CHAPTER I

THE CONVENTION

Introduction

1.01 The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 was finalised under the auspices of the United Nations Economic and Social Council at a Conference convened in New York in 1958. The Conference adopted the Convention in its Final Act on June 10 of that year when ten nations signed it. Subsequently thirteen other nations signed it within the period open for signature. The Convention came into force, after the third ratification, on June 7, 1959 and remains open to accession by any state which is a member of the United Nations or of any of its specialised agencies or by any party to the Statute of the International Court of Justice or by any other state invited to accede by the General Assembly (Articles VIII and IX).

1.02 The Convention has to date been ratified, or acceded to, by the following states (Commonwealth states being underlined):

Australia* (1975)
Austria
Barbados (in process)
Belgium
Benin
Democratic Kampuchea
Republic of Korea
Kuwait
Madagascar

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Botswana(1971)
Bulgaria
Byelorussian SSR
Central African Republic
Chile
Colombia
Cuba
Cyprus (1980)
Czechoslovakia
Denmark
Ecuador
Egypt
Finland
France*
Federal Republic of Germany
German Democratic Republic
Ghana (1968)
Greece
Holy See
India (1960)
Israel
Italy
Japan
Jordan
Mexico
Morocco
Netherlands*
Niger
Nigeria (1970)
Norway
Phillipines
Poland
Romania
San Marino
South Africa
Spain
Sri Lanka (1962)
Sweden
Switzerland
Syrian Arab Republic
Thailand
Trinidad and Tobago (1966)
Tunisia
Ukrainian SSR
Union of Soviet Socialist Republics
United Kingdom* (1975)
United Republic of Tanzania (1964)
United States of America*

In addition, the following states have signed the Convention:

Argentina, Costa Rica, El Salvador, Luxembourg, Monaco, Pakistan.

The Contracting States indicated by * are those to the external territories of which the Convention has been extended. These include the following dependencies of Commonwealth states:

Australia: Christmas Islands, Cocos (Keeling) Islands, Norfolk Island;

United Kingdom: Belize, Bermuda, Cayman Islands,Gibraltar, Hong Kong, Isle of Man and British Virgin Islands [in process].

1.03 In terms of states covered at least, this multilateral Convention has proved an outstanding success. It is, however, striking that of the 57 or so Contracting States only 10 (excluding Barbados) are from the Commonwealth (although this figure does not include those territories for which Australia and the United Kingdom are responsible). This is perhaps surprising as the Convention was intended to replace the regime instituted by the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention for the Execution of Foreign Awards of 1927 to which a considerable number of Commonwealth jurisdictions (some 30 or so) had been made parties either directly (as in the case of Bahamas, Bangladesh, Grenada, Kenya, India, Malta, Mauritius, New Zealand, Tanzania and the United Kingdom) or indirectly as present or former dependencies of New Zealand or the United Kingdom.

1.04 Doubts about the present operation in the Commonwealth of the Geneva scheme have been expressed in the Commonwealth Secretariat study, The Recognition and Enforcement of Judgments and Orders and the Service of Process within the Commonwealth: A Further Report (1977), paras.4.16-4.31. These arise from the following circumstances:

(i) in some instances states have not become parties to one or both of the Protocol and Convention, although municipal legislation posited on the opposite assumption exists;

(ii) doubts exist about the extent of succession to those treaties by certain states to which the treaties were applied by the United Kingdom, in particular, prior to independence;

(iii) the effectiveness in certain states of municipal legislation based upon these treaties may be questioned when those treaties are no longer applicable to those states;

(iv) in some instances, valid declarations extending the municipal legislation to particular Commonwealth states parties to the treaties do not appear to exist and may not be possible under the terminology currently found in that legislation;

(v) it is probable that in some cases extension orders made prior to independence no longer have effect after independence.

1.05 The New York Convention, therefore, represents an opportunity to remove uncertainties about the operation of the system of arbitral award enforcement in Commonwealth states with the added advantage of enabling those states to become parties to an updated scheme and one which is designed to avoid some of the legal shortcomings of the earlier treaties.

Aim of the Convention

1.06 The Convention is designed to further the interests of the world business community which traditionally prefers the flexibility, informality, privacy, low expense and speed of arbitration for the settlement of their disputes to the more cumbersome processes and, arguably, the greater uncertainty of judicial proceedings. Difficulties which have frequently been

experienced include the readiness of courts to allow the initiation of legal proceedings, notwithstanding an agreement to arbitrate, and to assume jurisdiction over matters encompassed by an arbitration agreement whilst refusing a stay of court proceedings and reference of the issue to the agreed arbitral tribunal. Further problems have been encountered through the unenforceability of, or other legal discrimination against, awards made, in one country by virtue of an arbitration agreement, in another where the defendant or his assets are to be found.

1.07 The aim of the Convention is principally to require that foreign arbitral awards will not be discriminated against in these ways in the Contracting States. These states, therefore, are put under an obligation to ensure that non-domestic awards are recognised and are generally rendered capable of enforcement in their jurisdictions in the same ways as awards actually made there. An ancillary purpose is to require the courts of Contracting States to give full effect to non-domestic arbitration agreements by requiring courts to deny the parties access to court in contravention of their agreement to refer the matter to an arbitral tribunal.

1.08 Arbitration arrangements in internal commerce frequently cross national legal boundaries. It is necessary, therefore, if common standards of national legal practice are to be achieved in relation to such arrangements that wide international agreement on these matters be reached. The New York Convention is designed to replace the regime introduced by the Geneva Protocol and Convention (Article VII). Many of the principles - and indeed the general approach - of the earlier schemes are continued by the 1958 Convention but certain deficiencies exposed by thirty years of international experience of the earlier arrangements resulted in a number of different provisions.

1.09 The principal areas of difference relate to the following-

(i) the range of awards

Under the earlier scheme (1927 Convention, Article 1), three requirements restricted the range of awards which were thereby enforceable:

(a) the award had to be made in pursuance of an agreement covered by the Protocol;

(b) the award had to be made in the territory of a Contracting Party;

(c) the award had to be made between persons "subject to the jurisdiction" of a Contracting Party.

The latter two restrictions in particular have been removed or substantially modified. The 1958 Convention (Article I) applies to awards made in any State other than the enforcing state and to awards "not considered as domestic awards" in the latter (see further para. 1.23 below). It is also made clear by Article 1.2 that awards by permanent arbitral bodies are within the scheme.

(ii) burden of proof

The earlier scheme failed to make clear which of the parties to an award carried the burden of proving that the various requirements of the enforcement scheme had been fulfilled. In practice, the responsibility fell upon the successful party to the award who was trying to enforce it. As a consequence, it was on occasions relatively easy for the defendant to be obstructive or in some cases to defeat the enforcement application. The 1958 Convention in Articles IV and V fixes more precisely where the burden of proof lies and, in particular, imposes upon the defendant the duty to raise and prove the more substantial grounds upon which the enforcement application may be set aside (see further para.1.26 below).

(iii) setting aside of awards

Under the Geneva Convention, the unsuccessful party to an award was permitted to contend that the award was not final in the country where it was made because certain court action was available or proceedings to contest the validity of the award were actually pending there (Article 1(d)). This provision enabled a losing party to obstruct enforcement by setting such procedures in motion and relying upon the protracted nature of court proceedings or in some cases merely by threatening to invoke relevant procedures, often unrestricted by time limits.

The New York Convention (Article V.1(e)) in effect allows an award to be enforced notwithstanding that court proceedings may be brought, although enforcement may be suspended by the receiving court if proceedings have been commenced (Article VI) (see further para.1.27(f) below).

(iv) re-opening of merits

As a consequence of Article 1(e) of the Geneva Convention, enforcement could be resisted on the grounds that it was contrary "to the principles of the law of the country in which it is sought to be relied upon." In some instances, receiving courts were prone to re-examine the award to determine whether it measured up to the requirements of the lex fori: the merits of the award could, in effect, be reconsidered. The New York Convention in Article V.2(b) omits this provision and the same Article sets out the only permitted grounds for setting aside (see further paras.1.27 and 1.28 below).

1.10 It should also be added that commentators have suggested that the United Kingdom legislation implementing the Geneva scheme which has been the model for most existing Commonwealth statutes on the matter does not accurately reproduce at the municipal level the obligations established by the international agreements (see the Commonwealth Secretariat Study, op.cit., paras 4.10 and 4.13). Replacement by the New York Convention of the earlier scheme would, therefore, remove these inconsistencies.

1.11 At the same time, it should be said that the New York Convention itself gives rise to a number of difficulties which have in some cases been resolved in different ways in the process of national implementation. For these and other reasons, features of the Convention have been subjected to criticism. These matters are adverted to in the following commentary. Nonetheless, a steadily increasing number of states appear from their acceptance of the Convention to share the conclusion of the Private International Law Committee of the United Kingdom which in its Fifth Report (Cmnd 1515, 1961) recommended adhesion. In their view, the Convention

> "contains a number of improvements on the Convention of 1927..., appears to be acceptable to the business community and...goes as far towards facilitating the enforcement of foreign awards as is reasonable in a multilateral Convention".

Application of the Convention

1.12 The central features of the Convention are concerned with the recognition and enforcement of arbitral awards. It was recognised, however, during the later stages of the negotiation of the Convention, that provision should also be made in the same instrument with respect to the recognition of arbitration agreements rather than in a separate Protocol (as was initially

contemplated, following the precedent of the Geneva agreements). Article II, therefore, was adopted to preclude the possibility that an award might be refused enforcement on the grounds that the agreement upon which it was based was not recognised. Such a conclusion would frustrate the central purpose of the Convention. The following commentary, therefore, looks separately at the recognition of agreements and at the recognition and enforcement of awards.

1.13 The Convention does not limit its operation to awards or agreements made subsequent to its coming into effect in relation to any adhering state. It must be assumed, therefore, that it may be applied with respect to awards and agreements already in existence when it takes effect. Otherwise, following the repeal of the Geneva scheme, existing awards and agreements within the scope of that scheme would no longer be within any international arrangements.

1.14 Whilst replacing the Geneva Protocol and Convention as between Contracting Parties to the New York Convention, the latter treaty does not replace any other multilateral or any bilateral conventions dealing with this topic to which Contracting States may be party (Article VII). Moreover any other rights which any interested party may be able to invoke under the law or treaties of the country where recognition or enforcement of an award is being sought are unaffected by the operation of the Convention there (ibid.).

1.15. Provision is made for a Contracting State to undertake to extend the Convention to territories for the international relations of which it is responsible. Indeed, there is a duty on concerned states to consider whether to make such an extension, subject, where necesary for constitutional reasons, to the consent of the Governments of such territories (Article X). The Convention also makes provision with respect to the special circumstances of non-unitary states (Article XI - see para.2.03 below).

Reciprocity in the Convention

1.16. The Convention contains one clause which is principally concerned with reciprocity. Article XIV provides that a Contracting State is not entitled to avail itself of the Convention against other such States "except to the extent that it is itself bound to apply the Convention." The principal function of this clause seems to be in respect of permitted reservations (see paras.2.04 ff.). A state which another state is pressing to apply the Convention obligations may, under Article XIV, rely upon any reservation entered by the latter. Thus a state could refuse to enforce an award which was not in respect of a "commercial matter" at the behest of a state which had confined its adherence to that kind of award by a reservation under Article I.3. Arguably, any other restrictive applications of the Convention by a state, including those resulting from judicial interpretation of implementing legislation, could also be relied upon in this way.

1.17 Beyond this, reciprocity appears to have no explicit role under the Convention with respect to the recognition of arbitral agreements. For, as drafted, the Convention scheme is not limited to agreements which have an appropriate connection with another Contracting State. In principle, the Convention applies to any arbitration agreement. In practice, however, it is not uncommon for Contracting Parties to exclude certain agreements, especially "domestic" agreements, from the scheme. There are also cases in which "foreign" agreements have been excluded for want of any connection with a Contracting State. As paragraph 1.19(iv) indicates, it may be open to a state when implementing the Convention to determine the extent to which agreements connected with non-Contracting states are to be recognised. Considerations of reciprocity appear to have played little explicit part in Commonwealth practice in this latter respect to date.

1.18 Insofar as the recognition of arbitral awards is concerned, the Convention in its principal obligation is not restricted to those awards connected in some way with another Contracting State. It applies generally to awards made in the territory of any State, other than the State asked to enforce and even to awards made in the requested State when those are not considered "domestic awards" under the law of that State (Article I.1). It is, however, open to a State when becoming a Party to the Convention to enter a reservation declaring that it will apply the Convention to the recognition and enforcement of only those awards which are made in the territory of another Contracting State (Article I.3). This declaration is to be made "on the basis of reciprocity". It is probable that this requirement means no more than that the declaring state intends to limit the scheme to awards made in those States which under the Convention are obliged to enforce awards made in the declaring state (i.e. Contracting States). As paragraph 1.23(ii) suggests, Contracting States retain considerable power to determine for themselves whether and to what extent foreign awards involving non-Contracting States should be brought within their municipal arrangements introducing the Convention scheme. There seems little doubt that in making decisions on such matters, considerations of reciprocity may well be taken into account in practice.

Recognition of arbitral agreements

1.19 Article II, cast in very wide terms, obliges in general every Contracting State to recognise written arbitration agreements and requires the courts of the State at the request of a party to any such agreement to stay legal proceedings on matters which should be the subject of arbitration under the agreement and to refer the issue to arbitration. This general statement calls for a number of explanatory comments.

(i) The Convention requires that the agreement must be one in which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them "in respect of a defined legal relationship whether contractual or not, concerning a subject matter capable of settlement by arbitration" (Article II.1).

It is open to a Contracting State by making a reservation to confine this to legal relationships which are considered as "commercial" under its law. (Article I.3 - see paras. 2.14ff below).

(ii) Whilst it is clear that an arbitration agreement cannot be oral, it will be within the ambit of the Convention if contained in some document, even though it is not formally entitled an arbitration agreement. Article II.2 makes clear that an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams,will be caught. This is not intended to be an exhaustive statement. It has been suggested, for example, that it would extend to a contract which is made by reference to standard conditions of sale which include an arbitration clause, provided that the contract is written or signed by the parties or is contained in letters or telegrams between them. Presumably, it also covers an actual submission of a dispute to a particular arbitrator.

(iii) The Convention does not explicitly deal with the question whether the agreement must be one capable of giving rise to an award which would be enforceable under the scheme. There is no doubt that Article II was introduced to ensure that enforcement of awards would not be precluded by a refusal to recognise the agreement underlying the award. Although one Commonwealth decision has decided otherwise (Indian Organic Chemicals Ltd. v. Chemtex Fibres Inc. 65 A.I.R. 1978 Bom. 108), it is doubtful whether the agreed

provision was limited in this way. Commonwealth statutory practice suggests that it is not. So, for example, Commonwealth legislation does not as a rule exclude agreements which may lead to awards being made in non-Contracting States, even though such awards may not be enforceable (see below, para. 1.23 (ii)).

(iv) As drafted, Article I appears to apply to all arbitration agreements which satisfy the requirements set out in the previous paragraphs, whether or not they have any foreign element to them. It seems probable that those who negotiated the Convention had no intention of it applying to purely domestic agreements in which other Contracting States can have no conceivable interest. A number of signatories, therefore, in their implementing legislation, have limited the municipal obligation to the recognition of foreign arbitration agreements (variously described). There are, however, sharp differences of approach as to what connecting factors should be relied upon to determine the agreements which should and should not be covered by the Convention obligations (see further paras.2.20 ff.below). In a number of jurisdictions, however, including several in the Commonwealth, no such limitations have been adopted and it appears that a general obligation to recognise, and to stay legal proceedings, applies in respect of all arbitration agreements, whatever their connections.

(v) Although the obligation to recognise the agreement is cast in general terms, it seems that it exists only in relation to the matters prescribed by the Convention. Article II, therefore, cannot be used to oblige the recognition of agreements for other purposes. Commonwealth legislation reflects this by confining municipal obligations to the matter of staying judicial proceedings.

(vi) A court's duty to stay legal proceedings under Article II.3 is subjected to several limitations.

(a) There must be a request by one of the parties that the matter be referred to arbitration. Clearly it is open to the parties to agree or consent to a matter being heard before a judicial body notwithstanding an arbitration agreement to the contrary.

(b) Such a request can only be made whilst the court is "seized of an action". The Convention gives no guidance about this; in particular it does not indicate at what point of time (if at all) an applicant will be regarded as having allowed the action to proceed too far to be able to make a request for stay.

(c) The agreement must be one within the contemplation of the Convention. In particular, it must relate to subject matter "capable of settlement by arbitration" (Article II.1, see para.(i) above). Whilst the forum state appears to be the one to determine whether this condition is fulfilled, the Convention is silent concerning the law which is to be applied in answering the question, although Article V.2(a) lays down the relevant law by which a similar question is to be determined in the context of recognition and enforcement of an award. It appears probable that the issue would be treated as governed by the lex fori. In line with the provisions of V.2(a), the courts would then refuse to recognise an agreement which concerns subject matter which is not capable of settlement under the law of the State in which the application to stay is made.

(d) A court may refuse a reference to arbitration where it finds the agreement "null and void, inoperative or incapable of being performed." Again the Convention is silent on an important matter - by reference to which law are these matters to be

determined? Again there is an analagous provision in Article V.1(a), in the context of awards, relating to the validity of agreements which suggests that the law of the parties' choice should be followed. But in the absence of any such choice, it is arguable that questions of validity should be determined by reference to the forum state's conflict of law rules relating to validity of contracts. In so far as Article II.3 refers to issues which involve questions of public policy, they will presumably be determined by the lex fori. But these matters are not free from doubt.

(e) It seems clear that the courts are not permitted to claim any residuary discretion to decide whether to refer a matter to arbitration, if the requirements outlined above are all fulfilled. The Convention is intended to be mandatory in this respect.

(vii) The court's duty to stay does not depend upon actual submission of an existing dispute to arbitration. The Geneva Protocol scheme, as made effective through statutes modelled upon United Kingdom legislation, could be given that construction, although a correct translation of the French text would lead to the opposite conclusion. This model appears also to have influenced the Indian draftsman of the legislation implementing the New York Convention (The Foreign Awards (Recognition and Enforcement) Act 1961, section 3). An amending Act, No.47 of 1973, was necessary to reverse a decision of the Supreme Court of India applying this limited construction (M/s V/O Tractoroexport, Moscow v. M/s Tarapore & Co., Madras 58 A.I.R. 1971 SC 1.). It is clear that the Convention applies with respect to agreements, even though a submission to an arbitrator under it has not yet been made.

Recognition of arbitral awards

1.20 The central obligation imposed upon Contracting States by the Convention is to recognise all arbitral awards within the scheme as binding and to enforce them, if requested so to do, under the lex fori. It is for each Contracting State to determine the procedural mechanisms which may be followed, where the Convention does not prescribe any requirements. Thus the time within which an application for enforcement of an award must be made will be determined by the lex fori and may be prescribed by implementing legislation. The lex fori must not discriminate against these awards.

1.21 An applicant seeking recognition is required to produce the original award, duly authenticated, and the original agreement or, in either case, a duly certified copy - where necessary with a certified translation (Article IV). This is enough to establish a prima facie case: the burden of proving that the award should not be recognised and enforced then falls upon the other party (see para.1.25 below).

1.22 There are, however, important qualifications to this central requirement.

1. Awards within the scheme

1.23 The scheme is restricted to certain categories of arbitral award:

(i) the award must arise out of differences between persons, whether physical or legal (Article I.1). It may, in appropriate cases, extend to differences involving states themselves, as well as public corporations.

(ii) it extends to awards made in any state other than the state of enforcement (Article I.1). As drafted, therefore, it is not limited to awards made in other Contracting States. It is argued that there may well be awards made in non Contracting-States which e.g. are governed by the law of the receiving state or which benefit nationals of that state and which it may, therefore, wish to enforce. On the other hand, it may be restricted in that way by a reservation made under Article I.3 (see above para.1.18). If no reservation is made, it appears that awards in non-Contracting States should be recognised and enforced as part of the enforcing state's obligation to other Contracting States under the Convention. (But see paras.2.06-2.13 below.) If, however, such a reservation is made, it is clearly open to a Contracting State unilaterally to extend its implementing legislation to awards from non-Contracting States and to determine what additional qualifications must be present in relation to an award made in a non-Contracting State, as for example that the legislation will be applied only if reciprocal benefits are offered by that state.

(iii) it can also be applied to awards "not considered as domestic awards" in the state of enforcement (Article I.1). This provision appears to be intended to embrace awards which, though made in the state of enforcement, are treated there as "foreign" under its law, because of some foreign element in the proceedings, e.g. another state's procedural rules are applied. It is clearly open to each Contracting State to determine through its own law what awards locally made (if any) may be brought within the scheme under this provision. It is not open to a state to designate awards made in another Contracting State as "domestic" so as to take them outside the scheme.

(iv) it appears that the award must be one made under an agreement capable of recognition by virtue of Article II. For Article IV.1(b) and V.1(a) seem to have been drafted on this premise. It therefore follows that if a reservation has been entered confining the scheme to differences considered as commercial by the Contracting State (see para. 1.19(i) above), an award under an agreement which does not satisfy that reservation will be unenforceable.

But an award made pursuant to an agreement which falls outside the staying provisions of the Convention scheme solely because it has been designated under the lex fori as a "domestic agreement" (see para.1.19(iv) above) may nonetheless be enforceable if it satisfies the conditions for enforcement of awards set out above.

(v) it makes no difference to the scheme whether the arbitrator is one selected by the parties themselves or is a permanent arbitral body to which the parties have submitted (Article I.2). It is clear, however, that the selection or submission must be voluntary in the sense of deriving from the parties' agreement.

2. Recognition and enforcement

1.24 The Convention implicitly draws the distinction between recognition and enforcement. It is clearly contemplated that a Contracting State will be under an obligation, in an appropriate case, to allow the award to be relied upon as a defence or for purposes of set-off and counterclaim and the like. Article III provides specifically that enforcement is

to be discharged "in accordance with the rules of procedure of the territory where the award is relied upon". In comparison with domestic awards, the proceedings for recognition or enforcement must not be discriminatory in the sense that they may not involve "substantially more onerous conditions or higher fees or charges" (Article III.1).

3. Refusal of recognition

1.25 Under the scheme, as we have seen, an applicant seeking enforcement need do little more than present proof of the existence of an award and the agreement under which it was made. The burden of establishing before the court that recognition and enforcement should be refused lies with the party against whom the award was made (Article V.1). But in all cases,unlike the situation under the Geneva scheme, the court retains a discretion whether to refuse enforcement even when the grounds are satisfied.

1.26 In addition to a list of grounds for refusal which the debtor may prove, the Convention also prescribes two grounds upon which the court may of its own motion refuse recognition (Article V.2). It appears that these provisions together comprise an exhaustive list of the grounds which may be relied upon.

(i) grounds to be proved by the debtor

1.27 The grounds are set out in five paragraphs in Article V.1. The courts before which they are raised appear to have some discretion whether or not to apply them.

(a) "the parties to the agreement were under some incapacity" (Article V.1(a)).

Where the agreement (which must be of the kind referred to in Article II) is impaired by incapacity of one of the parties an award made in pursuance of it cannot be enforced. The law to be applied to determine the existence and effect of incapacity will be "the law applicable to the parties" as determined in accordance with the rules of private international law of the enforcing state. It seems probable that the time at which incapacity is intended to be relevant is the time when the agreement was made.

(b) "the agreement (which must be the kind referred to in Article II) is not valid" (Article V.I(a)).

An award cannot be enforced if it depends upon an agreement which is not within the scope of the Convention (para.1.19 above) or lacks validity. The question of validity is to be determined by "the law to which the parties have subjected [the agreement] or, failing any indication thereon,...the law of the country where the award was made".

The effect of this requirement seems to be that if the parties have given clear, though not necessarily express, indication of the choice of law in the agreement, that choice must prevail. If that is lacking, the law of the place of arbitration (which place is normally strong evidence, under common law, of the proper law) must be applied.

(c) "the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case" (Article V.1(b)).

This clause allows the enforcing court to determine whether due process or natural justice has been accorded to the debtor. The clause is silent upon the question of whose law is to be applied in this respect but the better view suggests that this, as with other public policy objections, will be governed by the lex fori. The final words of the clause were introduced to cover circumstances involving force majeure and the like as well as those in which the debtor was not afforded an adequate opportunity to present his case.

(d) "the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration or it contains decisions on matters beyond the scope of the submission to arbitration" (Article V.1(c)).

The law which is to govern the interpretation of a submission would be determined under the conflict of laws rules of the enforcing state. The purpose of this objection is to ensure that awards made in circumstances which go beyond the parties' agreement as expressed in the actual submission of the dispute to an arbitrator cannot be enforced. In short, it relates to the question of whether the arbitrator has stayed within his terms of reference dictated by the submission, if there is one, or if not, by the arbitral clause governing the reference. It is subject to a proviso that any part of such an award which is within the submission and is capable of being separated from the ultra vires matters may be recognised and enforced.

(e) "the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place" (Article V.1(d)).

This rather ambiguous clause does not make clear the extent to which the parties have a freedom to agree on these matters, particularly on the arbitral procedure to be followed. For it fails to state precisely whether they are confined to selecting some national system of law to govern these matters and that they may not devise their own procedures. It is arguable that such a restriction was intended, since it is consistent with the explicit references to an identifiable law in Article V.1(a) (see para.(a) above) and Article V.1(e) (see para.(f) below). But the question is not free from doubt.

(f) "the award has not yet become binding on the parties or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made" (Article V.1(e)).

One purpose of this provision is to maintain the authority of the courts of a state over arbitration processes which take place in that state or under its law. Accordingly an award which has been set aside or suspended in such a state cannot be enforced elsewhere. The Convention leaves it to the law of the state setting aside to determine the grounds upon which such action can be taken. It is, however, unusual for courts in most states to have jurisdiction to set aside or suspend awards merely because they have been granted by application of their law. A second purpose is to ensure that awards which because they are still subject to some form of appeal, have not become binding under the law of the place where they were made or, if different, the law under which they were made, cannot be enforced until those appeal opportunities have been exhausted or the time for taking them has elapsed. A similar limitation will probably arise where some further procedure (such as court confirmation) is mandatory in the state of arbitration or, if different, by the law

under which the award was made, before that award can be put into effect. Where proceedings to set aside an otherwise binding award are pending in the country of the award, or under the law of which the award was made, the enforcing court is empowered to adjourn the application for recognition until the outcome of those proceedings. Security may be required from the debtor (Article VI). This is, however, merely discretionary: there is no duty to adjourn the decision to enforce in those circumstances . If, as seems the case, the enforcing court has no power to refuse recognition for a patent error of law in the award, it seems probable that it should always be ready to adjourn its proceedings whilst such an issue is determined in the courts of the country of the award.

(ii) grounds to be applied by the court on its own motion

1.28 Where the enforcing court finds one or other of the following grounds present, whether or not objection is made in that respect by the debtor, it may refuse to recognise and enforce the award (Article V.2):

(a) "the subject matter of the difference is not capable of settlement by arbitration under the law of [the] country" of enforcement (Article V.2(a)).

It is, therefore, open to the court to decide whether the matter could have been arbitrated under its law. In the case of more objectionable subject matters, this is obviously an application of general public policy principles. It is, however, capable of being applied where under domestic law particular subjects are considered to be unsuited to arbitration, although this may be an eccentric local rule.

(b) "the recognition or enforcement of the award would be contrary to the public policy of the country" of enforcement (Article V.(b)).

This ground reflects a basic principle normally found in any scheme for enforcement of foreign judgments or awards. As in other schemes, courts will refuse to facilitate the enforcement of awards which would conflict with the rules relating to public policy developed by those courts. It seems probable that questions of fraud could be brought under this head. But if the aims of the scheme are to be achieved, it seems desirable that a narrow view is taken of public policy in this context. This would be consistent with practice in relation to other enforcement schemes developed in the Commonwealth.

Relationship with Foreign Judgments legislation

1.29 Many Commonwealth states have statutory provisions permitting arbitral awards to be registered and enforced as foreign judgments under legislation equivalent to the Foreign Judgments (Reciprocal Enforcement) Act, 1933 (U.K.). In most cases these will be awards made in other Commonwealth States. Dicey and Morris, The Conflict of Laws, 10th ed., 1980, p.1155 suggest that this procedure may preclude resort to the New York scheme even though extended to the relevant Commonwealth State, because section 6 (or its equivalent) prohibits all court proceedings, except registration proceedings under the 1933 Act, with respect to judgments, and thus awards, caught by the Act. Whilst it may be open to a court faced with this apparent conflict of statutory provisions to hold that the legislation implementing the New York scheme should prevail as it is usually later, the matter is not free from doubt. It is clear that if the earlier legislation prevails, the Convention obligation to all Contacting States to recognise and enforce awards, otherwise within the Convention Scheme, will be frustrated and the usefulness of the Convention arrangements will be lost in many intra-Commonwealth matters, particularly.

1.30 On the other hand, awards which cannot be registered under the legislation because they do not meet the requirements of that legislation, might be enforced under the Convention Scheme. It seems unfortunate if the beneficiary of an award is required first to determine or ensure that the award does not fall under the legislation before he may contemplate proceedings under the Convention.

1.31 For these reasons, it is suggested that Commonwealth states should make clear that the Convention scheme is an alternative to that provided by the Foreign Judgments legislation. There seems no reason in principle why a party to an award should not be free to follow whichever of the procedures best suits the case. The model Bill in the Annex to Chapter II provides accordingly (clause 8(3)).

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS. DONE AT NEW YORK, ON 10 JUNE 1958

Article I

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

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

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

Article II

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

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

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

Article III

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

Article IV

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

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

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

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

Article V

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

(*a*) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or 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; or

(*b*) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(*c*) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(*d*) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(*e*) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

(*a*) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(*b*) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

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

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923[1] and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927[2] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply :

(*a*) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(*b*) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(*c*) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceeding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

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

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

(*a*) Signatures and ratifications in accordance with article VIII;

(*b*) Accessions in accordance with article IX;

(*c*) Declarations and notifications under articles I, X and XI;

(*d*) The date upon which this Convention enters into force in accordance with article XII;

(*e*) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.