

U.P.L. 1949 - PAPERS : XXV  
Arbitration between Governments and  
Individuals - Doc. 4

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

- - -

ARBITRATION BETWEEN GOVERNMENTS AND INDIVIDUALS

R e m a r k s

concerning the draft Arbitration Convention between States  
and Individuals

by

Justice Algot BAGGE

- - -

Rome, February 1949

States and individuals, arising out of commercial contracts. But if, in each special case, recourse to arbitration is based only on an agreement concerning that special case, made by the State concluded and by the individual at the time the contract, or later, it is necessary to be certain that the States adhering to the new Arbitration Convention are ready to submit such differences to arbitration according to the rules of the Convention, provided the other party agrees.

Evidently there are difficulties which must be overcome, particularly in those countries where legislators still feel some distrust for the institution of arbitration itself. This distrust, however, seems to have given place, in recent times, to a greater understanding of the benefits of arbitration, at least in the case of differences on commercial matters, even when the State is one of the contracting parties. So that there is every reason for a forward trend in favour of the arrangements stated in the draft.

As we have said above, the Permanent Court of Arbitration at The Hague, in reality, is not a tribunal of arbitration; it is an international organization founded in order to create, for each difference between the contracting States, subject to the Arbitration Court, a tribunal of arbitration which gives its award. The choice of the members of this tribunal must be made out of a list of persons selected by the contracting States. The persons inscribed in this list are called members of the Court.

The institutions of the Court are: its International Bureau, serving as record office for the Court, and the Permanent Administrative Council, which settles the rules of procedure needed by the Court, and decides all questions of administration. The permanent Administrative Council is composed of the diplomatic representatives of the contracting Powers accredited to The Hague and of the Netherlands Minister for Foreign Affairs, who acts as president.

The present draft follows as much as possible the rules

The object of the draft is to facilitate recourse to arbitration between States and individuals, in case of differences arising out of commercial contracts; this becomes increasingly important, considering the constantly increasing part taken by States in commercial matters.

The Permanent Court of Arbitration at The Hague, founded by the Convention for the pacific settlement of international disputes of October 18th, 1907, deals with differences between States. Hence the Court is simply an institution whose purpose it is to establish for each special case a tribunal of arbitration, that it may give its award on the difference brought before the Court. The Court itself does not judge. It assists in preparing the procedure for arbitration, above all through its organ, the International Bureau.

It seems desirable that this organization should also be used to settle differences arising out of commercial contracts between States and individuals.

The 1907 Convention does not oblige the States to submit all their differences to arbitration. Article 38 of the Convention simply says that "it is desirable that the contracting parties should, as far as circumstances permit, have recourse to arbitration in any controversies which may arise ... in questions of a legal nature and especially in the interpretation or application of international conventions".

At the time the Convention was made, it probably was not possible to obtain from all the contracting States a more binding undertaking to submit their differences to arbitration. The result has been that the cases submitted to the Court for arbitration have not been very many.

Nevertheless it seems possible to make some further progress towards arbitration, when it is a question of submitting to arbitration not differences between States, such as those contemplated in the 1907 Convention, but differences between

of the 1907 Convention, as to the constitution of the arbitration tribunal and procedure of arbitration. But it has seemed more practical to entrust the Administrative Council with the task of preparing the list from which the arbitrators shall be chosen. In this case it is not a question of including in the list persons who consider themselves representatives of each contracting Power; the aim is to make a list of persons representing, in the broadest and most universal manner possible, the sum of commercial and juridical experience and of profound knowledge.

The Administrative Council has also been called upon to choose the arbitrators, in cases where the parties have not been able to agree upon the composition of the arbitral tribunal.

As to the compromis contemplated by the draft, it must be remarked that recourse to arbitration is based on an agreement between the parties made, generally, before the difference has been submitted to the arbitration tribunal. Thus the arbitration agreement forms the basis of the compromis, whose object is simply to state clearly, in view of arbitration procedure, consequences of the agreement. Hence it seems fitting that the president of the arbitration tribunal should be entrusted with the task of drawing up the compromis; the parties being however free, if they are agreed, to modify the contents of the compromis when it is submitted to them. If they do not reach an agreement, the opinion of the arbitration tribunal will prevail.

With the object of favouring a procedure of arbitration that shall be sound, and at the same time speedy, the draft has accepted the written preliminary examination of the 1907 Convention.

The draft provides that the International Bureau, in cooperation with the president of the arbitration tribunal, shall verify that the preliminary examination is complete and, if necessary, shall request the parties to carry out the complementary examination needed. In this manner the president of the tribunal, who must draw up and submit to the parties a clear and complete

compromis, will be in a position to do what is needed for this purpose, and to concentrate in a single session the debates before the tribunal.

Rules on the debates before the tribunal are mainly drawn from the 1907 Convention.

All the decisions of the arbitration tribunal are reached by a majority of its members. It may nevertheless happen that the opinions of the members of the tribunal differ to such an extent, that it will not be possible to reach a decision through a majority. In this case the president's opinion shall prevail.

- - - -