D. Note by the Secretariat: further work in respect of international commercial arbitration (A/CN.9/169)*

1. At its tenth session, the United Nations Commission on International Trade Law (UNCITRAL) considered certain recommendations on international commercial arbitration addressed to it by the Asian-African Legal Consultative Committee (AALCC).[1] AALCC in its decision, reproduced in document A/CN.9/127** and briefly commented upon in a note by the Secretariat (A/CN.9/127/Add.1), had recommended, *inter alia,* clarification of the following issues:

"(*a*) Where the parties have themselves chosen the arbitration rules for settling their disputes, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in the law applicable to the arbitral procedure and the award rendered should be recognized and enforced by Contracting States to the 1958 New York Convention;

"(*b*) Where an arbitral award has been rendered under procedures which operate unfairly against a party, recognition and enforcement may be refused;

"(*c*) Where a governmental agency is a party to a commercial transaction and it has entered in respect of that transaction into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration commenced pursuant to that agreement."[2]

2. The Commission, in its decision of 17 June 1977, requested the Secretary-General to consult with AALCC and other interested international organizations and to prepare further studies on the matters raised by AALCC.[3]

3. The Secretary-General submitted in document A/CN.9/168*** a study on the application and interpretation of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The present note sets forth certain suggestions as to what further steps could usefully be taken by the Commission in respect of international commercial arbitration. It reflects the discussions and views expressed at the tenth session of the Commission as well as the consensus reached by the participants in a consultative meeting held at Paris on 7 and 8 September 1978.[4]

4. It may be recalled that AALCC suggested that a protocol to the 1958 New York Convention could possibly clarify the issues identified by it. During the discussions at the Commission's tenth session the predominant opinion was that, if it were decided at a later stage to implement the proposals of AALCC, the preparation of a protocol to the 1958 New York Convention was not an appropriate approach.[5] That view was shared by the participants in the consultative meeting referred to above.

5. The principal reason advanced in the Commission and the consultative meeting was that the 1958 New York Convention had been widely accepted and was, despite some minor deficiencies, considered to be a successful instrument for facilitating the recognition and enforcement of foreign arbitral awards. This assessment is confirmed by the survey of more than 100 court decisions on the application and interpretation of the 1958 New York Convention to be found in document A/CN.9/168. As stated in the conclusions therein (para. 50), the Convention has satisfactorily met the general purpose for which it was adopted and the problems identified in that survey are not of such a magnitude that their existence would justify the preparation of a protocol to the 1958 New York Convention or the modification of some of its provisions.

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* 11 May 1979.

** Yearbook ... 1977, part two, III.

*** Reproduced in this volume, part two, III, C, above.

[1] UNCITRAL, report on the tenth session (A/32/17), annex II, paras. 27-37 (Yearbook ... 1977, part one, II, A).

[2] A/CN.9/127, annex; also reproduced in Yearbook ... 1977, part two, III.

[3] A/32/17, para. 39 (Yearbook ... 1977, part one, II, A).

[4] Participants in this meeting were representatives of the Commission's secretariat and of the secretariat of AALCC, and members of the International Council for Commercial Arbitration (ICCA) and of the Commission on International Arbitration of the International Chamber of Commerce (ICC). Discussions were also held by the Commission's secretariat with representatives of member States of AALCC at the twentieth session of AALCC held at Seoul from 19 to 26 February 1979.

[5] A/32/17, annex II, para. 31 (Yearbook ... 1977, part one, II, A).

6. The participants in the consultative meeting referred to earlier were of the unanimous view that it would be in the interest of international commercial arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure. It was considered that the preparation of a model law on arbitration would be the most appropriate way to achieve the desired uniformity. Such undertaking, if successful, would also meet the concerns expressed in the AALCC recommendations. It would have to be considered whether such model law should be geared to international commercial arbitration or whether it should cover both international and domestic arbitration proceedings.

7. The major reason for this proposal is the fact that most national laws on arbitral procedure were drafted to meet the needs of domestic arbitration and that many of these laws are in need of revision. A model law could therefore be useful particularly if it would take into account the specific features of international commercial arbitration and modern arbitration practice. Another reason, which was stated by Professor Ion Nestor (Romania) in his report on arbitration submitted to the fifth session of the Commission,[6] is the need for greater uniformity of national laws on arbitration.

8. Yet another reason is the divergence existing between frequently used arbitration rules and national laws; this is the area of concern expressed by AALCC in its recommendations. For example, some national laws restrict the power of the parties to determine the applicable law. Some national laws do not recognize the competence of the arbitral tribunal to decide about its own jurisdiction, or they provide for judicial control over the composition of the tribunal and sometimes even over the application of substantive law. Other laws establish certain nationality requirements for the arbitrators or require the award to be accompanied by a statement of reasons irrespective of any agreement by the parties to the contrary.

9. It is suggested that an UNCITRAL model law on arbitral procedure would, if implemented at the national level, solve many of the problems referred to. It would also establish universal standards of fairness and would, thus, meet the concern expressed in one of the proposals of AALCC. Moreover, such a model law would prevent some, if not all, of the difficulties detected in the survey on the application and interpretation of the 1958 New York Convention (cf. A/CN.9/168, para. 49). Finally, by the elimination of certain local particularities in national laws, a model law would be relevant in the context of the proposal of ICC to limit the reasons for setting aside awards to the grounds for refusing recognition and enforcement specified in article V, paragraph 1 (*a-d*) of the 1958 New York Convention.

10. If the Commission were to agree with the above recommendation, it may wish to request the Secretary-General (*a*) to prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, setting forth the major differences between such provisions, and (*b*) to prepare, in consultation with interested international bodies, a preliminary draft of a model law on arbitral procedure.

[6] A/CN.9/64, para. 140 (Yearbook ... 1972, part two, III).