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EXPERT ADVISORY GROUP TO CONSIDER POSSIBLE REVISIONS TO THE EUROPEAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION OF 1961

Addendum 1

Survey on the European Convention on International Commercial Arbitration of 1961

1. Before beginning serious discussions regarding the future of the 1961 European Convention, the Bureau of the Advisory Group decided that it was important to try to measure the extent to which the Convention is still being used and is useful. The answer to this question was not evident because most of the Convention's articles require no notification to the United Nations when they are used, and they can be invoked by a Court or simply referenced by private lawyers in initial discussions which are never officially recorded. Therefore, it was agreed to develop a questionnaire both on the current usefulness of the Convention and on areas where changes in the Convention might be helpful.

2. This questionnaire was distributed to the following:

(1) Organizations nominated by countries under the Convention and the International Chamber of Commerce whose national organizations are referenced in the Convention;
(2) Organizations nominated by UN/ECE member countries specifically to answer the questionnaire;
(3) Experts identified by the Bureau of the Advisory Group.

3. Under groups 1 and 2, answers were received from 35 organizations nominated by 26 countries and the International Chamber of Commerce. Under group 3, answers were received from 8 experts. In this document we will look at the replies from groups 1 and 2 to selected questions. However, an analysis including all questions and all answers can be obtained from the UN/ECE secretariat.

4. There were 33 questions in the survey: 1 on the relative importance of the principal provisions, 3 on awareness of the overall Convention, 27 on specific provisions, and 2 related to the future of the Convention.

5. For reference when considering the analysis given below, the text of the 1961 European Convention on International Arbitration, as well as a list of the contracting States can be found by selecting commercial arbitration from the menu on the Internet at http://www.unece.org/trade/tips/tp_home.htm

The Relative Importance of Provisions

6. The principal provisions in the Convention, which respondents were asked to rank, are:

- The ability to designate foreign nationals as arbitrators (art. III)
- Procedures for appointing arbitrators (art. IV)
- Procedures for determining arbitral jurisdiction (art. V)
- Jurisdiction of Courts of law (art. VI)
- Procedures for determining applicable law (art. VII)
- Rules for setting aside awards (art. IX)

7. The ratings were from 1 to 6 with 1 being the most important and 6 the least important. The average ratings for the provisions were between 2.1 and 2.8.

8. The two provisions with the highest ratings were the provision on Procedures for determining arbitral jurisdiction (article V) which received 22 ratings of 1 or 2 and only 2 ratings of 5 or 6 and the provision on Rules for setting aside awards (article IX) which received 19 ratings of 1 or 2 and only 3 ratings of 5 or 6.

9. Article V on arbitral jurisdiction ensures that pleas regarding jurisdiction are raised at the beginning of any proceedings and allows the issue to be decided by the arbitrators themselves. This effectively prevents such pleas from being used as a delaying tactic late in the proceedings when a party believes there is a good possibility that the award will not be in their favour. Of course, this does not prevent the party who is placing the arbitrator's jurisdiction in question to do so again, after the award has been made, in the applicable national court system, but it does prevent this type of delaying action from bringing the arbitration proceedings themselves to a halt. Article V served as a model for the provision on the arbitral jurisdiction in the UNCITRAL model law on international commercial arbitration. However, not all countries have implemented this law and variations exist in its implementation. Therefore, it is understandable that respondents believe this article to be still very useful in a binding international agreement.

10. It is interesting to note that only one of the provisions that was ranked covers an area that is included in the 1958 New York Convention, i.e. the setting aside of arbitral awards, but this same provision is also considered to be one of the most important in the 1961 European Convention. In fact, paragraph 1 of article IX in the 1961 European Convention is almost identical to article V of the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards with the important omission of clause (e). This omission means that an arbitral award CANNOT be set aside in a second country because of the conditions outlined in the above mentioned clause, i.e. when, *"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) of the New York Convention).

11. Thus, article IX, "preserves the international effectiveness of an award which has been annulled in its country of origin on any ground, including public policy, other than those provided by article IX (1)(a)-(d)."[1]. While a very liberal interpretation of the New York Convention might allow the same, such a liberal interpretation would be open to question and might not be applied by all courts in all countries that are party to that Convention.

12. The provisions with the lowest rating were that of the ability to designate foreign nationals as arbitrators (article III) which received 17 ratings of 1 or 2 and 8 ratings of 5 or 6 and that on Procedures for appointing arbitrators (article IV) which received 15 ratings of 1 or 2 and 5 ratings of 5 or 6. It should be pointed out, however, that both provisions had an average rating that was less than 3 (i.e. which was better than the middle/average rating).

13. The rather dramatic split between those who find article III on the appointment of foreign arbitrators to be very important (17) and those who found it to be not at all very important (8) is understandable. In some countries, as it is a longstanding or common practice to allow foreign nationals to be appointed as arbitrators, no need exists for that provision; whereas in some other countries foreign arbitrators are only allowed in foreign arbitration cases (most likely because of the Convention), and in some cases only if they are included on specific lists.

14. The lower evaluation of article IV on the procedures for appointing arbitrators is also not surprising, given that the procedures set forth are rather cumbersome and were developed in the context of East/West relations in 1960/1961. As discussed above, under the results from the Advisory Group meeting, plans are well under way for revising this article.

15. With regard to the two remaining provisions on the jurisdiction of courts of law (article VI) and procedures for determining the law under which the validity of an arbitration agreement can be ascertained (article VII), they received, respectively, 14 and 16 rankings of 1 or 2 and then 2 and 4 rankings of 5 or 6, with a relatively large number of middle rankings and no opinion responses.

[1] European Convention on International Commercial Arbitration of 1961, Commentary by Dominique T. Hascher, Yearbook Commercial Arbitration, volume XX-1995, International Council for Commercial Arbitration

16. Both of these provisions are useful in the cases of poorly drafted arbitration clauses in contracts because they lay out the rules for determining the applicable law with regard to: (a) the validity of the arbitration agreement itself (article VI) and (b) the substance of the dispute (article VII). Article VI also prevents courts from being used to interrupt or delay arbitration proceedings, by agreeing that courts will "*stay their ruling on the arbitrator's jurisdiction until the arbitral award is made, unless they have good and substantial reasons to the contrary*." The importance of these clauses increases the more accessible arbitration becomes to small and medium-sized enterprises, as it precisely these enterprises that are more liable to have inadequate legal advice and, therefore, a higher percentage of poorly worded arbitration clauses in contracts.

General Awareness Regarding the Convention

17. The following table provides an overview of the average response given by organizations with regard to the existing awareness of the Convention among potential "users".

	Is the Convention	
	Known?	**Referenced/Used?**
By Commercial Lawyers	3.0	3.4
By Judges/Courts	3.4	3.7
By Arbitrators	2.5	2.9
	1 = wide awareness/frequent use and 5 = not at all known/never used	

18. On an individual case level, the 1961 European Convention can assist in resolving a number of important procedural problems related to international commercial arbitration, such as how to determine applicable law and the place of arbitration when these have not been specified in the arbitration clause and no agreement can be reached. Therefore, while the "average" rating given for awareness of the Convention is not bad, it underlines the potential for increasing the usefulness of the Convention by increasing awareness of its existence and making its provisions better known.

Other Questions Related to Specific Provisions

19. A summary of some of the most interesting other questions from the survey is given below. They are organized according to the article of the Convention to which they are related.

20. Whether or not the results from this part of the survey are ever incorporated into the 1961 European Convention, the responses represent an interesting overview of what arbitration institutions and professionals believe would be useful in an internationally binding instrument, such as a Convention. They also highlight areas where national practices differ widely and it might be difficult to reach an international consensus (such as implied acceptance of arbitration agreements).

Should the Convention keep the word "European" in its title given that member States of the United Nations Economic Commission for Europe (UN/ECE) include countries of North America and Central Asia, and given that the Convention itself is open to signature by any member country of the United Nations?		
	Number of Responses	Percentage
Yes	11	31.4
No	21	60.0
No Opinion	3	08.6

Would it be useful to have more contracting parties from outside the region covered by the United Nations Economic Commission for Europe? At this time there are only two: Burkina Faso and Cuba.		
	Number of Responses	Percentage
Yes	26	74.3
No	5	14.3
No Opinion	4	11.4

21. When looking at international agreements affecting the ability to conduct international trade and investment with greater confidence, the general rule is “the more the merrier”, which is confirmed by the responses to the above questions. In fact, comments to the questionnaire and discussions during the Advisory Group meeting revealed that the lack of unanimity in the responses to these questions in fact reflect two other issues. The first issue being the desire to maintain the title of the Convention in order not to create confusion, especially when it is referenced in legislation or other existing texts. The second issue being a question, on the part of some, as to whether or not it is appropriate to expand the coverage of an existing regional Convention (which may be expedient from the standpoint of time and acceptability) even though work is not currently planned on a new international Convention on international commercial arbitration.

Article I: Scope of the Convention

In your country and/or organization, is the interpretation given to this article on the scope of the Convention sufficiently wide so as to cover all types of transactions, operations and contracts which arise in the field of international economic relations (i.e. trade in goods and services, leasing, investment, etc.)?		
	Number of Responses	Percentage
Yes	31	88.6
No	3	08.6
No Opinion	1	02.8

22. The three organizations that answered “no” to the above question where from Georgia, Slovakia and the former Yugoslav Republic of Macedonia. Unfortunately, only one responded to a second question regarding which areas were not covered. The one country that did respond, Georgia, indicated that it did not interpret the scope of the Convention to cover investment.

Should the list of documents accepted be expanded to explicitly include other writings? For instance, writing as defined in the UNCITRAL model law on electronic commerce, that is to say: *"Where the law requires information to be in writing, that requirement is met by a data message if the information contained therein is accessible so as to be usable for subsequent reference." (Article 6, Writing)*

	Number of Responses	Percentage
Yes	33	94.3
No	2	05.7
No Opinion	0	0

Should the acceptance of the definition of signature as found in the UNCITRAL model law on electronic commerce be explicitly indicated? This definition follows:

"(1) Where the law requires a signature of a person, that requirement is met in relation to a data message if:

(a) a method is used to identify that person and to indicate that person's approval of the information contained in the data message; and
(b) that method is as reliable as was appropriate for the purpose for which the data message was generated or communicated, in the light of all the circumstances, including any relevant agreement." (UNCITRAL model law on electronic commerce, Article 7, Signature)"

	Number of Responses	Percentage
Yes	25	70.4
No	5	14.3
No Opinion	5	14.3

23. Methods of communicating commercial information have changed dramatically since 1961. While facsimile has often been treated in the courts as an equivalent to paper documents and telex, electronic methods of communication, such as electronic data interchange and e-mail have taken longer to find acceptance.

24. Electronic communications are, however, widely used in the commercial world today and, therefore, there is a real need to reflect this in the legislative and judicial world. At a national level this can be addressed by legislation which provides a wide interpretation for all existing requirements for "signature, writing or documents" (for example *via* enactment of the UNCITRAL model law on electronic commerce). However, adequate agreement on a "wider interpretation" in all fields of endeavour does not exist at an international level and, therefore, there is currently no movement to cover all international treaties and Conventions *via* an "umbrella agreement". As a result, the acceptance of electronic communications within the context of individual treaties or Conventions must be done either *via* direct modification or reliance upon liberal interpretations by national courts.

25. The very large positive response to the above questions reflects this situation and it is interesting to note that, with the exception of the organization from Israel, who replied "no" to both questions and from Norway which replied "no" to the second question, the other negative responses were all from countries where the use of electronic communications is very limited.

Should the implicit acceptance of arbitration agreements be included? This means the acceptance of arbitration clauses on documents, such as invoices, where the acceptance of the clause would be assumed unless the receiver of the document notifies the sender that they do not accept the arbitration clause in question

	Number of Responses	Percentage
Yes	19	54.3
No	15	42.9
No Opinion	1	02.8

26. The widely diverging responses to this question reflect very different national practices, particularly with regard to invoices, although it might be possible to obtain an agreement on implicit acceptance on a limited number of other documents. This would require further study and, for the moment, it is not clear whether an international consensus could be obtained on this issue in the short to medium term.

Article II: Right of legal persons of public law to resort to arbitration

Is the provision found in paragraph 2 of Article II satisfactory or should it be deleted? This provision allows governments to limit the ability of "legal persons of public law", such as government departments, to conclude valid arbitration agreements. Since 1961 the use of arbitration clauses in contracts with "legal persons of public law" has become common practice and there is some question as to the continued usefulness of this provision.

	Number of Responses	Percentage
Yes	15	42.9
No	17	48.5
No Opinion	3	08.6

27. The diverging responses on this question were surprising and merit further discussion. This is particularly true since the only country to take advantage of this clause by entering a reservation to the Convention, Belgium, has now changed its legislation and allows "legal persons of public law" to enter into arbitration agreements.

Article III: Right of Foreign Nationals to be Designated as Arbitrators
No Questions

Article IV: Organization of the arbitration and the Annex,
"Composition and procedure of the Special Committee referred to in Article IV of the Convention"

Should the Special Committee have its election procedures altered by a closer interpretation of the wording in the Annex to mean that countries would be assigned to one of two groups, for the purposed of electing the Special Committee only, based on the situation (with regard to the existence of national committees of the International Chamber of Commerce) which existed in 1961.		
	Number of Responses	Percentage
Yes	9	25.7
No	20	57.1
No Opinion	6	17.2
Should the Special Committee be replaced with the Secretary-General of the Permanent Court of Arbitration at The Hague to be in line with the UNCITRAL arbitration rules		
	Number of Responses	Percentage
Yes	27	77.1
No	5	14.3
No Opinion	3	08.6

28. Responses to the first question reflect a reluctance by countries that did not have national committees of the International Chamber of Commerce in 1961 (i.e. transition economies) to continue to be classified with those who do not. The response to the second question reflects a large consensus around the solution found in the UNCITRAL arbitration rules. However, it also reflects questions about whether the Secretary-General of the Permanent Court of Arbitration at The Hague should be asked to only appoint a body which would then take on the responsibilities now assumed by the Special Committee – which is similar to what is done under the UNCITRAL arbitration rules where he appoints a nominating body – or whether he should directly assume the responsibilities of the Special Committee.

Article V: Plea as to Arbitral Jurisdiction

Do you consider this article to be satisfactory as it stands?		
Rating (1 = highest)	Number of Replies	**Average = 1.9**
1	11	
2	18	
3	2	
4	0	
5	2	
No Opinion	2	

29. As discussed earlier, under the analysis of the relative ratings given to the articles, Article V on arbitral jurisdiction ensures that pleas regarding jurisdiction are raised at the beginning of any proceedings and allows the issue to be decided by the arbitrators themselves. This then prevents such pleas from being used as a delaying tactics.

Article VI: Jurisdiction of courts of law

Do you consider this article to be satisfactory as it stands?		
Rating (1 = highest)	Number of Replies	**Average = 2**
1	13	
2	12	
3	7	
4	0	
5	2	
No Opinion	1	

30. During the Advisory Group meeting, in February 2000, it was suggested that paragraph 3 of this article, where it says "courts of Contracting States subsequently asked to deal with the same subject-matter between the same parties or with the questions of whether the arbitration agreement was non-existent or null and void and had lapsed…" should reference the list of grounds for a setting aside of an arbitration award in article IX. It was thought that this would add clarity and avoid any confusion about the fact that the only valid grounds for setting aside an arbitration award are those listed in article IX.

31. In paragraph 4 of this article, provision is made for requests for interim measures to a judicial authority. This is an important issue in arbitration, and a suggestion was made that it would be useful to have this expanded upon as it is not covered by other Conventions.

Article VII: Applicable law

Do you consider paragraph 1 of this article to be satisfactory as it stands?		
Rating (1 = highest)	Number of Replies	**Average = 1.8**
1	18	
2	10	
3	4	
4	1	
5	2	
No Opinion	0	

32. While the vast majority found paragraph 1 of this article to be satisfactory, there were comments on whether or not "applicable law" should be replaced with "rules of law" or whether the reference to "rule of conflict" should be replaced with the "the law most closely connected" or if complete discretion in the choice of law should be given to the arbitrators. Current tendencies are to move away from the use of strictly national law, and to allow application of the most relevant law (which may be international), or to leave the law selected to the discretion of the arbitrators.

Paragraph 2: Would it be useful to delete the phrase "and if they may do so under the law applicable to the arbitration" in order to encourage the use of more "friendly" dispute resolution mechanisms, i.e. the use of arbitrators as "amiable compositeurs" when this is agreed by all parties?		
	Number of Responses	Percentage
Yes	18	51.4
No	14	40.0
No Opinion	3	08.6

33. There is clearly a large division of opinion on this topic. This exists because in some countries there is a distinct difference between mediators or "*amiables compositeurs*" and arbitrators. In addition, some arbitration courts prohibit arbitrators from acting as mediators in order to prevent potential conflicts of interest. However, there is also a growing school of thought, whereby it is felt that **if** the two parties to the dispute agree, it may be faster and more efficient to allow arbitrators to also act as "*amiables compositeurs*".

Article VIII: Reasons for the Award

No Questions

Article IX: Setting aside of the arbitral award

Should the scope of this article be extended to all judicial controls which reverse or modify awards in order not to restrict "setting aside" to the limited technical concept of annulment?		
	Number of Responses	Percentage
Yes	10	28.6
No	18	51.40
No Opinion	7	20.0

34. While no clear consensus appears to exist on this issue, several comments indicated that they believe this to already be the case, i.e. that the limitation as to the conditions under which awards can be set aside also covers their reversal or modification. However, it is not at all clear that this interpretation exists in all countries and this may be an area for potential misunderstandings.

Article X: Final clause

Is it known that paragraphs 1 and 2 of article X make the Convention open to accession by **all** countries that are members of the UN, as well as European nations that are not members of the United Nations but which have been admitted to the UN/ECE on a consultative capacity (such as Switzerland)?		
	Number of Responses	Percentage
Yes	20	57.1
No	13	37.2
No Opinion	2	05.7

35. Paragraphs 1 and 2 of article 10 indicate the that all countries covered by paragraphs 8 and 11 of the terms of reference of the United Nations Economic Commission for Europe may become contracting parties to the Convention. However, they do not indicate that those countries are all United Nations Member States and all member States of the UN/ECE (irrespective of whether or not they are Members of the United Nations, such as in the case of Switzerland).

36. While a large number of respondents were aware of whom the Convention was open to, a significant number were not and, as a result, the Advisory Group meeting in February 2000, believed it would be useful to add an explanatory note to this part of the Convention.

Future of the Convention

Having reviewed all of the issues covered in the previous questions, do you believe that the Convention should be:		
	Number of Responses	Percentage
Revised	12	34.3
Amended	14	40.0
Re-published	4	11.4
Let completely alone	2	05.7
Abolish	1	02.9
No opinion	2	05.7

37. Close to 86 per cent of the respondents to the questionnaire clearly thought that the Convention remains valid and useful, and close to 75 per cent thought some changes to the Convention would be helpful. As discussed in the first part of this article, the Advisory Group meeting in February 2000, defined a consensus with regard to the need to modify Article IV and add two explanatory notes and it is hoped that proposals for these changes will be finalized before December 2000.

38. Further changes depend upon both the development of a consensus among the countries concerned and, in a number of cases, upon the development of negotiations within UNCITRAL on these same or related issues.

Conclusions

39. The results of this survey show that the Convention remains useful; provides a common set of minimum standards to be observed in international arbitration; and could be made even more useful to both existing and potential new contracting states if it were updated.

40. The UN/ECE wishes to encourage the participation of interested arbitration experts in its Arbitration Advisory Group which is working on these issues. Further information can be obtained from the Secretary to the Committee for Trade, Industry and Enterprise Development at the following e-mail address: virginia.cram-martos@unece.org

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