policy") of the Netherlands' proposal for determination by the court ex officio, only four of the grounds in that proposal remained to be proved by the opposing party. A fifth was added: that the award deals with a difference outside the scope of the submission [para. 1(c) of Article V].

Each of the grounds adopted for refusing recognition and enforcement will now be separately considered in the order in which they appear in the final text.

(b) Absence of Valid Arbitration Agreement

"(c) 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;" (Article V, paragraph 1)

An obvious ground for refusing enforcement would be the absence of an agreement to arbitrate the dispute. Under the draft of the Ad Hoc Committee it would have been necessary for the successful party to prove such an agreement, but it was not stipulated how this was to be done. Under the Netherlands' proposal (L.17) the first ground for refusal (as in the outline in paragraph 17 of the Note by the Secretary General) would have been

"(a) the parties have not validly agreed in writing to submit to arbitration the matters dealt with in the award."

but the Netherlands' delegate had added the word "validly" and this provoked extensive debate.

In the view of the Israeli delegate, the Convention
"... should provide only for minimum requirements common to the procedures of all countries. As in some countries the law might not require the production of the arbitral agreement, there was no reason why an international convention should be more exacting ..."

"As regards the validity of arbitral agreements, he thought that any agreement which was in conformity with the law of the country in which it had been made or with the law of the State where the enforcement of the award was requested should be treated as valid; and that such a rule should be spelt out expressis verbis, instead of leaving the choice of law vague and obscure under a formula such as 'the law applicable.'" (SR.11,p.10)

Norway could not agree with this:

"In order to be considered valid, a submission to arbitration had to be valid under the law of the country in which the award was relied upon or under the rules governing the conflict of laws. However ... he considered it advisable not to indicate how validity should be determined. By using the expression 'applicable' law ... the matter could be left to the competent authority of the country in which the award was relied upon." (SR.12,p.3)

Czechoslovakia also considered that the matter of validity

"... should be determined under the law of the State in which enforcement of the award was sought. Under the Israel amendment ... a submission to arbitration would also be held valid if it was valid under the law of the State where it had been made, but that provision was unacceptable to his delegation because it might compel a court to enforce an award which was not valid under the law of its own country." (id.,p.6)

And the French delegate added

"If the Conference decided to adopt a provision on the validity of arbitral agreements, it would find itself dealing with the validity of contracts, which was one of the most controversial questions of international private law. Whether it sought
to reconcile existing differences or to impose special rules regarding contracts containing arbitral clauses, it would have to undertake a long and difficult labour, the outcome of which would be uncertain." (SR.13,p.7)

At the most, he said, the Conference might refer simply to the "law applicable" as was done in the Geneva Convention.

In the draft submitted by Germany (L.34) a provision regarding validity was omitted. The Israeli delegate considered this a serious defect and "insisted on its inclusion in the Convention" (SR.14,p.5). The Bulgarian delegate agreed with this (id.,p.9).

The Working Party accepted this view in principle and produced the following formula:

"(a) the arbitration agreement or the arbitral clause is not valid under the law applicable to it" (L.43).

At the same time it redrafted Article III

"so as to require from the claimant only positive evidence that his application for enforcement was prima facie justified, leaving it to the party opposing enforcement to present such evidence as may be appropriate to rebut this claim." (SR.17,p.2)

The Israeli delegate still felt, however,

"... that the text should not merely refer to the applicable law but should specify what that law was. Having heard the views of the representatives of Sweden and France he would reluctantly withdraw his earlier suggestion, but he hoped that the entire question of the applicable law would be settled on the international level in the relatively near future." (id.,p.9)

At the twenty-third meeting of the Conference the representative
of the U.S.S.R. said he felt that (a) was "not sufficiently clear" and that the "phrase 'the law applicable' should be defined." He proposed that this clause read (the following being, of course, an English translation):

"the arbitration agreement or the arbitration clause is not valid under the national law to which the parties have subjected their agreement or, failing any indication thereon, under the law of the country where the award was made" (SR.23,p.14).

The Norwegian delegate thought it would be simpler to delete any reference to the applicable law and he proposed that (a) read simply:

"the arbitration agreement or the arbitration clause is not valid." (id.,p.15)

The Norwegian proposal was defeated by 17 votes to 3, with 6 abstentions, while the U.S.S.R. proposal was adopted by 14 votes to 7, with 9 abstentions (id.,p.15). Thus, further and significant recognition was given to the freedom of the parties to select the law to govern their agreement.

At the final session the Netherlands' delegate said he was not happy with the wording of clause (a) [and also (e)]. Although the U.S.S.R. and Byelorussian delegates opposed reconsideration, and the motion to reconsider was defeated by a vote of 15 to 9, the Netherlands' delegate renewed his proposal at a later stage and the Conference adopted by 15 votes to 7, with 11 abstentions, the following final text:

"(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." (SR.24,p.7)
The Norwegian delegate then moved to reconsider the decision to adopt this wording, the Byelorussian delegate having said it "departed from the text previously adopted to a far greater degree than the Netherlands representa-tive had stated," but this motion was defeated by 7 votes to 14, with 15 abstentions (SR.24,p.8).

There is no indication in this clause (a) as finally adopted that the decision of the parties as to the law which is to govern their agreement need be in the agreement itself or even in writing. Any form of agreement, express or tacit, would appear to be sufficient.

During the debates on this clause there was some discussion regarding a requirement that the arbitration agreement be in writing. The provision for this in the original Netherlands' proposal (I.17), provoked the following comment from the French delegate:

"It was, however, worth considering whether written proof was not an excessive requirement; it should be remembered that the document under discussion was a Convention on commercial arbitration, a matter in which the rules of proof had become less rigid, even in legislation such as that of France, which had remained somewhat formalist in charac-ter ... The Conference might refrain from laying down any rules of proof and rely on the standards of the country of enforcement or of the country in which the arbitration agreement had been con-cluded. If, however, the Conference wished to lay down such rules, it might refer to the Latin concept of prima facie proof." (SR.11,p.7)

As noted above, Israel felt it should not even be necessary to prove an agreement: it should be enough for the defendant to show there was none (id.,p.10). Czechoslovakia felt that "agreement in writing" should be included,

"... but should not be given too broad a connotation."
In that connexion, the definition of the words 'in writing' proposed in the amendment submitted by the Federal Republic of Germany (E/CONF.26/L.19) lacked precision ... With regard to ... the Netherlands draft that an agreement in writing should be held to include an exchange of letters or telegrams, he felt that any agreement reached by exchange of telegrams should subsequently be confirmed by an exchange of letters." (SR.12,p.6)

The United Kingdom delegate also felt the Netherlands' definition of "in writing" was inadequate, but that it would be better not to clarify the expression (SR.13,p.9). Turkey and Bulgaria agreed there must be a provision for a written agreement (SR.14,pp.5 and 9).

Although the draft of the Working Party (L.43) was not explicit on this point, the Turkish delegate felt that the requirement of a written agreement was implied in Article III as it called for the submission of the original agreement or a certified copy (SR.17,p.4).

It was noted by the Norwegian that the matter was still undecided, although he, too, failed to see how a party would be able to supply the original agreement or clause, or copies thereof, if they were not in writing (id.,p.6). The President at this point commented that if it was later decided that the submission did not have to be in writing consequential changes would have to be in paragraph 1(b). When Belgium proposed that the signatures to the agreement be duly authenticated, the French delegate said he felt that

"... the provision of the original arbitration agreement should not be subjected to excessive requirements. In many cases, arbitration was based merely on an arbitral clause agreed to in an exchange of correspondence between the two parties." (id.,p.7)

The Belgian proposal was rejected by 23 votes to 2, with 10 abstentions.
The final texts of Articles IV and V do not contain any express requirement that the agreement be in writing. Nevertheless, there must clearly be a writing of some sort in order that a successful party be able to comply with the requirement of paragraph 1(b) of Article IV. It is possible that a court might accept an unsigned memorandum or other writing as proof of the agreement, particularly as telegrams qualify as writings, but it might be said that, if this had been intended, some reference would have been made to appropriate evidence of a verbal or unsigned agreement. The expression "exchange of letters or telegrams" in paragraph 2 of Article II is unfortunately limiting as it would rule out a verbal offer accepted by a letter or telegram.

Possibly the reference in Article II to an "agreement in writing" and the definition in paragraph 2 of that Article would be construed as applying to the entire Convention. On the other hand, the express provision for "in writing" in Article II and the absence of that qualification when the term "agreement" is used in Article IV might be taken to mean that the latter is not subject to the qualification.

(c) Lack of Notice of Proceedings, etc.

"(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;"
(Article V, paragraph 1)

There was little discussion on this. The Conference inherited a clause from the Ad Hoc Committee, which provided for lack of notices (E/2704). In the Working Party sessions the words "in due form" with reference to the notice were dropped. When the text came before the plenary, the Norwegian representative proposed the insertion of "proper"
before "notice" to take care of the situation where the respondent was "under a legal incapacity" (SR.17,p.9) and this was adopted by 25 votes to 3, with 7 abstentions (id.,p.14).

At the twenty-third meeting the Netherlands' representative proposed that the words "in sufficient time to enable him to present his case" be altered to read "or was otherwise unable to present his case" in order to deal with the circumstances where force majeure or other cause operated to prevent a party from presenting his case or where he was not given adequate opportunity to do so. This proposal was adopted by 18 votes to 5, with 9 abstentions (SR.23,p.15).

The Norwegian representative was not happy about the failure to deal with "many matters which might affect the validity of an award, such as the relationship of an arbitrator to one of the parties." The only remedy left to a party, he said, would be to have the award set aside (SR.17,p.11). No attempt was made to deal with such matters. Apparently it was felt that the enforcing court could always invoke the "public policy" clause where there was evidence of collusion or partiality or some other basic defect in the proceedings.

(d) Award Outside Scope of Arbitration, etc.

"(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;" (Article V, paragraph 1)

Clause (c) of paragraph 1 of Article V was also inherited from the Ad Hoc Committee's draft (E/2704) and occasioned no debate except for
the proviso permitting a court to separate that part of the award properly
within the scope of the arbitration from the matters not submitted to
 arbitration, and to enforce the former, but it was omitted from the suggested
list of grounds set out in paragraph 17 of the Note by the Secretary General
(C/CONF.26/2). It was, however, included in the Netherlands draft (L.17),
in the German draft (L.34) and in the three-Power draft (L.40).

The subject occasioned no debate in the plenary sessions leading
up to the appointment of the Working Party. There it was adopted but there
was disagreement regarding the inclusion of the proviso (SR.17,p.2).

When the draft of the Working Party came before the plenary
sessions the Belgian delegate moved that the proviso be deleted (id.,p.9).
The U.S.S.R. delegate agreed that "the complexity of the proviso could only
give rise to confusion" (ibid.).

On the other hand, the Indian delegate felt that

"If the enforcing court was not authorized to sever
that (extraneous) matter from the remainder of the
award and was obliged to refuse enforcement alto-
gether merely because a small detail fell outside
the scope of the arbitral agreement, the applicant
might suffer unjustified hardship. He consequently
thought that the proviso should be retained." (ibid.)

Italy, Bulgaria and Argentina felt the same way and the Belgian proposal
was rejected by 17 votes to 15, with 6 abstentions (id.,p.14).
(e) **Invalidity of Arbitral Authority and Procedure**

"(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;" (Article V, paragraph 1)"

In Article IV of the Ad Hoc Committee's draft it was provided in (g) that one of the grounds for refusing recognition and enforcement would be the fact that the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties "to the extent that such agreement was lawful in the country where the arbitration took place" or, failing such agreement, was not in accordance with the law of the country where the arbitration took place. The requirement that the agreement of the parties be subject to the law of the place of arbitration provoked extensive criticism (E/CONF.26/2, paras. 13 and 17) and it was omitted from the Netherlands' proposal (L.17) and the "three-Power working paper" (L.40).

The Turkish delegate disapproved of the possibility that the arbitral agreement "would not be governed by any law" (SR.12,p.5) and urged that the draft clause

"... should be so amended as not to leave the impression that the parties could agree on the composition of the arbitral authority and on the arbitral procedure independently of any law." (SR.14,p.5)

Autonomy of the parties in selecting a governing law was rejected by the United States (id.,p.6). Norway, noting that the qualifying words in the Ad Hoc Committee's draft "to the extent that such agreement was lawful in the country where the arbitration took place" had disappeared in the Netherlands' and subsequent drafts, proposed their restoration
"... for there were some mandatory rules of law that could not be ignored, for example, those governing the question of the relationship of the arbitrator to one of the contracting parties ..." (SR.14,p.7)

This proposal was supported by Italy (id.,p.8), but rejected by France:

"The omission noted by the Norwegian and Italian representatives in article IV (c) of the three-Power paper was not accidental. Article IV (g) of the Ad Hoc Committee's draft recognized the autonomy of the parties only to destroy it immediately. Since the beginning of the present century, his country's jurisprudence was based on the concept of the autonomy of the parties, in particular with respect to the choice of the law governing the arbitral procedure and the award. France would not be able to sign or ratify a Convention which went against that concept." (id.,p.9)

On this issue the Working Party adopted the view of the Netherlands, Germany and France.

In his report to the Conference at its Seventeenth Meeting, the Chairman of the Working Party said that in view of paragraph 1(a) of Article IV under which

"... the enforcement of the award could be refused if the agreement of the parties to submit to arbitration was not valid under the applicable law ... the Working Party agreed that there was no need to subdivide the arbitral procedure chosen by the parties to the law of the country where the arbitration took place, and proposed to amend paragraph 1 (a) of article IV accordingly." (SR.17,p.3)

As amended the provision read

"(a) 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." (1.14)
In commenting on this text the Italian delegate, who opposed permitting private parties to arbitrate disputes without reference to any law, said that paragraph 1(d)

"... although similar to the proposal originally submitted by the International Chamber of Commerce, had been inserted on the understanding that the parties enjoyed discretion only to the extent that they could select the national law applicable in the matter. Consequently, the Working Party's text should not be interpreted to mean that the parties could agree to disregard all national laws and determine some special procedure applicable to their case alone. He hoped that the Drafting Committee would make that point clear." (SR.17,p.10)

Notwithstanding rejection by the Working Party of Norway's proposal to add the words "to the extent that such agreement was lawful in the country where the arbitration took place" after "agreement of the parties" in paragraph 1(d), Yugoslavia submitted an amendment to this effect at the Seventeenth Meeting. In opposing this restriction on the freedom of contracting parties to choose their own law, the representative of the United Kingdom

"... recalled that as a member of the Ad Hoc Committee he had originally put forward the text embodied in the Yugoslav amendment. However, it was now incompatible with the terms of paragraph 1(a) and he could therefore not support the Yugoslav amendment." (ibid.)

As 1(a) permits the parties to choose the law to govern their agreement, it was thus the view of the United Kingdom delegation that the parties should also be free to choose the law governing the arbitral procedure.

France and Argentina supported this. Turkey

"pointed out that the French courts considered the will of the parties to be paramount. That
was not the case in many countries, and those countries would find it difficult to accept paragraph 1(a), which placed the will of the parties above the law." (SR.I, p.11)

As the Yugoslav amendment was rejected by 20 votes to 12, with only 2 abstentions (id., p.14), the Conference clearly upheld the autonomy of the parties as regards arbitral procedure. Whether the statement made by the Italian representative is a correct report of the "understanding" in the Working Party is not so clear, but it was not disputed and it might therefore be hazardous for parties to adopt a procedure without reference to any law.

(f) Award Not Binding, etc.

"(a) 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, paragraph 1)

As noted above under 1(a), a major issue at the Conference was the question of the double "exequatur." Must an award, in order to qualify for recognition and enforcement under the Convention, have become "final and operative" in the country where it was made? Such a condition was eventually rejected by the Conference in favor of proof by the losing party that the award had not yet become binding on the parties or had been set aside or suspended by a competent authority of the country in which, or under the law of which, it was made.

The concept of "binding" was introduced by the Working Party (L.43) and provoked extensive discussion. Just when an award achieves this state of maturity is not at all clear. The Guatemalan delegate said that in his country
"An award would not become binding until all means of recourse, both ordinary and extraordinary, had been exhausted and all formalities completed." (SR.17,p.14)

In reporting on the labors of the Working Party, which on this subject had had a variety of proposals to consider and reconcile (see E/2704; E/CONF.26/7; L.8; L.15/Rev.1; L.16; L.17; L.22; L.24; L.25; L.30; L.31; L.34; L.35), the Chairman said that

"The text of paragraph 1(e) of article IV was drafted with the aim of making the Convention acceptable to those States which considered an arbitral award to be enforceable only if it fulfilled certain formal requirements which alone made the award binding on the parties. The Working Party agreed that an award should not be enforced if under the applicable arbitral rules it was still subject to an appeal which had a suspensive effect, but at the same time felt that it would be unrealistic to delay the enforcement of an award until all the time limits provided for by the statutes of limitations had expired or until all possible means of recourse, including those which normally did not have a suspensive effect, had been exhausted and the award had become 'final.' The Working Party also agreed to avoid the use of the words 'operative' or 'capable of enforcement' which many delegations considered unacceptable because they could be interpreted as requiring the award to satisfy all conditions for its enforcement in the country where it was made." (SR.17,p.3)

If the parties agree to submit their differences to arbitration and to abide by any award rendered (this last undertaking is usually implied), an award would appear to be binding as soon as it is rendered. Such a conclusion would not preclude the operation of a condition subsequent in the form of a court order setting the award aside or the decision of an appellate or other competent authority that it was a nullity. Nevertheless, the intention of the Working Party appears to have been that the time for taking an "appeal" must first expire before an award can be
said to be "binding," but that the possibility of other means of recourse would not operate to prevent the attainment of this condition.

In the plenary sessions Turkey suggested the replacement of "binding" by "final in the sense that it is still (not) open to normal means of recourse" (SR.17, pp. 4-5). This, the delegate said was designed to

"... safeguard the rights of the party against which the enforcement was sought. In some countries, that party could not challenge an arbitral award before a court of law unless the latter had evidence of due compliance with a provision of the law of the country where the award had been made requiring the award to be deposited with a specified authority." (id., p. 7)

Thus in Turkey, he said, "an award had to be deposited with a court before the party against whom an award had been made could challenge it. That requirement did not affect the character of the award."

In France, on the other hand, there is a clear distinction between the award itself and the procedure for its enforcement. In most cases, an award is not deposited because enforcement is not necessary. If one party wished to enforce it, he would have to deposit it with the court, "often at considerable expense since a charge was levied in proportion to the amount of the award" (id., p. 8).

In Colombia, it was said, the problem would not arise as an arbitral award there has the same force as a judgment. In other countries the position might be different.

"Some learned authorities had suggested that an award lacked executive force until it had been duly sanctioned by a judicial authority. In States which required any such formality, the
The defendant might be precluded from entering an appeal until the deposit had been effected. Consequently, the Turkish amendment would afford a valuable safeguard." (SR.17,p.8)

The Turkish delegate added that, as the Working Party's draft empowered the enforcing authority to refuse recognition and enforcement if the award had been set aside, it was only reasonable to ensure that the defendant had been in a position to institute the necessary proceedings (ibid.).

On a vote, this proposal was rejected 25 to 6, with 7 abstentions, and this might well be regarded as a decision of some significance. If the formalities necessary to make an award "enforceable" or to put the losing party in position to take an appeal do not have to be taken, the award would appear to be "binding" as soon as it is made. To a contention that allowance should be made for a lapse of the time within which an appeal might be taken, it could be pointed out that in the first place there is no such provision and in the second such an allowance would clearly be absurd where the time does not run until a deposit of the award is made.

Guatemala, Turkey and Belgium all objected to "binding" (id., pp.12-13). The Italian delegate said that in the Working Party it "had been taken to mean that the award would not be open to ordinary means of recourse" (id.,p.13) and he supported a Norwegian amendment to add "or has been set aside in the country under the law of which it was made" (id.,p.11). The Bulgarian delegate opposed this amendment. Israel suggested adding "by a competent authority" instead of "in the country in which it was made" (id.,p.14). He felt the Turkish amendment would be difficult to reconcile with the law of common law countries and the Working Party "had wisely refrained from using the term 'normal means of recourse.' He agreed with
the Italian representative's interpretation of the word 'binding.' However, a more acceptable term might be found by the Drafting Committee" (SR.17,p.14). Guatemala

"could not agree with the Italian representative's interpretation of the word 'binding. An award would not become binding until all means of recourse, both ordinary and extraordinary, had been exhausted and all formalities completed." (ibid.)

The Norwegian proposal does not appear to have been put to a vote, but the Israeli suggestion to substitute "by a competent authority" was adopted by 14 votes to 7, with 12 abstentions, and both expressions found their way into the final text. An Israeli suggestion to add "or suspended" after "set aside" was also adopted by 12 votes to 5, with 16 abstentions (ibid.).

At the end of the Conference the U.S.S.R. proposed that paragraph 1(e) of Article V read

"(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." (SR.23,p.15)

The Belgian delegate asked what was meant by "binding." The representatives of Argentina and El Salvador said that it replaced all such terms commonly used in the various legal systems as "res judicata," "final" and "enforceable" etc. The Guatemalan delegate said that, while accepting 1(e), his delegation would interpret binding to mean "final and enforceable."

But there was no discussion regarding the significant addition
proposed by the U.S.S.R. of the words "or under the law of which." Clearly this was designed to bring clause (e) into line with (a), where the freedom of the parties to choose a law to govern their agreement is recognized. It is also in line with the implication in (d) that, while the parties are free to agree upon the composition of the arbitral authority and the arbitral procedure, they must do so with reference to some law. If they choose the law of a country other than that in which the award is rendered, then the U.S.S.R. amendment would recognize the right of a competent authority in the former country to take cognizance of the award and set it aside or suspend it. Whether a court under its domestic law would have authority to entertain an application by the losing party in respect of an award made in the territory of another state would have to be considered in each case.

The U.S.S.R. amendment was adopted by 20 votes to 3, with 8 abstentions (SR.23,p.15) and the text thus accepted was incorporated in the final document (E/CONF.26/8/Rev.1).

The Working Party had been unable to agree upon the place for this clause (e). Some felt it should be included in paragraph 1, where the burden of proof would rest with the party opposing enforcement; others felt it should go in paragraph 2, where the court could deal with the matter ex officio.

The Israeli delegate spoke forcefully in favor of the first
alternative:

"Paragraph 2 dealt with matters of which the enforcing court, knowing its own country's law, would have judicial notice, whereas the provision under discussion concerned a foreign law, with which the court would not be too familiar." (SR.17,p.12)

Turkey opposed this, contending that the court should ascertain whether the award was binding or had been set aside or suspended. The Conference decided by a vote of 30 to 2, with 5 abstentions, to retain this clause in paragraph 1 (id.,p.14).

The addition of the words "or suspended" after the words "set aside" proposed by Israel was adopted by 12 votes to 5, with 16 abstentions. The Israeli delegate had said (referring to what is now Article VI) that

"The fact of suspension should entail the refusal of enforcement, not merely the adjournment of the decision on enforcement as provided in article V(1). If his amendment was adopted, article V(1) would be deleted." (id.,p.13)

Brazil proposed the addition of the following as clause (b) or (c) in paragraph 2 of Article IV

"that the award has been ratified, in the country where it was made, by a competent judicial authority, and that it receive, in the country where enforcement is sought, the sanction required by local law." (L.37/Rev.1; SR.17,p.13)

This was defeated by 26 votes to 9, with 4 abstentions (SR.17,p.16).
(g) **Defect in Subject Matter**

"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;"

(Article V, paragraph 2)

This provision had its origin in Article 1(b) of the Geneva Convention. There was little comment on the corresponding provision in the Ad Hoc Committee's draft, but in the Conference the French delegate said that this clause

"... would permit the judge of the country in which the award was sought to be relied on to refuse enforcement when the subject matter of the award was not capable of settlement by arbitration under the domestic law of that country. The judge would thus be tempted to give international application to rules which were of exclusively domestic validity. The exception of incompatibility with public policy was quite sufficient to cover the rare cases in which the enforcement of an arbitral award might conflict with that policy." (SR.11,p.7)

This view was shared by the German delegation who omitted the provision in their draft on the ground that enforcement could be refused for this reason under the public policy clause and it was therefore superfluous (SR.14,p.2).

In the draft submitted by the Working Party the clause was put in paragraph 2 of Article IV (as it then was) as one of the grounds on which the competent authority might *ex officio* refuse enforcement and it was carried forward in this position into the final text.
Although there has been little comment on this ground for refusal it might conceivably constitute a severe limitation on the effectiveness of the Convention. Where a dispute cannot under the domestic law be settled by arbitration, is this not a ground for refusing to enforce a foreign award? And does this not mean, then, that a successful party must be careful to pick a jurisdiction for enforcement which does not suffer from this limitation?

(h) **Contrary to Public Policy**

"(b) the recognition or enforcement of the award would be contrary to the public policy of that country." (Article V, paragraph 2)

In the Geneva Convention this ground for refusing enforcement was linked with "the principles of the law" and in the Ad Hoc Committee's draft took the following form

"(h) That the recognition or enforcement of the award, or the subject matter thereof, would be clearly incompatible with public policy or with fundamental principles of the law (ordre public) of the country in which the award is sought to be relied upon."

Taking into account the comments submitted by governments, organizations and others, the Note by the Secretary General (E/CONF.26/2) simplified this to read

"(e) If the arbitral award would have the effect of compelling the parties to act in a manner contrary to public policy in the country of enforcement." (id., p.9)

This formula was adopted in the Netherlands' proposal (L.17), and in the German draft (L.34) was put as one of the grounds for the court refusing enforcement *ex officio*. The latter text, however, reverted to the
phrase "incompatible with the public policy (ordre public) of the State in which the award is sought to be relied upon."

In the debates, Japaa opposed too broad a definition of "public policy." As noted above, France had suggested the omission of IV(b) in the Netherlands' draft ("not capable of settlement by arbitration under the law of the country ...") on the ground that this was covered by "public policy," but the Japanese delegate felt that to stretch this expression to such an extent would "defeat the purpose of the Convention" (SR.14,p.7).

The Peruvian delegate said that

"He was not satisfied with the limitation of the exception in article IV(e) of the three-Power paper to incompatibility with public policy. Incompatibility with fundamental principles of the law was an adequate ground for refusing enforcement, and he favoured the retention of the wording in paragraph IV(h) of the Ad Hoc Committee's draft, with the deletion of the word 'clearly.'" (id.,p.9)

On the other hand, the Bulgarian delegate said he felt the German and the three-Power drafts had improved the Committee's draft (id.,p.10).

The Working Party put "public policy" in paragraph 2(b) of Article IV as one of the grounds on which the court might ex officio refuse enforcement. In reporting this the Chairman said that

"As regards paragraph 2(b) of article IV, the Working Party felt that the provision allowing refusal of enforcement on grounds of public policy should not be given a broad scope of application. It therefore agreed to recommend the deletion of references to the subject matter of the award and to fundamental principles of the law." (SR.17,p.3)

The text proposed read
"(b) the recognition or enforcement of the award would be incompatible with the public policy of the country in which the award is sought to be relied upon" (L.43).

In the brief discussion of paragraph 2 in the plenary session, the Italian delegate

"observed that in the Working Party he had withdrawn his proposal to the effect that recognition and enforcement of an arbitral award might also be refused if the competent authority in the country where recognition and enforcement were sought considered that the arbitral award was incompatible with a judgment applying to the same parties and the same subject matter rendered in the territory of the State where the sentence was relied upon, on the understanding that it was covered by the term 'public policy' in sub-paragraph (b)." (SR.17,p.15)

When he was asked by the Israeli delegate "whether the principle of res judicata, deemed to have been covered by the term 'public policy,' also applied to violations of a country's criminal law," he said that "'public policy' was a matter within the discretionary power of each country."

Again the Peruvian delegate said he felt that a mere reference to "public policy" was not enough: the words "or with the fundamental principles of the law" should be added. The Iranian delegate expressed agreement with this (ibid.).

Not satisfied with the reply given him by the Italian delegate, the Israeli representative proposed that the words "illegal or" should be added before "incompatible," but this was defeated by 27 votes to 8, with 4 abstentions (id.,pp.15-16). A Brazilian proposal, embodying the views of Peru, to add "or with fundamental principles of the law (ordre public)"
after "public policy" was rejected by 21 votes to 12, with 4 abstentions (SR.17, pp.15-16).

In the Drafting Committee the words "of the country in which the award is sought to be relied upon" were changed to "of that country" and "incompatible with" to "contrary to" (L.61), so that the final text reads

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

It will be recalled that during one of the debates on Reservations the Italian delegate said that his proposal (L.41)

"was designed to ensure that the Convention would not apply to disputes which were not international. Unless such a provision was included, two residents of a country involved in a commercial dispute which had no relation to a foreign law could simply move to another State to avoid application of the domestic law of the country in which they had their usual residence. Such action would constitute evasion of the law ... (H)e could not sign the Convention unless it was made clear that the Convention would not apply to disputes which were not of an international character." (SR.21, p.14)

To which the French delegate replied that

"the difficulty to which the Italian representative had referred could be prevented by a State's public policy." (ibid.)

And the United Kingdom delegate

"agreed with the French representative that the point raised by the Italian representative would be covered by the public policy of a State." (ibid., p.15)
On a vote the Italian amendment (L.41) was rejected by 16 to 6, with 8 abstentions (SR.21,p.15).

Finally, the Italian delegate stated with reference to paragraph 2(b) of Article V that

"his Government intended, when depositing its instrument of ratification, to make known to what extent and under what conditions its own nationals might benefit from the provisions of articles III, IV and V of the Convention without violating public policy" (SR.24,p.2).

Perhaps, in view of what he said earlier, that a state's public policy is a part of a state's domestic legislation, whereas the Convention refers to awards made in the territories of other states, reliance on the "public policy" clause alone would not be enough and some such declaration as that announced by him would be advisable, at least in the particular case mentioned by him of a deliberate evasion of domestic law by Italian nationals or habitual residents. As noted above, there is also the provision in paragraph 2 of Article V, on which some reliance can be placed, that

"(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country" (E/CONF.26/8/Rev.1).

Certainly "public policy" will provide considerable scope for the ingenuity of defense counsel and it is quite likely that a variety of interpretations will be forthcoming from the courts of different countries.
PART III

MISCELLANEOUS PROVISIONS

A. Effect on Other Treaties

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 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention."

In its comment on the Article VI proposed in the draft of the Ad Hoc Committee Austria urged an express provision, not contained in the draft, that as between contracting states the Convention superseded the 1923 Protocol and the 1927 Convention (E/2822, Annex I 6). Belgium also considered that the new Convention should terminate the old as between contracting states.

At the Conference Poland submitted an amendment designed to make the old Protocol and Convention "automatically extinct" as between contracting states (E/CONF.26/7) and Pakistan also proposed that the old Convention should "no longer be valid," but it did not refer to the Protocol (L.16). During the debates doubts were expressed regarding the wisdom of singling out these particular treaties and not others, and regarding the
position of the Protocol. Some delegates suggested that the old treaties might exist side by side with the new (SR.18, pp.2-7). On the initial vote the Polish proposal, modified so as to limit it to the 1927 Convention, was adopted by 14 votes to 7, with 18 abstentions, while an Italian amendment to add the words "in so far as they are not incompatible with this Convention" was rejected by 14 votes to 8, with 14 abstentions (id., p.7).

Another aspect of this Article was raised by Switzerland in its comment on the draft of the Ad Hoc Committee. It was there suggested that other treaties might be relied upon in so far as they stipulated "more liberal conditions governing the recognition and enforcement of international arbitral awards in private law" but not if the conditions were "more stringent" (E/2822, Annex I G). There was also some discussion regarding a Belgian view that states which were not parties to bilateral or multilateral agreements containing favorable conditions for the recognition and enforcement of foreign awards should not have the benefit of such conditions by virtue of this Article (SR.19, p.2). The Belgian proposal, however, to omit the words "or the treaties" toward the end of the first paragraph only received 16 votes in favor and 12 against, with 9 abstentions, so that it was not adopted and the Swiss proposal was rejected by 22 votes to 2, with 11 abstentions (SR.18, p.7).

In the drafting Committee the first paragraph was left unaltered. Paragraph 2 as adopted by the Conference was amended to read as follows:

"The Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound by this Convention." (L.61)
When the text came before the plenary session "the right" in paragraph 1 was changed to "any right" at Belgium's suggestion.

"in order to make it clear that the right described was not a right acquired under the Convention but a right enjoyed wholly apart from the Convention." (SR.24,p.3)

A reference to the 1923 Protocol was also adopted and the words "and to the extent that they become bound" were added in paragraph 2 (id.,p.4). There was no separate vote on this Article (id.,p.10).
MISCELLANEOUS PROVISIONS
(continued)

B. States Invited to Participate

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."

The Polish amendment to alter paragraph 1 to read

"This Convention shall be open for signature and
ratification on behalf of all States." (E/CONF.26/7)

was rejected by 19 votes to 11, with 6 abstentions, after lengthy speeches
for and against the principle of universality (SR.19,p.7). At the request
of the United States a separate vote was taken on the first part of
paragraph 1 up to and including the words "International Court of Justice"
and this part was adopted by 25 votes to 7, with 2 abstentions. The re-
main ing part was adopted by 28 votes to 4, with 3 abstentions (ibid.). A
later motion for a separate vote on the words in the final text of para-
graph 1 after "of any other State" was defeated by 20 votes to 9, with
4 abstentions (SR.24,p.5). The final vote on Article VIII was 27 to 8,
with 1 abstention (id.,p.10).

As regards Article IX, the Polish proposal to delete the words
"referred to in article VII" appearing in paragraph 1 of what was then
Article VIII (E/CONF.26/7), so that the Convention could be open for
accession "to all States," was defeated by 21 votes to 9, with 5 abstention
(SR.20,p.2). Paragraph 1, with the qualification that acceding
states must be those referred in what is now Article VIII, was adopted by
25 votes to 8, with 2 abstentions, and the Article as a whole by 27 votes
to 7, with 2 abstentions (ibid.).
MISCELLANEOUS PROVISIONS
(continued)

C. Extension to Territories

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."

In explaining why this Article was considered necessary, the United Kingdom delegate said that

"It was the United Kingdom's policy to promote the advancement towards self-government of the territories for which it was responsible; that policy was in conformity with the provisions of the United Nations Charter. Many of those territories already enjoyed a large degree of self-government. It was therefore necessary for the United Kingdom, which was still responsible for their foreign relations, to consult them and obtain their consent before acceding in their name to international conventions. Article IX would make it possible for the United Kingdom to accede to the Convention on behalf of each territory"
which agreed to do so. Without the article in question, it would be necessary for the United Kingdom to wait until all the territories had given their consent before acceding to the Convention and it was even probable, in those circumstances, that it would find it impossible to become a party to the Convention. Thus the deletion of the clause referring to a territorial application article, far from broadening the applicability of the Convention, would in practice have the opposite effect. Moreover, a similar clause was included in a number of international agreements negotiated under the auspices of the United Nations, such as the 1956 Slavery Convention and the 1957 Convention on the Nationality of Married Women." (SR.20, pp.2-3)

Various exceptions were taken to this. The delegate of the U.S.S.R. referred to the Article as "the colonial clause" and said that it

"made it possible for certain States not to apply the Convention to their colonies or dependencies, which was contrary to the directives which the General Assembly had given the Commission on Human Rights in 1950, in resolution 422 (V). His delegation would therefore vote against article IX." (ibid., p.3)

Argentina made the following statement:

"If another Contracting Party extends the application of the Convention to territories which fall within the sovereignty of the Argentine Republic, the rights of the Argentine Republic shall in no way be affected by that extension." (ibid.)

and Guatemala the following:

"The Guatemalan delegation will vote in favour of article IX of the Convention on the express understanding that it cannot affect or detract from the rights of Guatemala over Belize (improperly called British Honduras) if the Power occupying that part of Guatemala's national territory should at any time extend this Convention to that territory.

"The Guatemalan delegation accepts the inclusion of this article with this express reservation, which it will make, if necessary, on signature of the Convention." (ibid.)
The delegates from Czechoslovakia, the Ukraine, Poland, Bulgaria, Byelorussia and Albania all announced that they would vote against this "obsolete provision which took no account of the movement of peoples towards independence," while Belgium and France both associated themselves expressly with the United Kingdom (SR.20,p.4).

The Article was adopted by 25 votes to 8, with 5 abstentions (id.,p.5) and on a separate vote at the end of the Conference by 28 votes to 8, with 1 abstention (SR.24,p.10).
MISCELLANEOUS PROVISIONS
(continued)

D. Federal and Non-Unitary States

ARTICLE XI

"1. 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."

This Article was also attacked by the Soviet bloc, this time on the ground that

"... it contradicted the principle of the equality of the parties. It placed federal States in a privileged position by permitting them to evade some of the obligations imposed by the Convention." (SR.20,p.5)

and

"... unitary States would be accepting an absolute
obligation while federal States would be bound only under certain conditions ... (T)he Commission on Human Rights had rejected the federal clause when it had prepared the draft International Convention on Human Rights." (SR.20,p.6)

The Australian delegate, however, was strongly in favor of this Article as without it

"... Australia would, at best, be able to ratify the Convention only after a long delay and, at worst, not at all." (ibid.)

This position was supported by the United Kingdom (id.,p.8). The delegate of El Salvador said that

"... in principle his delegation had no objection to the federal clause, which merely took into account the internal structure of certain States." (ibid.)

and the representative of Ceylon added that

"... without the article federal States would not be able to accede to the Convention or could do so only after a certain time and with difficulty. His delegation would therefore vote in favour of article X despite the misgivings it felt in the matter." (id.,p.9)

On a vote paragraph 1 was adopted by 29 votes to 8, with 2 abstentions (ibid.).

There was, however, considerable discussion regarding paragraph 2 of the Ad Hoc Committee's draft which read

"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 bound by the Convention."
Why, it was asked, should this "special reciprocity clause" be included here, "when there was no such clause in any of the other articles" (SR.20,p.6)? Norway had proposed an amendment to make this a separate article, so that it would apply to the Convention as a whole (L.28). This was supported by Bulgaria, Belgium, the United Kingdom and Ceylon. The Israeli delegate said that

"article X, paragraph 2, in its present form could be interpreted as applying to all the provisions of the Convention and not only to article X. If the Conference agreed upon that interpretation, it would be better, for the sake of clarity, to adopt a separate article as proposed by the Norwegian representative.

"... he pointed out that the Ad Hoc Committee's idea had been that the States parties to the Convention should not be able to take advantage of the reservations made by other States. That was not in conformity with current practice but in the case of arbitration there were sound reasons for departing from custom. If a State made a reservation because of the special features of its domestic legislation -- for example, because it regarded certain awards made abroad as domestic -- other States were obviously not compelled to adopt those special features. The Ad Hoc Committee had therefore been quite right in not basing the draft convention on the idea of reciprocity, at least with regard to the possible reservations. His delegation felt that reciprocity should apply only to the federal clause; it would therefore vote against the United Kingdom and Norwegian amendments." (id.,p.7)

The representative of Ceylon said that he thought that those who had drafted paragraph 2 had meant it to apply only to the federal clause:

"There was therefore no question of any reservation on the scope of the Convention and there were no obstacles in the way of an immediate vote. To remove all ambiguity paragraph 2 could be worded in such a way as to make it clear that it referred to the States referred to in the provisions of paragraph 1." (id.,p.9)
This proposal to limit paragraph 2 to states referred to in paragraph 1 was approved by 31 votes to none, with 5 abstentions (SR.20,p.10). In the Drafting Committee this paragraph was accordingly altered to read as follows:

"A federal or non-unitary State shall not be entitled to avail itself of this Convention against other States except to the extent that it is bound to apply this Convention." (L.61)

When this draft came before the plenary session an addition proposed by Norway of the words

"and in particular not as to awards made in a constituent state or a province to which the State is not bound to apply the Convention."

was rejected by the very small vote of 6 to 1, with 22 abstentions (SR.24,p.5).

Shortly thereafter the Norwegian delegate reintroduced his delegation's earlier proposal for a general reciprocity clause (L.28) and this was adopted by 13 to 5, with 16 abstentions (id.,p.7). As the Israeli delegate then pointed out, this rendered paragraph 2 of Article XI superfluous and his proposal to delete it was adopted by 16 votes to 4, with 13 abstentions (ibid.). The Article as thus amended was then adopted by 27 votes to 8, with 1 abstention (id.,p.10).
MISCELLANEOUS PROVISIONS (continued)

E. Final Clauses

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 acceding 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 denounced 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 XV

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

(a) Signature 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.

An interesting point was raised with respect to the first of these Articles (it was then numbered XI). The Yugoslav delegate pointed out that

"in its draft the Committee had not made it clear to what foreign arbitral awards the Convention was to apply. Would it apply only to those which had become operative after the entry into force or also to those which had become operative before? It would be desirable for the Convention to apply only in the former case, for that would encourage the accession of a larger number of States. His delegation was prepared to submit a proposal to that effect." (SR.20,p.12)

As amended by Turkey, the proposal to cover this was to read

"This Convention shall apply only to arbitral awards rendered after the entry into force of the Convention." (SR.21,p.2)

There was considerable opposition to this proposal on grounds of principle. The Swiss delegate

"recalled that the primary purpose of the draft Convention was to facilitate the recognition and enforcement of foreign arbitral awards. Under the Yugoslav amendment, many awards would arbitrarily be denied the benefit of the Convention, which should apply to as many awards as possible. He therefore opposed the amendment...

"... (T)he Convention would apply only to unenforced awards which had not been brought before the courts. Such awards could not be many and there was no reason to exclude them." (ibid.)

The Israeli delegate agreed with this, saying that
"While it was a recognized rule that conventions and laws should not be made retroactive, that rule should not apply to purely procedural instruments. Since the purpose of the draft Convention was to make recognition and enforcement as easy as possible, it would be in accordance with sound legal practice for it to apply to awards made before the Convention's entry into force." (SR.21,p.2)

And the French delegate said that

"arbitral awards were the results of arbitration agreements entered into voluntarily and presumably in good faith. The majority of such awards were voluntarily enforced and the draft Convention would therefore apply retroactively only to awards whose enforcement had been prevented by the bad faith of the losing party." (id.,p.3)

The Argentine delegate agreed with this saying that good faith was "the basis of arbitration" and there could be "no possible objection to the retroactivity of an instrument designed to facilitate an existing procedure" (id.,p.4), but Belgium opposed the principle of retroactivity:

"The Conference was creating new law, which, moreover was not purely procedural; to make the draft Convention retroactive would greatly complicate the work of the judges in the country of enforcement, as they would have to look into many additional matters, all connected with foreign law." (id.,p.3)

On the vote, the Yugoslav/Turkish amendment received only 17 votes as against 11 in opposition, with 10 abstentions, and thus failed to realize the requisite two-thirds majority (id.,p.4).

As regards the remainder of the final Articles there is no aspect of the brief discussions worth mentioning. There was, however, some debate regarding the jurisdiction of the International Court of Justice to settle disputes under the Convention.
MISCELLANEOUS PROVISIONS
(continued)

F. Disputes Concerning Interpretation or Application

Article XIII of the Ad Hoc Committee's draft provided for the settlement of disputes by the International Court of Justice upon the request of any party. It read:

"1. Any dispute which may arise between any two or more Contracting States concerning the interpretation or application of this Convention, which is not settled by negotiation, shall, at the request of any one of the parties to the dispute, be referred to the International Court of Justice for decision, unless they agree to another mode of settlement.

"2. Any State may at the time of signature, ratification or accession declare that this article shall not apply to it."

An amendment proposed by the U.S.S.R. (L.56) would have altered this to require "the consent of all parties to the dispute" to any such submission. It was said, in support of this, that to bring states before the Court "without their consent" would be

"... entirely contrary to the principles of international law, in particular, that submission to the jurisdiction of the Court was entirely voluntary." (SR.21,p.4)

Italy was opposed to this:

"If it were adopted, there would be a danger that, if the parties themselves could not agree, there would be no
competent jurisdiction to effect a final settlement. Article XIII was designed to avert that very danger, particularly as regards countries not parties to the Statute of the Court, which might easily contest the Court's competence unless it was expressly stipulated in the draft Convention." (SR.21,p.5)

In the view of the United Kingdom, however,

"The effect both of the article and of the USSR amendment would be to make the decisions of domestic courts open to challenge in international law. Even without such a provision, States would still be free to bring unresolved disputes to the International Court of Justice, and they should not be encouraged to do so. He therefore proposed the deletion of the article." (ibid.)

After the delegates of Czechoslovakia and Poland had both spoken in favor of the U.S.S.R. proposal, the Swiss delegate said that

"draft article XIII was not a novelty in international conventions. A similar provision had appeared in copyright conventions, including the 1954 Convention prepared under the auspices of UNESCO. His delegation would vote for draft article XIII as it stood, because it would ensure the final settlement of any disputes that might arise concerning the interpretation or application of the present Convention." (id.,p.6)

And the Australian delegate,

"in explaining his vote on article XIII, said that his Government had consistently favoured any action that sought to uphold the authority of the International Court of Justice as the supreme tribunal of the United Nations in international legal questions. He would therefore vote for paragraph 1 as it stood." (id.,p.7)

A series of votes on this subject resulted in the deletion of the Article (id.,p.8). On the first vote, however, the U. K. proposal to delete the whole of the Article was rejected by 16 votes to 15, with 7 abstentions.
On the next vote, the Soviet amendment (L.56) was rejected by 18 votes to 15, with 5 abstentions. A Peruvian amendment to replace the word "negotiation" by "agreement of the parties" was adopted by 19 votes to 3, with 13 abstentions, but a Philippine amendment to delete "at the request of any one of the parties to the dispute" failed because it did not realize a two-thirds majority (the vote was 20 to 14, with 4 abstentions).

A vote was then taken on paragraph 1 as amended. This produced 21 votes in favor and 12 against, with 3 abstentions. The President announced that the necessary two-thirds majority had not been achieved and the paragraph was not, therefore, adopted. He also announced that paragraph 2 would not be put to the vote, as it was meaningless without paragraph 1.

The Italian delegate pointed out that, in spite of the rejection of paragraph 1, states which were parties to the Statute of Court would still be under an obligation to submit disputes concerning the Convention to the Court. The close votes on the various points raised in respect of this Article indicate the strength of the view held by many that something more positive than this would have been desirable.