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COMMENTARY: THE CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES*

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INTRODUCTION

Included in the mandated "work program" adopted by the conferees at the first world Conference on World Peace Through the Rule of Law (Athens, 1963) was a reference respecting arbitration and conciliation as a means of resolving international disputes. The conferees urged studies to "(3) Further the proposed establishment of continental international arbitration tribunals. . . ." Frequent recognition has been given to the need to facilitate the settlement of investment disputes arising between a foreign investor and a State as a means of promoting mutual confidence and enhancing the opportunity for the increased flow of private capital into States seeking such investment.[1]

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† Of the Allegheny County Bar. The author is solely responsible for the views expressed in and the contents of this memorandum, but would like to express his appreciation for the constructive comments of Thomas M. Cooley, II of the Allegheny County Bar and Kenelm L. Shirk, Jr. of the Lancaster County Bar, both members of the Committee on World Peace Through Law of the PBA's Section on International and Comparative Law. The research assistance of Jon Alder of the Allegheny County Bar and the critical review of Egon M. Gross and H. Eastman Hackney, both of whom are also of the Allegheny County Bar, were invaluable.

1. See, for example, U.N. Doc. No. E/3492, *The Promotion of the International Flow of Private Capital*, 18.V.61, at 100:

> . . . the consultations . . . tend toward the conclusion that apprehension of non-business risks constitute an impediment to foreign private investment which may be substantially lessened by the assurance of an effective machinery for the adjustment of investors' claims arising from disputes with the government of the country of investment. In order to be effective, such machinery should be international in character, so as to assure complete independence in interest from both parties to the dispute.

Cf. U.N. Doc. No. E/3365, *The Promotion of the International Flow of Private Capital*, 28.VI.62, at 40 *et seq.*

The reader must bear in mind the limitations upon the scope of this article. Therefore, although the Convention proposes one more forum to many already in existence, no comparative analysis of such forums will be considered. However, the reader should be aware of the variety of opportunities, either extant or proposed: bilateral agreements for the settlement of investment disputes, such as the Saudi-Arabian concession agreements; the recent proposal by the PBA Section on International and Comparative Law respecting an international trade court; guaranty arrangements available to U.S. nationals through the U.S. Agency for International Development; etc.

The Executive Directors of the World Bank, cognizant of the present lack of appropriate international recourse to settle investment disputes between States and private parties, nationals of other States, considered arbitration or conciliation of such disputes and concluded it would be desirable:

> (a) to establish institutional facilities, sponsored by the Bank, for the settlement through voluntary conciliation and arbitration of investment disputes between governments and foreign investors; and
>
> (b) to provide for such facilities within the framework of an inter-governmental agreement.[2]

The preliminary report of the World Bank's Executive Directors was approved by its Board of Governors, whereupon the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "Convention") was formulated. The text of the Convention was approved and submitted to member governments of the World Bank on March 18, 1965.[3]

The basic purpose of this Convention is the strengthening of the partnership between countries in the course of economic development by encouraging a larger flow of private international investment. The provisions of the Convention seek to create the institutional framework within which the settlement of disputes between investors and States may be facilitated. The international methods of settlement offered by the Convention are designed to take account of both the special characteristics of investment disputes as well as the character of the parties. At the same time, there has been an attempt to maintain a careful balance between the interests of investors and the interests of host States.

As will be discussed in detail, the Convention becomes effective after signature and ratification by twenty States; the number of signatories to the Convention has now reached forty-eight[4] and the requisite twenty

2. REPORT TO THE BOARD OF GOVERNORS, INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, Annual Meeting, August 6, 1964.

3. Excellent reviews of the historical steps involved in the formulation of the Convention may be found in J.P. Sirefman, *The World Bank Plan for Investment Dispute Arbitration*, 20 ARB. J. 168 (1965), and C.J. Hynning, *The World Bank's Plan for the Settlement of International Investment Disputes*, 51 A.B.A.J. 558, 559-60 (1965).

4. The United States signed the Convention in 1965, N.Y. *Times*, August 28, 1965, p. 7, col. 3 (City ed.) and ratified it on June 10, 1966, UN-OPI, WS/249 dtd. July 8, 1966. The other signatories are Tunisia, United Kingdom, Jamaica, Ivory Coast, Pakistan, Nigeria, Mauritania, Niger, Central African Republic, Liberia, Dahomey, Upper Volta, Ethiopia, Gabon, Cameroon, Japan, Sweden, Somalia, Sierra Leone, Nepal, Luxembourg, Denmark, Morrocco, Malaysia, Italy, Ghana, Greece, Belgium, France, Congo-Brazzaville, China, Togo, Federal Republic of Germany, Cyprus, The Republic of Korea, Chad, Austria, Kenya, the Netherlands, Malagasy Republic, Uganda, Malawi, Norway, Afghanistan,

States have ratified it, thus bringing the Convention into force as of October 16, 1966.[5] It will be noted that the Latin American countries continue reluctant to tender their signatures and ratification. This development will be discussed at greater length infra.

PROVISIONS OF THE CONVENTION

ORGANIZATION

The Centre

The Convention establishes the International Centre for Settlement of Investment Disputes as an institution with full international legal personality.[6] The basic task of the Centre, which is "to provide facilities for conciliation and arbitration of investment disputes, . . ." will be carried out by Conciliation Commissions and Arbitral Tribunals.[7] The chief organs of the Centre are the Administrative Council and the Secretariat.[8]

The Administrative Council

The Council will be composed of one representative of each Contracting State, which representative serves without remuneration by the Centre. Matters before the Council will be decided by majority vote, except where the Convention otherwise provides. The President of World Bank serves as *ex officio* Chairman of the Council. The Council's chief function will be to elect the Secretary-General and his Deputy, both of whom must be elected by a majority of two-thirds of the members. Nominations for these two offices, however, are the responsibility of the Chairman of the Council and he shall propose one or more candidates for each office. Articles 6 and 7 set forth the various powers of the Council, such as the adoption of a budget, an administrative financial regulation, rules governing the institution of proceedings, and rules of procedure for conciliation and arbitration proceedings.[9]

Iceland, Ireland, Senegal, Trinidad and Tobago. See IBRD Press Release No. 66/58, dtd. October 14, 1966 and UN-OPI WS/249 dtd. July 8, 1966.

5. The first 20 States having ratified are: Central African Republic, Congo—Brazzaville, Chad, Dahomey, Gabon, Ghana, Iceland, Ivory Coast, Jamaica, Malagasy Republic, Malawi, Malaysia, Mauritania, The Netherlands, Nigeria, Sierra Leone, Tunisia, Uganda, United States, Upper Volta. Pakistan ratified the Convention on Sept. 15, 1966. States ratifying subsequently become parties 30 days after the deposit of their instrument of ratification. Letter of June 6, 1966 from Lars J. Lind, Deputy Director of Information, International Bank for Reconstruction and Development and IBRD Press Release No. 66/58 dtd. Oct. 14, 1966.

6. Arts. 1, 18-24.

7. Art. 1(2).

8. Arts. 4-11.

9. Arts. 4-8.

Secretariat

The Secretary-General and his Deputy are elected for renewable terms of six years, and are assigned various administrative functions by the Convention.[10] The Secretary-General has the power to screen requests for arbitration or conciliation by refusing to register the requests and thus prevent the institution of a proceeding, where, from the information furnished by the applicant, he finds that the dispute is "manifestly" outside the jurisdiction of the Centre.[11]

The Panels

The Centre is required to maintain a Panel of Conciliators and a Panel of Arbitrators.[12] The selection of the members of these Panels rests, however, with each Contracting State which may designate four persons to each Panel. These persons need not be nationals of the designating State. The Chairman of the Council may also designate ten persons to each Panel, each one of whom shall be of a different nationality. A person may serve on both Panels and the term of office is for renewable periods of six years. To promote the essential element of flexibility in the proceedings, parties to a dispute may appoint Arbitrators or Conciliators from outside, but such appointees must possess the qualities required of the Arbitrators and Conciliators (the Panels) by Article 14(1).[13]

Financing and Facilities

The expenses of the Centre are to be met out of the fees collected and any deficit is to be made up by the Contracting States in proportion to their respective subscriptions to the capital stock of World Bank or, with respect of States which are not members, in accordance with rules adopted by the Administrative Council. The seat of the Centre will be in premises provided by the International Bank for Reconstruction and Development, free of charge for the time being.[14]

JURISDICTION

Consent

The cornerstone of jurisdiction is the consent of the parties which,

10. Arts. 7(1), 11, 16(3), 25(4), 28, 36, 49(1), 50(1), 51(1), 52(1), 54(2), 59, 60(1), 63(b), and 65.

11. Arts. 28(3) and 36(3).

12. Art. 3.

13. Arts. 31(2) and 40(2). The qualifications set forth in Art. 14(1) are

> . . . persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

The Chairman of the Council is vested, inferentially, with the authority to pass upon the "qualities" of appointees. Art. 14(2).

14. Arts. 17, 59-61.

once given, may not be unilaterally withdrawn.[15] The time and manner by which consent is given is not prescribed by the Convention. Consent could presumably be given by direct reference in an investment contract, by separate written instruments, such as legislation to which the party, national of another State, accedes, or be a *compromis* regarding a dispute which has already arisen. Consent alone is not sufficient to bestow jurisdiction, however, and under the terms of the Convention reference must be made to the nature of the dispute and the parties thereto.

Nature of the Dispute

The dispute must be a "legal dispute arising directly out of an investment." The term "investment" is not defined by the Convention, but under Article 25(4) Contracting States at any time may notify the Centre of the class or classes of dispute or disputes which it would or would not consider submitting to the jurisdiction of the Centre, although such notification does not constitute the "consent" discussed, *supra.*

Parties to the Dispute

For a dispute to be within the jurisdiction of the Centre, one of the parties must be a Contracting State or a constituent subdivision or agency of the Contracting State, and the other party must be a national of another Contracting State. A national is defined as including both natural and juristic persons. In the case where the national has more than one nationality, he is ineligible as a party if he is also a national of the Contracting State party.[16] The definition of the term "national" is sufficiently flexible so that a juristic person which has the nationality of the Contracting State would be eligible to be a party if the State party agreed to treat it as a national of another Contracting State because of foreign control.[17]

Exclusive Remedy

Unless it is otherwise provided, consent to arbitration under the Convention is "deemed consent to such arbitration to the exclusion of any other remedy." A Contracting State may, however, require exhaustion of local remedies as a condition of its consent to arbitration.[18] In addition, a Contracting State is prohibited from giving diplomatic protection or bringing an international claim in respect to a dispute which one of its nationals and another Contracting State have agreed to submit to arbitration, unless the other Contracting State has failed to abide by and comply with an award rendered in such dispute.[19]

15. Art. 25(1).
16. Art. 25(2)(a).
17. Art. 25(2)(b).
18. Art. 26.
19. Art. 27.

PROCEDURE

Institution of Proceedings

Proceedings are instituted by means of a request addressed to the Secretary General.[20] The limited power of the Secretary General to prevent the institution of proceedings by refusing to register requests has already been noted, *supra.*

Constitution of Conciliation Commissions and Arbitral Tribunals

The Convention leaves to the parties a large measure of freedom with regard to the constitution of Conciliation Commissions (the "commissions") and Arbitral Tribunals (the "tribunals"). On the other hand, the Convention assures that lack of agreement between the parties or lack of cooperation by one of the parties on these matters will not frustrate the proceedings. Articles 30 and 38 provide that if within a given period of time the parties have not been able to appoint Conciliators or Arbitrators in accordance with the specified procedures, the Chairman of the Council shall appoint them. Though no restrictions are placed upon the nationality of Conciliators, Article 38 rules that the majority members of an Arbitral Tribunal should not be nationals of the State party or of the State whose national is a party to the dispute, unless the parties have by agreement appointed the Arbitrators.

Powers and Functions of Conciliation Commissions and Arbitral Tribunals

Articles 32-53 and 41-49 set forth respectively the powers and functions of the Conciliation Commissions and Arbitral Tribunals, and reflect the basic distinction between a conciliation and an arbitral proceeding. The former process is designed merely to bring the parties to some form of agreement, while arbitration aims at a binding determination of the dispute. Conciliation Commissions and Arbitral Tribunals are empowered to determine their own competence, and must comply with the rules of procedure promulgated by the Administrative Council or agreed upon by the parties to the dispute. If any question of procedure arises which is not covered by these two sources, the Commission or Tribunal may decide the question for itself.[21]

Article 42 provides that the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. Failing such agreement, the tribunal must apply the law of the Contracting State party to the dispute (including its conflict of laws rules) and such rules of international law as may be applicable. The term "international law" as used in this context is, according to the drafters of the Convention, to be understood in the sense given it by Article 38(1) of the Statute

20. Arts. 28, 36.

21. Arts. 32, 33, 41, 44.

of the International Court of Justice, allowance being made for the fact that Article 38 was designed to apply to inter-State disputes.[22]

The parties are bound by the award of an Arbitral Tribunal, though the Convention provides remedies for the revision, the annulment, the supplementation, and the interpretation of the award.[23] Article 54 requires every Contracting State to recognize the award as binding and to enforce the pecuniary obligation imposed by the award as if it were a final decision of a domestic court. To confirm that the doctrine of sovereign immunity may prevent the execution of judgments against a State under domestic law, Article 55 provides that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign state from execution.

Place of Proceedings

Proceedings will usually take place at the Centre, but the parties may agree to hold the proceedings at the seat of the Permanent Court of Arbitration or at any other appropriate institution with which the Centre may make arrangements for that purpose.

Disputes by the Contracting States

Should any dispute arise between Contracting States concerning the interpretation or application of the Convention which is not settled by negotiation, the dispute shall be referred to the International Court of Justice upon application of any State party to such dispute, unless the States concerned agree to another method of settlement.

Entry Into Force and Other Provisions

The Convention is open to signature on behalf of State members of the Bank. It is also open for signature on behalf of any other State which the Administrative Council, by a vote of two-thirds of its members, have invited to sign the Convention. The Convention will become effective thirty days after the date of deposit with the Bank of twenty instruments of ratification, acceptance or approval.[24]

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22. *Viz.*:

a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59 [decision without binding force except between the parties and in respect of the particular case], judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law. Am. Jur. 2d *Desk Book*, Doc. No. 15 (1962).

23. Arts. 49(2), 50, 51 and 52.

24. Arts. 67-68.

There is also established a procedure by which the Convention may be amended,[25] and by which a Contracting State may denounce the Convention, which denunciation will take effect six months after receipt of written notice to the depository (the World Bank) of the Convention.[26]

DISCUSSION

The quest for speedy adjustment of commercial disputes, particularly those arising out of the international marketplace, is not of recent origin.[27] It is appropriate that the World Bank, seeking to strengthen the partnership between countries for economic development, sponsor an institution of an international nature to finally and expeditiously determine disputes between States and investors, nationals of other States.

The Convention proposed meets the characteristics traditionally propounded in favor of conciliation and arbitration: international investment disputes may be heard with dispatch by impartial or disinterested parties in accordance with a prior defined procedure. The hallmark of the Convention is that a person or entity, national of another State, may bring his claim directly against a foreign state[28] and is afforded a forum in which to present it; his claim is not subject to the political vagaries which frequently afflict relations between States.

Under the Convention, the prime sources of law are (a) the law agreed upon by the parties, (b) the law of the host State party, including its conflicts rules, or (c) "international law" as that term is used in the Statute of the International Court of Justice.

From the viewpoint of the United States investor, the absence of Latin American countries as signatories is especially conspicuous. This difficulty first became evident at the September, 1964, Annual Meeting of the Bank's Board of Governors in Tokyo. The General Counsel of the World Bank, A. Broches, Esq., discussed some of the arguments advanced in Latin America *against* the Convention in a speech at San Juan, May 27, 1965. Summarized, the Latin American objections are five-fold:

—The Convention introduces compulsory arbitration.

—Latin American constitutions prohibit international arbitration of disputes between the State and a foreign national (investor).

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25. Arts. 65-66.

26. Art. 71.

27. *E.g.:* The Norman kings made grants according the privilege of holding trading-places to merchants. These grants included the authority to establish courts of summary justice to hear and settle disputes between merchants and traders.

28. It will be recalled that for a dispute to be within the jurisdiction of the Centre, one of the parties must be a Contracting State, or a constituent subdivision or agency of a Contracting State, and the other party a "national of another State."

—The Convention violates the constitutional principle of equality of citizens and aliens.

—International conciliation and arbitration impugns national courts.

—Latin American history suggests that international arbitration is an unfortunate procedure.

The latter two arguments seem unnecessarily emotional, but any definite conclusion would have to abide a detailed study beyond our immediate concern. Suffice it to note that the necessity for international conciliation and arbitration more frequently arises out of arbitrary executive or legislative acts which jeopardize and result in the uncompensated confiscation of a foreign national's investment. The Convention thus seeks to encourage private international investment whilst simultaneously protecting the interests of the investor as well as that of the host State. With respect to the second argument advanced, the Bank's General Counsel noted he had been advised that only the Constitution of Venezuela contains a prohibition against the submission of State contracts to any forum other than the national judiciary, but that disputes with parastatal agencies could be arbitrated and that there was no proscription against conciliation.

Indeed, as this cursory summary suggests, the argument that the Convention introduces compulsory arbitration seems to have the greatest and most vociferous Latin American support, yet, the lack of compulsory arbitration is a hallmark of the Convention:

> The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or Agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, *which the parties to the dispute consent in writing to submit to the Centre.* When the parties have given their consent, no party may withdraw its consent unilaterally. (Emphasis supplied).[29]

Neither State nor investor can be compelled to enter upon arbitration until they have first agreed in writing to do so. On its face, this Article would seem to require that the State party tender its written agreement of submission on a case by case basis although it may be adequate if the State party "submits" by direct reference to the Article in investment legislation, etc.

On the other hand it is regretted the Convention fails to deal with an increasingly common form of dispute, *viz.*: those involving subrogation of a national's claim to his State pursuant to investment guaranty pro-

29. Art. 25(1).

grams or related investment inducements. Another omission which limits the effect of decision-making under the Convention with respect to predictability, a common goal of jurisprudential systems, is the failure to require publication of the rationale of arbitral awards.[30] With respect to the report or recommendations of Conciliation Commissions, a similiar inadequacy exists: the report or recommendations cannot be presented to an Arbitral Tribunal at some subsequent time, unless the disputants shall otherwise agree.[31]

An area which raises a more fundamental question is whether a party, national of another State, can execute upon his arbitral award. The drafters of the Convention, obviously unable to resolve the varying interpretations of sovereign immunity, acquiesced to language providing that nothing is intended ". . . as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution."[32]

Thus, although the arbitral award is considered binding on the parties[33] and each Contracting State is to recognize the binding character of the award and enforce the pecuniary obligation thus imposed ". . . as if it were a final judgment of a court in that State . . .",[34] and execution of the award is to be governed by the laws respecting execution of judgments in the State wherein such execution is sought,[35] the award may be a nullity if the written agreement is not considered a waiver of immunity and, as such, deemed to be a waiver of immunity from execution. In the United States there is no state procedure for the enforcement of foreign arbitral awards and this would appear to be so even with respect to commercial treaties entered upon by the United States in which the foreign award is restricted to no better treatment than that accorded an interstate award.[36] The latter, however, are entitled to constitutional

30. Art. 48(5).

31. *Ibid.*

32. Art. 55.

33. Art. 53(1).

34. Art. 54(1).

35. Art. 54(3).

36. With respect to the ability of a party to attach foreign-owned assets in this country, it is generally true that the foreign state, even though subject to suit, may be free from execution on the judgment entered. In Dexter & Carpenter v. Kunglig Jarnagsstyrelsen, 43 F.2d 705 (2d Cir. 1930) involving the State-owned railway of Sweden, attachment was not allowed.

The railway was fully owned by the Swedish government and run as a department of the government. Its revenues were paid directly into the State's exchequer; its directors were government appointees.

Plaintiffs' counterclaim alleged breach of contract by the railway in the purchase of bunker coal. Because the Swedish government neither intervened nor pleaded immunity when the suit was first commenced, a valid judgment was rendered against the railway.

Following judgment, plaintiffs sought to attach funds of the railway held in certain

protection under the full faith and credit clause if reduced to judgment in the state in which the award was rendered; the former do not fall within this protective aegis.[37] [An interesting question is presented in the event the arbitral award is made at the Centre, located for the time in the premises of the World Bank in Washington, D. C. Quaere: would such an award be a "foreign award"?]. With respect to the enforcement of arbitral awards abroad, the same issue appertains. It has been suggested that the fact the parties must initially consent to jurisdiction provides greater assurance that an award will be honored. Furthermore, the interest of the World Bank in the Centre may provide the practical inducement so to do. Outside of this, the enforcement procedures of the Convention would appear technically unworkable.

The Tate letter, requiring recognition of sovereign immunity only if acts of a public nature are involved,[38] offers little solace. Query: whether the promotion of foreign investment through co-operative ventures with domestic industries constitutes a public as opposed to a private act. It should also be noted that the Restatement, Second, Foreign Relations Law of the United States, § 70(3)(1965) states that "a waiver of immunity from suit . . . [by a foreign state] does not, in the absence of a clear indication to the contrary, imply a waiver of immunity from execution."[39]

* * *

New York banks. The Swedish government then did intervene. The Circuit Court held that consent to suit doesn't give consent to attachment, although "it is regrettable that Sweden may thus escape payment of a valid judgment . . . ." *Id.* at 710.

37. But see Gilbert v. Burnstine, 255 N.Y. 348, 174 N.E. 706 (1931), wherein the N.Y. Court of Appeals, reversing judgment below thus denying defendant's motion for judgment on the pleadings, found that a complaint to recover an arbitral award, pursuant to an agreement providing for arbitration in a foreign country, stated a cause of action. Such recourse is fraught with uncertainty. For example, a challenge to the validity of the arbitration agreement in an international investment dispute would raise extremely intricate procedural as well as factual problems. *Cf.* Goldstein v. International Ladies' Garment Workers' Union, 328 Pa. 385 (1938) involving the Pennsylvania Arbitration Act, PA. STAT. ANN. tit. 5, § 161 *et seq.* (1963). The Pennsylvania Supreme Court found that an arbitrator cannot determine his own status and jurisdiction with respect to the contract under which he purported to act.

The Pennsylvania act contains language bearing upon the comment in the text, *supra:*

> The judgment [confirming an award, etc.] so entered shall have the same force and effect, in all respects as, and be subject to, all provisions of the law relating to a judgment in an action at law, and it may be enforced as such in accordance with existing law. PA. STAT. ANN. tit. 5, § 174 (1963).

See also Banco-Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964), which suggests that the United States Supreme Court, unless the Executive branch of the Government would otherwise intervene, would give effect (comity) to a ruling or adjudication of an international (parastatal?) tribunal.

38. 26 DEP'T. STATE BULL. 984 (1952).

39. But see Comment "c" to the Restatement regarding the extent of waiver:—

> The extent to which a waiver of immunity from suit . . . contains a clear indica-

There is little doubt the Convention will provide a more functional forum for the adjustment of investors' claims arising out of disputes with the government of the foreign country in which the investment was made. However, the profession should now promote and support—to give practical effect to the Convention—legislation conferring upon the several United States District Courts original federal jurisdiction with respect to the enforcement of arbitral awards made pursuant to the Convention.

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tion that it implies a waiver of immunity from execution depends upon the reasonable interpretation of the intended effect of the waiver in the light of the rules of procedure applicable in the forum.

Query: if Article 55 of the Convention (providing that nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to the immunity of that State or of any foreign State from execution) were expunged, would the consent of the State party to the Centre be deemed to imply a waiver of immunity from execution?