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Arbitration between Governments
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ARBITRATION BETWEEN GOVERNMENTS AND INDIVIDUALS

Draft Report

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The study of the development and perfection of the processes for the settlement of differences between individuals and Governments through arbitration is not only fascinating but extremely useful. This is clearly seen when we consider the defects of present day municipal and international law with regard to the prosecution by individuals against Governments of claims arising out of the violation of contract obligations.

By becoming the owner or the manager of businesses once reserved to private initiative, the State has greatly expanded its sphere of activity into the field of economics, but from a legal point of view, this has not meant that the State's position is the same as that of other subjects of private law. On the contrary, its position is often privileged and in many instances injustice results because the State often enjoys the advantages of its commercial activities while escaping many obligations ordinarily connected therewith. It can exercise its rights against private citizens but may not be prosecuted for certain liabilities it has incurred towards them. However this phase of the subject will not be considered in this report which will only briefly discuss the possibility, under the present state of municipal and international law, of an individual bringing suit against a State in its own courts or of suing it in the courts of another State.

The question of whether a State may be sued in its own courts has been resolved differently in the various law-systems, varying according to the prevailing conceptions of the State and its juridical nature.

In Roman law we find the concept of a Fiscus, a juridical entity distinct from the State, yet enjoying a certain amount of sovereign power. Juridical fiction endowed the Fiscus with a personality of its own but placed it, within certain limits, under the ordinary rules of private law and enabled individuals to bring certain actions against it.

This concept of the Fiscus as a juridical person, capable of being invested with rights and obligations in the field of private law, and hence qualified to appear in lawsuits as plaintiff or defendant, to uphold its own rights and answer for its own wrong doing, has also been introduced into the legislation of some European countries. In such countries, suit may be brought against the State by individuals for the wrongful commission of any act normally outside the scope of its ordinary

governmental powers such as those based on commercial contracts. Nevertheless each such country determines in what court suit may be instituted and the extent of the court's jurisdiction (1).

Even in the countries which only recognize the responsibility of the State for its contract obligations or (within certain limits) its liability in tort, there still remains the difficulty of execution of any judgment obtained. It is a general rule that State property cannot be forcibly seized, and hence an individual has no means at his disposal to enforce his judgment; his only guarantee is the State's sense of honour and dignity which oblige it to respect the orders of its own judges.

English law is inspired by a totally different concept. The early English law was that "The King can do no wrong" and the King could not be sued in his own courts. Under the Act of 1860, the remedy available to enforce a contractual obligation was by a petition of right. But it was a condition precedent to the hearing of any such petition by the court that it should be endorsed by the Crown with the words "fiat justitia". There was no appeal against the refusal of the fiat, which, however, was always granted unless the application was frivolous or plainly disclosed no cause of action. A judgment in favour of a suppliant on a petition of right took the form of a declaration of the rights to which the suppliant was entitled and, being always observed by the Crown, was as effective as a judgment in an ordinary action. Yet it was impossible to sue the Crown directly either in respect of wrongs expressly authorised by the Crown or in respect of wrongs committed by servants of the Crown in the course of

(1) Thus while some countries in private law cases place the State on the same level as juridical persons of private law and allow legal proceedings to be instituted against the State in the ordinary Courts, other countries grant jurisdiction over such actions only to special administrative courts. State responsibility is usually limited to the acts of its officers in the management of its public services; some countries have even narrowed this responsibility. In France, for example, at one time the State was not liable for damages caused by its officers to private citizens, if such damages could be charged to the officers' "personal fault". More recently the Council of State allowed such actions in administrative courts if the officers' fault revealed a "faute de service", but damages are granted as a matter of equity and not of absolute right.

their employment. The actual wrongdoer alone could be sued, but in practice, the Treasury Solicitor usually defended an action against a subordinate official and if he was found liable, the Treasury as a matter of grace paid the damages awarded. Petitions of right were abolished by the Crown Proceedings Act of 1947, and proceedings by and against the State are now assimilated, as far as possible, to ordinary civil suits, and the Crown now is itself even liable in tort.

In the United States, the Court of Claims was set up and given jurisdiction over all actions based on the Constitution, the laws of Congress, the ordinances of the executive departments (pensions excepted), or explicit or implicit contracts with the Federal Government (1). A further method of settling disputed between the Government and the individual was adopted by the executive departments on their own initiative without the aid of any specific legislation. They provided for insertion into Government contracts of what is known as the "disputes article", which provides that if certain disputes arise under the contract, they will be disposed of by an administrative officer of the Government's choosing (2). As to tort actions, a series of Congressional Acts passed during the last quarter of a century, culminating in the Federal Tort Claims Act of 1946, were considered necessary in the public interest, and with certain exceptions were designed to give the United States the same standing in the Courts as a private individual or corporation. However the exceptions are very broad and will in some measure defeat the purpose of eliminating private claim bills in Congress.

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- (1) The Court of Claims and the district courts have concurrent jurisdiction over contract suits against the Government when the matter of controversy does not amount to \$ 10,000.==. When it exceeds that figure, the Court of Claims has exclusive jurisdiction. As regards actions brought by foreign citizens against the United States Government, title 28, § 261 of the Judicial Code provides that: "Aliens whose native country gives American citizens the same right to sue it as its own citizens have, may sue in the Court of Claims to the same extent as is permitted to an American citizen".
- (2) See "The disputes article in Government contracts" by Leslie L. Anderson (Michigan Law Review - vol. XLIV, p. 21).

If actions brought by individuals against their own States still meet with such serious obstacles and substantial limitations, consider how much more difficult is the individual's position when he claims his rights from a foreign State. His choice lies between suing the foreign State in the latter's own courts or in those of his own State. Both courses are fraught with serious difficulties.

Although restrictions imposed by some legal systems on suits by foreigners (such as the cautio judicatum solvi) have largely been eliminated, yet it cannot always be presumed that judges will be impartially disposed towards foreigners suing the State. And the technical difficulty of bringing a civil action against one State in the courts of another is substantial.

According to an authoritative body of opinion, there should be an international juridical norm granting one State immunity from the jurisdiction of the courts of another with respect to all acts for which it allows suits to be brought against itself in its own courts. (Anzilotti, "L' esenzione degli Stati stranieri dalla giurisdizione", Riv. di dir. int., 1910, pp. 477-550). And in England as well as in the United States jurisprudence has remained faithful to the principle of immunity of one State from being sued in the courts of the other although such principle may be based rather on a rule of international politeness than on a genuine norm of international law.(1).

However even if such an international juridical norm had been established, there would always be the question whether or not it had lapsed from desuetude or been cancelled by international agreements to

(1) In some international acts we find now one principle stated, now the other; the Bustamante Code contemplates several hypotheses, ranging from absolute exemption to a minimum of subjection to jurisdiction in all cases; the Brussels Convention on the immunity of State ships (1926) has been interpreted as opposed to the recognition of a customary norm, and in favour of the existence of a rule of international politeness (see Bosco, "Lo stato attuale della questione dell' esenzione degli Stati esteri dalla giurisdizione interna", Riv. di dir. internazionale, 1929, pp. 35-62).

the opposite effect (1).

This cursory review may give an idea of the uncertainty still prevailing and the difficulty of deducing a clear-cut rule under which individuals may feel moderately certain that they are taking the right course in their litigation with foreign States.

There have been no lack of attempts and proposals by means of agreements to solve this much debated question. One solution might be to insert in contracts between States and foreign individuals a clause under which the State in question would of its own free will submit to the foreign jurisdiction (2).

Another solution might be to set up an international court where individuals might bring their actions against foreign States (3). This however is hampered by a certain doctrinal reluctance to recognize individuals as subjects of international law.

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- (1) Opposed to recognition of the norms mentioned above are: (1) legislative measures which have denied immunity to foreign States by allowing the seizure of sovereign public property even under alleged conditions of reciprocity; (2) Acts of government stating that governments must appear before foreign courts as subjects of private law, and (3) explicit declarations against the principle of immunity.
 - (2) Such a clause has generally been considered binding unless it is contrary to the principles of the Constitution, or of public policy in the State in which suit is thought to be brought. On the contrary some authors maintain that this submission, to become binding, should be expressed in an international convention.
 - (3) In 1911 Prof. Wehberga suggested that such a court should have jurisdiction in the following cases:
 - 1) actions brought by individuals against debtor States, and actions of creditor States against individuals;
 - 2) cases of private international law;
 - 3) actions brought by individuals, concerning the interpretation of general conventions;
 - 4) appeals of individuals against the judgments of domestic courts, called in question because they are irreconcilable with some rule of international law. In the case mentioned under No. 1, the international court would act as a judge of the first degree, while in the cases contemplated under Nos. 2, 3 and 4 it would be a court of appeal (court of cassation).

The International Court of Justice, formerly the Permanent Court of International Justice (founded in 1920 and reconstituted by the United Nations' Charter), reserves its jurisdiction for disputes between States (art. 34). Hence that Court cannot deal with actions brought by individuals unless such actions are taken over by the States whose subjects they are, so that the proceedings become lawsuits between States. As a rule States are disinclined to support the claims of their own subjects against foreign States, unless all other legal means of redress before the courts of the defendant State are first exhausted, and this leads to considerable delay.

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If we leave aside the possibility of a solution through a permanent international court (which may come about in a more progressive period of international law) we should examine the possibility of settling cases between States and individuals through arbitration. There is no doubt that under present conditions of international law, this method has the better chance of success for the following reasons:

1) Since the arbitration was consented to in advance, States who submit to it do not impair the principle of immunity from the processes of another jurisdiction.

2) Since the contending parties each usually have the right to select an arbitrator, each State can choose one of its own citizens; this seems better than accepting the decision of a body composed entirely of foreign judges.

3) Since arbitrators in international arbitration are not bound as a rule to apply a particular national law, this serves as a guarantee of impartiality, and States, parties to arbitration proceedings, cannot help finding this more acceptable.

Accepting the assumption that States would be more disposed to submit to arbitration in international litigation, than to accept the judgment of judges of another State or of a genuine international court, we must now enquire whether a clause providing for arbitration

between States and individuals would be generally recognized as valid, especially in cases between States and individuals not subject to their own jurisdiction.

Arbitration clauses between individuals are recognized as valid in almost all States although recognition is sometimes limited to commercial contracts. Article 1 of the Geneva Protocol of September 24th, 1923 recognized the validity of agreements "between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any difference that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject" (1). This arbitration clause obviously refers only to disputes between persons. Whether the validity of such a clause would be recognized if extended to contracts in which a State is a party, particularly when the arbitration is entrusted to arbitrators who are not citizens of the State in question, or when the arbitration must take place abroad, is a question whose solution must be sought in the municipal law of the different States, and in the practice followed by them, both in their internal and international relations.

The validity of an agreement providing for the submission to arbitration of differences existing or apt to arise out of a given legal relation between the State (as a juridical person in private law) and an individual, is explicitly recognized by some legislations, albeit with some precaution and subject to certain restrictions in the interest of the State.

(1) "..... entre parties soumises respectivement à la juridiction d'Etats contractants différents, du compromis ainsi que de la clause compromissoire par laquelle les parties à un contrat s'obligent en matière commerciale ou en toute autre matière susceptible d'être réglée par voie d'arbitrage par compromis, à soumettre en tout ou en partie les différences qui peuvent surgir dudit contrat, à un arbitrage même si ledit arbitrage doit avoir lieu dans un pays autre que celui à la juridiction duquel est soumise chacune des parties contractantes".

The German law (Gesetz über die Schiedsgerichtliche Erledigung privatrechtlicher Streitigkeiten des Reichs und der Länder of October 10th, 1933, 1-772) laid down the rule that clauses by which the Reich consents to submit to the judgment of an arbitration court in matter of private law, in order to be valid must have the approval of the Ministry of Finance. This provision also applies to agreements entered into by the Länder.

In Italy although the law does not explicitly sanction the validity of arbitration clauses in contracts between the State and individuals, yet several methods of arbitration in contract cases exist. These however belong to the type of compulsory rather than voluntary arbitration. Reference is made to the arbitration proceedings provided for in art. 43 of the "Capitolato Generale" annexed to the Law on Public Works of March 20th, 1865, which became operative by the Ministerial Decree of May 28th, 1895, n. 350. Nevertheless types of compromisory clauses proper are to be found in the practice of the State administration.

In Sweden, Denmark, Norway and Finland arbitration clauses regarding the legal relations between States and individuals have been held valid.

In England, Section 23 of the Arbitration Act of 1889 (52 and 53 Vict., Ch. 49) contemplates the possibility that an arbitration agreement may bind the Crown, although the court is not empowered to order any proceeding to which the Crown is a party to be tried before any referee, arbitrator or officer without its consent (1). By the Administration of Justice (Miscellaneous Provisions) Act of 1933, Section 7, it has been enacted that costs may be awarded to or against the Crown in any civil or arbitration proceeding to which the Crown is a party.

In the United States, the validity of arbitration clauses in contracts to which the State or Federal Government is a party, is not

(1) This provision was neither repealed nor amended by ^{the} arbitration Act of 1933, nor has it been affected by the Crown Proceedings Act of 1947 though it may well be that the new principles introduced by the latter Act may lead to an eventual modification of existing English Statute Law on arbitration.

clearly established. The Ames case is still cited in support of the proposition that the rights and liabilities of the United States may not be submitted without its consent to the adjudication of arbitrators (1). And it has been said that Federal Government contracting officers without express statutory authority, have no right to bind the Government by any arbitration provision (2).

In Soviet Russia a system of arbitration tribunals has been established to settle various kinds of disputes, which arise either between Soviet and foreign organizations or between Soviet organizations only. Four types of permanent tribunals have been created to deal with disputes: the Maritime Arbitration Commission of the All-Union Chamber

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- (1) United States v. Ames (24 Fed. Cas. 784 - C.C. Mass. 1845).
 - (2) This opinion was discussed in "The Yale Law Journal", January 1941, vol. 50, No. 3, p. 461. In footnote No. 18 the following statement appears: "The Pennsylvania Arbitration Act is specifically made applicable to any written contract executed by the State, any of its agencies or subdivisions, or any municipal corporations. PA. STAT. (Purdon, 1936) tit. 5, §§ 176, 181; Commonwealth v. Union Paving Co., 288 Pa. 577, 136 Atl. 856 (1927). Compulsory arbitration of controversies arising from contracts of the state highway commission is provided by statute in North Dakota and in Minnesota. MINN. STAT. (1927) § 2554 (17); N. D. LAWS, 1927, c. 160. Municipal corporations are generally stated to have an inherent power, incident to their power to contract, to submit to arbitration. DILLON, MUNICIPAL CORPORATIONS (4th ed. 1890) § 478; Shawneetown v. Baker, 85 Ill. 563 (1877); District Twp. of Walnut v. Rankin, 70 Iowa 65, 29 N. W. 806 (1886); Maroulas v. State Industrial Accident Comm., 117 Ore. 406, 244 Pac. 317 (1926). Iowa has carried an arbitration provision in its specifications for highway work for 25 years, under which some 40 arbitrations have been held. The Port of New York Authority and the Department of Water Supply of the City of Detroit have occasionally resorted to arbitration. The recent contract for construction of the Lake Champlain Bridge, between Crown Point, New York, and Chimney Point, Vermont, included a clause making the findings of the bridge commission's engineer on questions of time and financial consideration reviewable by arbitration pursuant to the New York Act. White, Arbitration Under Public Construction Contracts (1937) 1 ARBIT. J. 149".

of Commerce; the Foreign Trade Arbitration Commission in the aforementioned Chamber of Commerce; the State Arbitration Tribunals and the Commissariat Arbitration. They have respectively jurisdiction over: a) disputes arising out of salvage and collision in maritime trade; b) disputes between foreign firms and Soviet trade organizations; c) disputes between State institutions, enterprises and organizations, each of which is under the supervision of a different People's Commissariat and d) disputes between State enterprises under the administrative control of a single Commissariat (1).

On the other hand the laws of other countries explicitly prohibit the submission to arbitration of disputes under agreements to which the State is a party. In France articles 1004 and 83 of the Code of Civil Procedure forbid public juridical persons to be a party to arbitration agreements. Indeed art. 83 provides that the Public Prosecutor must be advised of lawsuits concerning the State, State property (*demanium*) municipalities or public establishments and art. 1004 forbids compromises in such cases. However the Loi de Finances of April 17, 1906 (art. 69), makes an exception providing that the State, the départements, and municipalities, may resort to arbitration to settle the payment of expenditures of public works and supplies. But the State itself is not empowered so to do, except by virtue of a decree issued by the Cabinet Council and countersigned by the Minister concerned and the Minister of Finance, and when such arbitration does take place, the rules laid down in the Code of Civil Procedure apply. Apart from these exceptional cases, all other cases concerning the State, the départements and municipalities come under the exclusive jurisdiction of the courts (Conseil d'Etat, 27 Janvier 1928, Sirey, 1929, 3, 118) (2).

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- (1) A full review of the Russian system of arbitration is offered by John N. Hazard: "Soviet Commercial Arbitration" (International Arbitration Journal, April 1945, vol. 1, No. 1).
 - (2) In the case of Republic of France v. Ingalls Shipbuilding Corp. (District court of Alabama, Civil Action NO. 5986, March 31, 1947), a contract for the construction and delivery of self-propelled cargo barges to the French Government, provided for arbitration "in the event of any dispute between the parties with respect to anything arising out of this contract" (See the Arbitration Journal, 1947, Vol. 2, No. 3).

The same prohibition is contained in art. 1004 of the Belgian Code of Civil Procedure (Cass. 23 févr. 1889, Pas. I, 29; Trib. Bruxelles, 22 mars 1900, Rev. Comm. 149; Trib. Namur, 24 déc. 1935, Jur. Liège, 1936, 140; Conseil d'Etat, 11 Juillet 1884, D.P. 1886, 3, 14; Trib. Lille 13 Avril 1929, Gaz. du Palais, 2, 68 (1); in art. 487 No. 3 of the Spanish Code of Civil Procedure (see MANRESA Y NAVARRO, Comentarios a la ley de enjuiciamiento civil, tomo II, p. 472); in art. 768 No. 3 of the Code of Civil Procedure of the Argentine; and in the Ley de Organización y atribuciones de los tribunales, art. 179, of Chile.

Some law systems forbid foreigners to act as arbitrators and others make it difficult to secure enforcement of awards rendered in foreign countries.

In his report to the International Law Association, on "International Commercial Arbitration from an American viewpoint" (New York Conference, 1930), Professor J. P. Chamberlain makes the following statements: "No Court can summon before it defendants who are not within its jurisdiction or who have not property on which can be based jurisdiction, and it is too evident that neither Courts nor legislatures look with favourable eye upon a proposal to compel their citizens to obey the results of a foreign arbitration or a judicial proceeding at which they were not personally represented, even though they may have promised as a part of their contract to allow the award or judgment to continue even in case of their default". And later: "If the American and foreign parties to the arbitration both appear at the proceedings abroad and submit themselves to the jurisdiction of the arbitrators, the award will be a contract but the summary enforcement granted to awards cannot under the statute be extended to foreign awards".

Even the States which signed the Geneva Convention of 1927 on the enforcement of foreign awards, are not bound to apply such agreement to awards other than those rendered under an arbitration clause as provided for in the above mentioned Protocol of 1923, namely awards in

(1) See A. Bernard, L'arbitrage volontaire en droit privé. Bruxelles, 1937.

arbitration proceedings between individuals. When a Government is a party to an arbitration there is still no international convention requiring the enforcement of foreign awards.

Whether or not an arbitration clause may as a matter of principle validly be stipulated for in agreements between governments and individuals, international practice, as matter of fact, supplies many instances of arbitration between individuals and States.

Since the middle of the XIX century there has been a progressive development in the actual practice of arbitration as a means of settling differences between individuals and foreign governments and the action of the individuals has been increasingly divorced from the control or support of the States whose subjects they happen to be. Among the most important arbitrations have been those under the Anglo-American Treaty of February 8 1853, which set up a mixed commission to deal with differences between United States subjects and the British Government, and vice versa; the arbitration by the Hamburg senate of the lawsuit between Mr. Croft, a British subject, and the Portuguese Government which closed with the judgment of February 7, 1856; the arbitration by a mixed commission of the lawsuit between the Republic of Paraguay and the United States and Paraguay Navigation Co. which ended in an award on August 13, 1860; the arbitration, concluded with the award of March 19, 1864 between Melville White, a British subject, and the Government of Peru; the arbitration set up to deal with differences between the British Government and that of ^{the} United States concerning the claims of the Hudson Bay and Puget Strait companies, and in particular the award given on Sept. 10, 1869; the Italo-Columbian arbitration of 1885-1897 in the Cerutti case, and the arbitration between the Frenchman Abouillard and the Haiti government (1904-1905). (1)

(1) A complete survey of all arbitrations in international relations is to be found in: CARABIBIER, "Les juridictions internationales de droit privé", Editions de la Baconnière - Neuchâtel.

In all these arbitration proceedings, although Governments may have formally participated to uphold their subjects' rights, arbitrators gave the latter a large measure of initiative by allowing them to state their own case either personally or through counsel, or to give evidence. By having the awards provide directly for measures in favour or against individuals and by admitting that the withdrawal of applications by individual plaintiffs had the effect of interrupting the proceedings, the importance of the individual was also recognized.

Arbitration as a means of settling international differences between individuals and governments reached its greatest development when mixed arbitration courts were set up under the peace treaties of Versailles, St. Germain, Trianon, Neuilly and Lausanne. The instruments setting up these courts explicitly declared that access to them was opened to subjects of the Allied and Associated Powers who might advance claims against the German Government. And the procedural regulations adopted by the courts themselves affirmed the principle by recognizing the individual's right to be represented by his attorney, and judgments often awarded compensation to individual plaintiffs. In the German-Polish convention of March 15, 1922 on Upper Silesia, an arbitration court was also established and empowered to deal with special cases which might arise between the Polish and the German governments. It was given authority to deal with cases asking compensation for damages due to the suppression or reduction by the State of acquired rights "sur plainte de l'ayant droit".

Although these mixed tribunals were called "arbitral" they enjoyed some of the characteristics of a real international tribunal because they were not founded on the basis of a "compromis" or of an arbitration clause agreed upon between individuals and States, nor were they the sole creatures of the contending parties.

Their jurisdiction was derived from the terms of the peace treaties concluded between States, and while the choice of two arbitrators was usually reserved to the States, the third was chosen by a) **personality** designated in the peace treaties or by the Council of the League of Nations.

Mixed arbitral tribunals are thus rightly defined as a "mixed jurisdiction" having at one and the same time both arbitral and judicial functions. They do undoubtedly partake of the nature of an international tribunal.

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From the above, some guiding principles may be deduced for the further development of arbitration in lawsuits between governments and individuals, particularly where are concerned differences of an international character.

An arbitration clause should be inserted in all contracts between governments and individuals because the ampler use of such a clause would spread the practice of arbitration and facilitate the access of individuals to such tribunals which are often better qualified than courts to solve technical problems. In particular, arbitration might be of great value if provided for in contracts for the issuance of international loans. On January 23, 1936, the Council of the League of Nations appointed a committee to examine means for improving contracts relating to international loans issued by Governments or other public authorities and in particular to prepare model arbitration provisions. The report suggested, among other things, the adoption of a specific type of arbitration clause for differences arising from the interpretation and execution of such loan contracts, and proposed that a special international court be created to deal with loans.

The International Institute for the Unification of Private Law at the "Conférence Internationale sur l'Arbitrage Commercial", during its first session in Paris in June 1946, submitted a memorandum on the subject in which it also considered the matter of the collective representation of bond-holders since it is evident that the recognition of a collective representation of bond-holders would make it easier to

settle differences through arbitration or other friendly settlement (1).

A model arbitration clause for contracts between Governments and individuals and some rules of arbitration were included in a Report submitted by a Dutch Committee to the Amsterdam Conference of 1938 of the International Law Association. These Rules, which were called the Amsterdam rules, were to be incorporated in contracts with Governments in the same way as the York and Antwerp Rules are included in shipping contracts.

The arbitration clause in a contract does not entirely solve the problem for, as we have seen, many countries do not recognize its validity where the State is a party to the contract and other countries, although recognize its validity, hedge it about with so many formalities and restrictions as to make it valueless. Hence it is suggested that

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- (1) Among the provisions of international loan contracts for the settlement of disputes we mention the following:
- Agreement with the American Bankers, Argentine 6% Redeemable Gold Loan, 1925, Article V, § 5: "Should the bankers and - or the paying agents have any doubts in some particular case as to their rights or obligations under the present agreement, any question or difficulty of this kind shall be settled by reference to an arbitrator appointed jointly by the Ambassador of the Argentine Republic in the United States of America and the bankers; the decision of this arbitrator shall be final and without appeal".
- 7 1/2 % Stabilisation Loan 1928 of the Kingdom of Bulgaria. General Bond, Clause 19: "Whenever any question arises as to the interpretation of the present text, such question shall be submitted to the Council of the League of Nations, and the decision taken by it or by such a person or persons as the Council may appoint to settle the question, shall be binding on all the parties concerned. When it is necessary to apply the present clause, the decision will be taken by a majority vote".
- A similar clause is inserted in the general obligation of the loan of the Free City of Dantzig, at 6 1/2 %, 1927.
- 5 % 1932 and 1937 Bonds, of the Czecho-Slovak Republic Guaranteed by the French Government. Contract concluded with French Bankers, Article 22: "Any dispute which may arise as to the interpretation or the execution of the present provisions shall be subject to the jurisdiction of the Permanent Court of International Justice of The Hague, acting in execution of Art. 14 of the League of Nations Covenant. The Czecho-Slovak State undertakes to lay such disputes before the Permanent Court of International Justice, whose jurisdiction it accepts".

reference should be made to such arbitration clauses in trade agreements between States so that differences arising under contracts between such Governments and individuals would have to be arbitrated, since such a clause would not only be applied to differences between the two contracting States or between subjects of said States, but also between one or more subjects of a State on one side, and the other State on the other.

A plurilateral convention under which each contracting State undertook to recognize the validity of an arbitration clause for the solution of determined classes of differences arising under contracts it made with citizens of the other contracting States would be of great value. This would extend the scope of the Geneva Protocol 1923, by making it applicable also to differences between individuals and Governments(1).

When an arbitration clause is inserted into a contract between a State and an individual, the greatest freedom possible should be left to the contracting parties, in the choice of arbitrators and the rules of procedure. Since special technical knowledge may be required of arbitrators, an arbitration panel of an invariable character would not be feasible. It might be preferable to allow each contracting party to designate one arbitrator and to give these two arbitrators, or some impartial organ, the right to select the third arbitrator or umpire. The task of choosing all the arbitrators might even be turned over to a particularly well-qualified national or international organization, such as an arbitration association, international or national chamber of commerce or importers or exporters association. The award of an arbitration court of tested national or international authority might also be sought. If the arbitration procedure itself is not set forth in detail in the agreement, reference might be made to the arbitral procedure of the International Chamber of Commerce or other national arbitration association.

(1) Such agreements would not be complete unless accompanied by an integrative agreement for the execution abroad of arbitration awards, like the Geneva Integrative Agreement of 1927.

In bilateral agreements between States it will be possible to adopt a largely uniform policy.

In the mixed arbitral tribunals referred to above, the arbitrators were selected by the States signatory to the treaty, the chairman being chosen from among designated personalities by the League of Nations Council, or by the parties themselves (July 24, 1923, Lausanne Convention). Moreover agents of the Governments concerned took part in the proceedings: they acted as advisers to their Governments and had the right to watch over the entire proceedings and also to approve transactions between the parties.

For those States whose legislation does not ordinarily recognize the validity of arbitration agreements with respect to their public administrations, a multilateral international agreement on arbitration might be achieved by providing that arbitration proceedings can only be instituted before a body enjoying a special international authority.

The Permanent Court of Arbitration (founded on the basis of the two Hague Conventions of 1899, art. 41, and 1907, art. 41) changed to meet the new conditions, might be such a body. At present it is composed of a panel of personalities "competent in questions of international law and enjoying high moral consideration" from whom qualified arbitrators may be selected. In 1907 it had been suggested that this court be given a truly permanent character by delegating three of its judges to pass on cases of summary procedure and to conduct inquiries.

If there were an arbitration court in permanent session from whose panel of court members the parties might choose their arbitrators, and if access to the court was permitted to individuals who, pursuant to an arbitration agreement, might prosecute governments to whose jurisdiction they are not subject, a long step forward will have been taken. Nevertheless to avoid burdening such a court with an excessive and indiscriminate amount of lawsuits, its jurisdiction should be confined to cases where the amount in controversy would be over a given sum. If the present Permanent Arbitration Court be so utilized, its personnel

should be chosen differently as the panel of arbitrators should contain not only personalities particularly competent in the field of "international law", but also experts in the different "private law" systems.

Disputes between individuals and States would create the necessity not only of applying rules of public international law, but also of a given municipal law and the arbitrators would have to be acquainted with such rules. Thus altered, the Permanent Arbitration Court would contribute greatly to the administration of Justice, for alongside the Permanent Court of International Justice, created mainly for the judicial settlement of disputes between States, there would be an arbitral court for the settlement of certain classes of disputes between individuals and States.

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Summing up, it seems that the following conclusions may be drawn:

1) Because of the usual claim of sovereign States to immunity from the jurisdiction of the courts of another State, arbitration seems the best method of settlement of the differences between individuals and the States to whose jurisdiction the former are not subject.

2) Settlement by arbitration is not always possible because some juridical systems do not recognize the validity of arbitration agreements in cases where the State's own interests are at stake.

3) To develop and gradually perfect the system of settling cases by arbitration, the following is suggested:

- a) the wide spread use of the arbitration clause in commercial contracts between the State and individuals not subject to its jurisdiction, in all cases where such a clause may be enforceable;
- b) the insertion of arbitration clauses in treaties of commerce between States, giving individuals under the jurisdiction of the contracting States the right to have recourse to arbitration for the settlement of differences arising out of the interpretation and execution of

such treaties, both when litigation takes place between subjects of the two States, and when it arises between an individual and the other State;

c) the conclusion of a plurilateral international agreement, which would recognize the validity of arbitration procedure for settling cases between States and individuals not subject to their jurisdiction.

4) In the organization of arbitration proceedings it is suggested:

- a) the arbitration clause inserted into the various treaties should grant the contracting parties the greatest freedom possible in the formation of the arbitral tribunal;
- b) in the case of arbitration clauses in bilateral treaties, the system of mixed arbitration tribunals set up by the peace treaties of Versailles should be followed with such alterations as may be appropriate;
- c) in a plurilateral international agreement sustaining the validity of arbitration agreements between States and individuals not under their jurisdiction, the Permanent Court of Arbitration should be the tribunal selected, and its organization should be suitably modified properly to carry out the new task assigned to it.

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