IBRD Convention, which states in Article 48 (5) that the Centre for Settlement of Investment Disputes is not to publish an award without the consent of the parties.

221. When evaluating the desirability of the publication of awards, a relevant consideration is the reluctance of parties to have awards relating to their disputes published.

E. RECOGNITION AND ENFORCEMENT OF AWARDS

222. The establishment of criteria regulating the enforcement of an award, should enforcement become necessary, is fundamental to international commercial arbitration, as it is, indeed, fundamental to arbitration in general. Where an international commercial arbitration award is involved, it is essential also, for its enforcement, that it should be recognized by the competent court of the country in which enforcement is sought.

1. Law applicable to the recognition and enforcement of awards

223. The enforcement of arbitration awards is a matter within the jurisdiction of national courts; and being essentially of a procedural nature, enforcement is generally governed by the differing norms of the lex fori. It would seem, therefore, that if it was thought desirable to remove all the existing uncertainties on this matter, it would be necessary to bring about an international unification of the rules on all aspects of the recognition and enforcement of international commercial arbitration awards.

224. While the existing international instruments and draft instruments dealing with the recognition and enforcement of awards contain certain unified rules on such matters as the grounds upon which the recognition and enforcement of awards shall, or may, be refused, they do not cover all aspects of the enforcement process. Moreover, on certain specific matters they contain references to the provisions of national law, and such references may give rise to uncertainty where national laws differ. For example, paragraph 3 of the Geneva Protocol provides that awards are to be executed "in accordance with the provisions of its [the Contracting State's] national laws". The Geneva Convention in Article 1 states that arbitral awards "shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon". Provisions to the same effect are contained in article III of the United Nations Convention, in article 7 of the Montevideo Agreement, in article 18 of the OAS Draft Uniform Law, in article 54(3) of the IBRD Convention, in article 3 of the CE Protocol and in article 17 of the Neuchâtel Rules.

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2. Finality of awards

225. One of the questions that arise when the enforcement of any arbitration award is sought is whether the award is in fact, so far as the arbitration is concerned, of a final nature or still open to further consideration by way of appeal or review. On this aspect for instance article 29.1 of the CE Uniform Law states that "an arbitral award may be enforced only when it can no longer be contested before arbitrators". A similar provision is to be found in article 1 of the CE Protocol.

226. A further question that arises when the enforcement of an international commercial arbitration award is involved is whether the award may be enforced when, under the national law of the country in which it was rendered or under the national law of the country where its enforcement is sought, it may still be contested in court. Several international instruments contain specific provisions on the finality of the award. The OAS Draft Uniform Law, for example, provides in article 18 that "arbitration awards have the force of a final judgement". The Annex to the OECD Draft uses the expression "final". The Comecon GCD provide in paragraph 91(3) that "the decisions of the arbitral tribunal shall be final and binding on the parties". The Geneva Convention in Article 1 states that "an arbitral award...shall be recognized as binding". Under article V.1(e) of the United Nations Convention, the enforcement of an award may be refused if "the award has not yet become binding on the parties".

227. The enforcement of an award may be refused under article 5 of the Montevideo Agreement if the award does not have "a final character, or the authority of res judicata"; under article 19(V) of the OAS Draft Uniform Law "when the award does not settle the dispute in a final and definite manner"; and under article 423.4 of the Bustamante Code unless "it is executory in the State in which it was rendered".

228. The matter is dealt with in some detail in article 1(d) of the Geneva Convention, which provides that it shall be necessary for recognition or enforcement "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, appeal 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".

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229. Article 54(1) of the IBRD Convention requires that the Contracting States "shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State". Article 42 of the European Rules appears to be similar in purpose. It requires that "the parties undertake to carry out the award without delay and, subject to any legal provisions to the contrary, renounce any right of appeal either before another arbitral institution or before a court of law unless otherwise expressly stipulated".

230. Of the instruments referred to above, the OAS Draft Uniform Law and the IBRD Convention appear to be the only instruments which give the force of a final judgement to an award. The other instruments appear to provide for enforcement only if the award is binding or final under the applicable national law. On this matter, in the course of the United Nations Conference on International Commercial Arbitration, it was observed that while "courts should remain free to refuse the enforcement of a foreign arbitral award if such action should be necessary to safeguard the basic rights of the losing party or if the award would impose obligations clearly incompatible with the public policy of the country of enforcement... the extent of judicial control over recognition and enforcement of arbitral awards 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".[36/]

231. It would seem therefore that it is only through a formula similar to that contained in the OAS Draft Uniform Law and the IBRD Convention, or through a precise definition of the extent of judicial control to be exercised over the recognition and enforcement of arbitral awards, that all uncertainties connected with the requirement that only "final" or "binding" awards may be enforced might be effectively removed.

3. Domestic or foreign character of awards

232. Another question which arises in connexion with the recognition and enforcement of international commercial arbitration awards is whether the award is

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36/ E/CONF.26/2, p.5. For references to the case law of, and writings in, various countries on this question, see W. J. Habscheid, "Nationale oder supranationale Schiedsspruche?" in Zeitschrift fuer Zivilprozess (1957), vol. 70, p. 32.

to be considered a "foreign" or a "domestic" award. The question is important, as international instruments provide only for the enforcement of foreign, and not of domestic awards· the enforcement of domestic awards being governed in every respect by the national law applicable.

233. The United Nations Convention, for example, states in article I(1) that it applies to arbitral awards "made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" and also to "arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought". It may be noted here that under the law of the Federal Republic of Germany awards rendered in any country under German procedural law are considered to be domestic awards. The place where the award was rendered, therefore, is not under that law the determining factor.37/

4. Refusal of recognition and enforcement

234. Though the procedural aspects of the recognition and enforcement of awards are governed by the national law of the country where enforcement is sought, most of the international instruments examined determine the grounds upon which recognition and enforcement of awards shall, or may, be refused.

235. Article 29(2) of the CE Uniform Law, for example, makes denial of recognition and enforcement mandatory "if the award or its enforcement is contrary to ordre public or if the dispute was not capable of settlement by arbitration". The exact scope of this provision seems uncertain, as the Uniform Law does not appear to define clearly the kinds of disputes which are capable of settlement by arbitration. Although article 1 of the Uniform Law does state that "any dispute... in respect of which it is permissible to compromise may be the subject of an arbitration agreement", it does not specify which law should govern or which court or other authority should determine the question whether a particular dispute may be the subject of a compromise. A similar, though more precise, provision is contained in article 26 of the UNIDROIT Draft, which states that "a judicial authority shall, of its own accord, refuse leave to issue execution, if the award is contrary to public policy or if the arbitrators have decided some question that was not capable of being submitted to arbitration according to the law of the place where leave to issue execution has been claimed".

37/ E/CONF.26/SR.6, p. 8. Article 1(1) of the Law of 15 March 1961, Bundesgesetzblatt 1961, II, p. 121.

236. The Geneva Convention in article 2 enumerates the grounds on which refusal of recognition and enforcement of awards is mandatory. The Montevideo Agreement in article 5, the Bustamante Code in article 423, the Geneva Convention in article 1, the United Nations Convention in article V, the OAS Draft Uniform Law in article 19, the CE Protocol in article 2 and the Neuchâtel Rules in article 15 contain detailed provisions concerning the grounds for or circumstances in respect of which the recognition and enforcement of awards may be refused.

237. Under most instruments, the recognition and enforcement of awards may be refused where the awards conflict with public policy, public order or ordre public. For example, under article 5(d) of the Montevideo Agreement, recognition and enforcement may be refused where an award conflicts "with public order in the country of their enforcement"; under article 423.3 of the Bustamante Code, where an award conflicts "with the public policy or the public laws of the country in which its execution is sought"; and under article 15 of the Neuchâtel Rules, where an award is contrary to "the public policy of the country in which it had been invoked".

238. The Geneva Convention in article 1(e) and the United Nations Convention in article V.2(b) permit refusal of the recognition and enforcement of an award not where the award but where the recognition or enforcement of the award is contrary to "the public policy or to the principles of the law of the country in which it is sought to be relied upon" (in the case of the Geneva Convention) or to "the public policy" of the country in which recognition and enforcement is sought (in the case of the United Nations Convention).

239. Under article 2 of the CE Protocol, recognition and enforcement may be refused "if it is incompatible with the ordre public" of the requested State and in particular if the settlement of the dispute by arbitration is contrary to that ordre public". As has already been noted above in paragraph 235, under article 29.2 of the CE Uniform Law, denial of an application for the enforcement of an award is made mandatory "if the award or its enforcement is contrary to ordre public".

240. The differences that are likely to exist, however, between different legal systems in regard to what constitutes public policy, public order or ordre public may give rise to uncertainties.

5. Staying of enforcement

241. A few of the instruments which deal with the recognition and enforcement of awards permit enforcement to be stayed in certain circumstances. The United Nations Convention in article VI provides that "if an application for the setting aside or suspension of the award has been made...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". The UNIDROIT Draft in article 27 states that "a judicial authority may adjourn the granting of leave to issue execution if a party cited to appear shows that he has a prima facie case for setting aside the award".

242. The IBRD Convention differentiates between cases in which enforcement may be stayed and cases in which enforcement shall be stayed. Under Article 51(4) of the Convention, where a request for the revision of an award has been made, "the Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision". However, "if the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request". A similar provision applies, in terms of Article 52(5) of the Convention, where a request is made for the annulment of an award.

243. The CE Uniform Law in article 30.5 empowers the judicial authority seized of an appeal, or of an application for setting aside, to order that the enforcement of the award be stayed. Article 8 of the CE Protocol states that "the authority... may delay its decision if, in the State in the territory or under the law of which the award was made, the award is the subject of an application to set it aside".

244. An award which is ignored by the party against whom it is made ceases to be of value if it is not enforceable in a country where satisfaction of the award may be realized. A matter of common concern to parties, therefore, is whether recourse to arbitration would be an effective method to settle a dispute if questions arise as to whether an award will be readily enforceable under the provisions of the applicable national laws. It seems important to international commercial arbitration that uncertainties of this kind should be resolved. In this connexion,

a question which may be considered further is whether it would be possible to remove such uncertainties through the formulation of self-contained rules covering all aspects of the recognition and enforcement of awards. These rules should not, in so far as possible, contain provisions referring to national laws, as the requirements of national laws are likely to differ and give rise to further uncertainties.

II. COMMENTS ON CERTAIN ASPECTS OF THE REVIEW

245. The review of international instruments made in the preceding chapter identified the existence of similarities and dissimilarities among those instruments in the treatment of the various elements of the arbitration process. This chapter will describe briefly the scope and extent of those similarities and dissimilarities considered to be of particular importance with respect to international commercial arbitration. Where possible, an attempt will also be made to indicate solutions, whether or not they are to be found in the instruments reviewed, which appear to be especially suitable for the purpose of enhancing the effectiveness of international commercial arbitration.

(1) Scope of application of the instruments

(a) Existing and future disputes.

246. One point of similarity in the instruments is that they all seem to include existing and future disputes within their scope of application; though only certain instruments contain express provisions to that effect.

(b) Subject matter of disputes.

247. Where the instruments refer, for the purpose of defining their scope of application, to the subject matter of the disputes to be covered, the provisions of the instruments show marked differences in formulation. It would seem desirable, in this connexion, to arrive at a formulation of a comprehensive definition of "international commercial disputes", without reference to national law. The Uniform Law on the International Sale of Goods, it may be noted in this connexion, contains a definition of what constitutes an "international sale of goods".

(2) Form of arbitration agreements

248. The desirability of arbitration agreements being reduced to writing seems to be recognized in the greater majority of the instruments examined, which limit their scope of application to arbitration agreements in written form. The definitions in some instruments of what might be regarded as "written forms"

contain common elements. It would seem reasonable, in this connexion, to regard (as some instruments expressly do) agreements concluded by way of an exchange of letters, or of telegrams or of teleprints as constituting agreements in "written form".

(3) The number and method of appointment of arbitrators

249. Certain basic principles appear to be common to all instruments in regard to the number and method of appointment of arbitrators. All instruments seem to acknowledge the right of the parties to an arbitration to determine how many arbitrators there should be and how they should be appointed. All instruments provide also for "an appointing authority" to appoint an arbitrator in a case where a party fails to make the necessary appointment. The principal difference between the instruments lies in the variety of appointing authorities designated under the instruments; this is probably due to differences in the scope of application of the instruments, both geographically as well as in the nature of the disputes covered. The variety of appointing authorities provided for under the instruments, however, should not cause uncertainties in practice, as the appointing authorities designated in the instruments are only required to act if the parties themselves have not named an appointing authority.

250. The appointment of foreigners as arbitrators is permissible under all instruments. Some instruments contain express provisions to that effect in view of the requirement in certain national laws that foreigners may not act as arbitrators.

(4) Place of arbitration

251. All instruments leave the determination of the place of arbitration to the parties, in the first instance, though the instruments differ on how the place should be determined where the parties have failed to agree. The problem is a complex one, yet it would seem on balance that a procedure which might be preferable would be to entrust to the arbitrators the determination of the place of arbitration where the parties are unable to agree. This is the procedure incorporated in the majority of instruments, and it would seem less time-consuming than other solutions.

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(5) Applicable law

252. Uncertainty as to which law is to be applied to the substance of a dispute and which law is to be applied to questions of procedure, in cases where the parties have not agreed on the applicable law, constitutes one of the principal uncertainties in respect of international commercial arbitration. Any step towards the reduction or elimination of such uncertainty, in so far as is possible, would enhance effectiveness of arbitration.

253. There are differences in the way in which the question of the applicable law is handled in the instruments examined. Where, as is the case under some instruments, the question is left to the arbitrators to determine, uncertainties on the matter continue till the arbitrators decide on the law applicable.

(6) Challenging of arbitrators

254. It is reasonable that parties to arbitration proceedings should be entitled to challenge an arbitrator on good grounds. It is equally reasonable however to ensure so far as is possible that challenges are not misused, as they would be if parties challenge arbitrators merely for the sake of obstructing the proceedings. The requirement, contained in one of the instruments examined, that a challenge must be submitted as soon as the challenger becomes aware of the ground of the challenge, might prevent, in some measure, the misuse of challenges.

255. Once a challenge has been made, it is important that a decision on its merits should be reached as promptly as possible, and from this point of view a provision requiring the non-challenged members of the arbitration tribunal to decide on the challenge might prove useful. In cases, however, where (a) the non-challenged members are of an even number and disagree, or (b) the majority of the arbitrators are challenged, or (c) there is only a single arbitrator, it would seem necessary for the validity of the challenge to be determined by another authority, such as the "appointing authority" or the competent court of the place where the arbitration tribunal has its seat.

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(7) Jurisdiction over questions relating to the validity of the arbitration agreement

256. Some of the instruments examined require questions relating to the validity of the arbitration agreement to be referred to the courts. Other instruments authorize arbitration tribunals to decide such questions. Under most international agreements, a decision of an arbitration tribunal on the validity of an arbitration agreement can be reviewed by the judicial authorities when the recognition and enforcement of the award is sought.

257. It might be considered in this connexion whether it is preferable for a question relating to the validity of an arbitration agreement to be (a) referred to the competent court immediately the question has been raised before the arbitration tribunal, or (b) decided in the first instance by the arbitration tribunal and then, at the request of a party, reconsidered by the court when recognition and enforcement of the award is sought.

(8) Pleas as to the jurisdiction of the arbitration tribunal, on grounds other than the invalidity of the arbitration agreement

258. All instruments which contain provisions on this matter authorize arbitration tribunals to decide on the merits of such pleas. There are, however, certain difficult problems which arise, namely, (a) should the decisions of arbitration tribunals on such pleas be made subject to judicial review and (b) if so, at what stage of the arbitration proceeding should judicial review take place or, in other words, should judicial review take place immediately after the decision of the arbitration tribunal or at the stage when recognition and enforcement of the award is sought.

(9) Reasons for award

259. The provisions of international instruments and national laws differ on the question whether arbitration awards should set out the reasons on which they are based. The inclusion of reasons in awards may be desirable in certain respects. Awards incorporating reasons would be helpful as a guide to parties in business relations and would also be a useful source of information for future work in the field of international commercial arbitration and in the harmonization and unification of international trade law.

(10) Publication of awards

260. It would seem desirable to consider also the question whether arbitration awards should be published. The regular publication of awards would be especially useful to those involved in the particular branches of trade to which the awards relate and would also contribute to spreading the knowledge of the theory and practice of arbitration. On the other hand, it should be taken into account that in certain cases the parties may be opposed to the publication of awards relating to their disputes, even though their names might be omitted from such publication.

261. Comments with respect to certain other aspects of the arbitration process have been made in chapter I. The comments relate to such matters as mandatory rules of procedure (paragraph 94), representation of parties, and failure of a party to participate in an arbitration proceeding (paragraph 104) jurisdiction of courts with respect to disputes subject to valid arbitration agreements (paragraph 148), extension of the time-limit fixed for the making of an award (paragraphs 168 and 169), making an award in a case where a party absents himself from the arbitration proceeding without good reason (paragraph 180), and the revision of an award (paragraph 218).

262. Section E of chapter I, which deals with the recognition and enforcement of arbitral awards, includes certain comments on the finality of awards (paragraphs 230 and 231), the refusal to recognize and enforce awards on the ground of public order, public policy or ordre public (paragraph 240), and the desirability of formulating self-contained rules covering all aspects of the recognition and enforcement of awards, in order that uncertainties connected with the recognition and enforcement of awards may be fully removed (paragraph 244).

III. NATIONAL LAW AND INTERNATIONAL COMMERCIAL ARBITRATION

263. There seems to be no doubt, as confirmed also by the preceding review of existing international arbitration instruments, that national law plays a vital role in the arbitration process. This chapter will discuss briefly the extent to which the intervention of national law may at times impede and at other times enhance the usefulness of arbitration.

264. Where the parties to a commercial transaction, whether domestic or international, reach an amicable settlement of a dispute arising from that transaction, the law, as a general rule, does not interfere with the autonomy of the parties in resolving the dispute as they wish. The parties are free to agree on the procedure to be followed in arriving at a settlement and on the terms of the settlement. Only in exceptional circumstances, as for example in case of alleged fraud or error, a party may apply to the courts to challenge the terms of an agreed settlement.

265. On the other hand, where the parties refer a dispute to arbitration, normally the laws of the country or countries concerned exercise a degree of control over the arbitral procedure and the award and its enforcement.

266. The laws of most countries and the international instruments examined in this report acknowledge, in principle, the autonomy of the parties in respect of such matters as the submission of a dispute to arbitration, the selection of an institutional or ad hoc arbitral tribunal, the appointment of the arbitrators, the choice of law.

267. The whole arbitration process, however, is generally subject to the mandatory provisions of the applicable law, e.g. the law of the country where the arbitration agreement has been concluded, or where the arbitral tribunal has its seat, or where recognition or enforcement of the award is sought.

268. The fact that arbitration is not completely divorced from the authority of national laws or the jurisdiction of the courts may tend to inject an element of uncertainty in the effectiveness of arbitration as a means for the final settlement of commercial disputes. This is especially true in the case of international trade, where the parties, not being able to rely exclusively on their own agreement or the decision of the freely chosen

arbitrators may be deterred from having recourse to arbitration by the possibility that certain aspects of the arbitration process might be subject to a foreign law unknown to them.

269. It would be an over-simplification, however, to conclude that any intervention of the law impedes the usefulness of arbitration. In some cases the opposite is true. For example, normally a party may apply to the courts to plead that the arbitral tribunal had no proper jurisdiction or exceeded its powers. This kind of intervention of the law tends to promote confidence in arbitration. The same may be said where the intervention of the courts is necessary to enforce an arbitral award.

270. On the other hand, no control by the courts seems necessary or desirable over the merits of the arbitral award. Persons engaged in international trade often prefer to settle their disputes by arbitration rather than by judicial proceedings owing primarily to the greater speed of the arbitration process. This advantage is wiped out where the losing party is allowed to appeal to the courts against the merits of an arbitral award or where the courts are entitled to review the award ex-officio. In such cases the intervention of the courts, in addition to delaying the settlement of a dispute, impedes arbitration by depriving the arbitrators, whose judgement was trusted by the parties, of the power to render a final and binding award.

271. For these reasons the international instruments examined in this report generally provide that arbitral awards should be final and have binding force, except where an award is contrary to the ordre public of the court of the country concerned (see paragraph 237 et seq. above).

272. Sometimes international arbitration instruments provide that certain matters will be governed by national laws (e.g. the law of the country where the arbitration takes place, or the law of the country where enforcement is sought). This often brings about uncertainties and complications. For example, when an arbitration agreement is concluded it may not be known where will be the seat of the arbitral tribunal, or where enforcement of the award may be sought by one of the parties. These locations may depend upon the decision of the arbitral tribunal, the place of residence of its president, the places where the debtor has or transfers his asset, or other factors. It may then occur that an

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arbitration agreement might not be valid under the law of the country where arbitration is supposed to take place, or an award might not be enforceable under the law of the country where enforcement is sought.

273. It is open to question whether, in the case of international commercial arbitration, it would be possible or desirable to avoid altogether any intervention by, or reference to, national laws. It seems clear, however, that, except in cases such as those mentioned in paragraph 269 above, a greater degree of autonomy from national laws would reduce the existing uncertainties and enhance the usefulness of arbitration.

IV. POSSIBLE METHODS FOR HARMONIZATION AND UNIFICATION OF THE LAW RELATING TO INTERNATIONAL COMMERCIAL ARBITRATION

A. MEASURES RECOMMENDED BY THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION AND BY THE ECONOMIC AND SOCIAL COUNCIL

274. Among the measures which have been recommended by United Nations organs with respect to commercial arbitration special reference should be made to the resolutions adopted in 1958 by the United Nations Conference on International Commercial Arbitration and in 1959 by the Economic and Social Council. On 10 June 1958 the Conference adopted and opened for signature the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. On the same day the Conference adopted a resolution[38/] on "other possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes". In that resolution the Conference expressed its support for wider diffusion of information on arbitration laws and facilities, the establishment of new arbitration facilities, technical assistance in developing arbitral legislation and institutions, study groups and seminars, and greater uniformity of national laws on arbitration.

275. Resolution 708 (XXVII) adopted by the Economic and Social Council on 17 April 1959,[39/] essentially restated the terms of the resolution of the United Nations Conference on International Commercial Arbitration. In addition, the Council, "considering that increased resort to arbitration in the settlement of private law disputes would facilitate the continued development of international trade and other private law transactions," invited "Governments to consider sympathetically any measures for improving their arbitral legislation and institutions" and requested the Secretary-General "to assist, within the limits of available staff and financial resources, Governments and organizations in their efforts to improve arbitral legislation, practice and institutions, in particular by helping them to obtain technical advice and assistance from appropriate sources available for this purpose and by providing guidance to Governments and organizations concerned in co-ordinating their efforts and promoting more effective use of arbitration in connexion with international trade and other private law transactions".

38/ See Annex I.

39/ See Annex II.

276. While the primary purpose of both resolutions was to promote the wider use and increase the effectiveness of international commercial arbitration, some of the measures recommended therein are relevant to the scope of this report, i.e. the consideration of steps that might be taken to promote the harmonization and unification of the law relating to international commercial arbitration and to avoid divergencies among existing international instruments. Thus, for instance, a greater uniformity among national arbitration laws, advocated in the resolutions, would reduce the divergencies and uncertainties deriving from the references to national laws to be found in international instruments, and would therefore have the effect of speeding up the process of harmonization and unification of international commercial arbitration law.

277. Similarly, another measure recommended by the Conference and the Economic and Social Council, i.e. the wider diffusion of information on arbitration law and facilities, could promote harmonization and unification by, for example, disseminating information (a) on arbitration rules used in international trade and, (b) on the interpretation and application of international commercial arbitration instruments by arbitral tribunals and courts. The publication of awards rendered by arbitral tribunals in disputes relating to international trade is another measure which would contribute to the wider diffusion of information and at the same time might be useful in promoting the harmonization and unification of the law of international commercial arbitration.

B. OTHER MEASURES

278. A number of other measures might be considered in the context of this report, such as harmonization and unification on a regional or commodity basis, revision of existing conventions with a view to reducing or eliminating divergencies, formulation of a new international instrument on international commercial arbitration.

279. The regional approach has been the basis of the activities undertaken in this field by United Nations organs and other organizations, e.g. the Economic Commission for Europe (ECE), the Economic Commission for Asia and the Far East (ECAFE) and the Organization of American State (OAS). Harmonization and unification of arbitration law on a regional scale is facilitated where the laws of the countries of a region are generally homogeneous, as is the case in Latin America. However, the fact that trade transcends regional boundaries is a limiting factor to this approach.

280. A degree of harmonization and unification of the practice of international commercial arbitration has been achieved on a commodity basis, primarily by trade associations. The effectiveness of this method is due to some extent to the similarity of trade customs and usages pertaining to a certain commodity in most countries of the world. Furthermore, the jurisdiction of arbitral tribunals established for different commodities by the respective trade associations is often accepted by persons engaged in trade in those commodities as a practical procedure for settling their commercial disputes. On the other hand, unification on the basis of individual commodities might tend to crystallize the different procedures applicable to different commodities, and any attempt to promote a more general approach might be consequently slowed down.

281. In order to reduce or eliminate divergencies among existing international instruments, consideration might be given to a revision of some of them. This course, however, would be impractical owing to the difficulties inherent in the procedures for revising conventions established by international conferences of sovereign States or by other intergovernmental bodies.

282. Finally, it might be considered whether the purpose of bringing about harmonization and unification could be achieved by the formulation of a new instrument (convention or uniform law) regulating on a world-wide scale all significant aspects of the arbitration process in respect of international commercial disputes. Should the Commission favour this approach it would be necessary to consider, among other matters, the question of whether and, if so, to what extent, a future convention would have the effect of superseding existing conventions.

ANNEX I

RESOLUTION ADOPTED BY THE UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION

The Conference,

Believing that, in addition to the convention on the recognition and enforcement of foreign arbitral awards just concluded, which would contribute to increasing the effectiveness of arbitration in the settlement of private law disputes, additional measures should be taken in this field,

Having considered the able survey and analysis of possible measures for increasing the effectiveness of arbitration in the settlement of private law disputes prepared by the Secretary-General (document E/CONF.26/6),

Having given particular attention to the suggestions made therein for possible ways in which interested governmental and other organizations may make practical contributions to the more effective use of arbitration,

Expresses the following views with respect to the principal matters dealt with in the note of the Secretary-General:

1. It considers that wider diffusion of information on arbitration laws, practices and facilities contributes materially to progress in commercial arbitration; recognizes that work has already been done in this field by interested organizations, and expresses the wish that such organizations, so far as they have not concluded them, continue their activities in this regard, with particular attention to co-ordinating their respective efforts;

2. It recognizes the desirability of encouraging where necessary the establishment of new arbitration facilities and the improvement of existing facilities, particularly in some geographic regions and branches of trade, and believes that useful work may be done in this field by appropriate governmental and other organizations, which may be active in arbitration matters, due regard being given to the need to avoid duplication of effort and to concentrate upon those measures of greatest practical benefit to the regions and branches of trade concerned;

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3. It recognizes the value of technical assistance in the development of effective arbitral legislation and institutions; and suggests that interested Governments and other organizations endeavour to furnish such assistance, within the means available, to those seeking it;

4. It recognizes that regional study groups, seminars or working parties may in appropriate circumstances have productive results; believes that consideration should be given to the advisability of the convening of such meetings by the appropriate regional commissions of the United Nations and other bodies, but regards it as important that any such action be taken with careful regard to avoiding duplication and assuring economy of effort and of resources;

5. It considers that greater uniformity of national laws on arbitration would further the effectiveness of arbitration in the settlement of private law disputes, notes the work already done in this field by various existing organizations, and suggests that by way of supplementing the efforts of these bodies appropriate attention be given to defining suitable subject matter for model arbitration statutes and other appropriate measures for encouraging the development of such legislation;

Expresses the wish that the United Nations, through its appropriate organs, take such steps as it deems feasible to encourage further study of measures for increasing the effectiveness of arbitration in the settlement of private law disputes through the facilities of existing regional bodies and non-governmental organizations and through such other institutions as may be established in the future;

Suggests that any such steps be taken in a manner that will assure proper co-ordination of effort, avoidance of duplication and due observance of budgetary considerations;

Requests that the Secretary-General submit this resolution to the appropriate organs of the United Nations.

ANNEX II

ECONOMIC AND SOCIAL COUNCIL RESOLUTION 708 (XXVII)

708 (XXVII). International commercial arbitration

The Economic and Social Council,

Recognizing the value of arbitration as an instrument for settling disputes,

Considering that increased resort to arbitration in the settlement of private law disputes would facilitate the continued development of international trade and other private law transactions,

Considering further that substantial contributions have been made to this end by measures designed to strengthen and promote the recognition of the legal status of international private law arbitration,

Recognizing that measures to improve the legal status of arbitration should be accompanied by measures in the fields of arbitral organization and procedure, by educational activity and by technical assistance, if arbitration is to attain maximum usefulness in the development of international trade and other private law transactions,

Noting the resolution[1/] adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958, which recognizes the value of practical measures in these fields,

Believing that, in addition to the contributions of intergovernmental and non-governmental organizations, much can be done directly and immediately through the initiative of Governments and of arbitration organizations to increase the effective use of arbitration,

1. Expresses the wish that arbitral associations, whether constituted along local, trade, national or international lines, give particular attention and emphasis to educational activities, especially among business and professional groups, to the establishment where necessary of new arbitration facilities or improvement of existing ones, and to facilitating international private law arbitrations;

1/ See United Nations publication, Sales No.: 58.V.6, p. 5.

2. Invites Governments to consider sympathetically any measures for improving their arbitral legislation and institutions, to encourage interested organizations in the development of arbitration facilities and related activities, and to avail themselves of appropriate opportunities to obtain or to furnish, as the case may be, technical advice and assistance;

3. Suggests that intergovernmental and non-governmental organizations active in the field of international private law arbitration co-operate with each other and with the United Nations organs concerned, especially in the diffusion of information on arbitration laws, practices and facilities, educational programmes, and studies and recommendations aiming at greater uniformity of arbitration laws and procedures;

4. Recommends that the regional economic commissions of the United Nations which have not as yet included such a project in their programme of work consider the desirability of undertaking a study of measures for the more effective use of arbitration by member States in their regions;

5. Requests the Secretary-General to assist, within the limits of available staff and financial resources, Governments and organizations in their efforts to improve arbitral legislation, practice and institutions, in particular by helping them to obtain technical advice and assistance from appropriate sources available for this purpose and by providing guidance to Governments and organizations concerned in co-ordinating their efforts and promoting more effective use of arbitration in connexion with international trade and other private law transactions.

1066th plenary meeting,
17 April 1959.