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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS FOURTH SESSION (Vienna, 4 - 15 October 1982)

CONTENTS

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INTRODUCTION

1. At its fourteenth session the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration. 1/

2. The Working Group commenced its work at its third session by discussing all but four of a series of questions prepared by the Secretariat designed to establish the basic features of a draft model law. 2/

3. The Working Group consists of the following States members of the Commission: Austria, Czechoslovakia, France, Ghana, Guatemala, Hungary, India, Japan, Kenya, Philippines, Sierra Leone, Trinidad and Tobago, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

4. The Working Group held its fourth session at Vienna from 4 to 15 October 1982. All the members were represented except Ghana, Guatemala, India, Sierra Leone and Trinidad and Tobago.

5. The session was attended by observers from the following States: Argentina, Australia, Belgium, Brazil, Chile, China, Ecuador, Egypt, Finland, German Democratic Republic, Germany,Federal Republic of, Greece, Holy See, Italy, Mexico, Panama, Republic of Korea, Sweden, Switzerland, Thailand and Venezuela.

6. The session was attended by observers from the following intergovernmental organization: Hague Conference on Private International Law, and from the following international non-governmental organizations: International Chamber of Commerce and International Council for Commercial Arbitration.

7. The Working Group elected the following officers:

Chairman: Mr. I. Szasz (Hungary)

Rapporteur: Mr. S.K. Muchui (Kenya)

8. The following documents were placed before the session:

(a) Report of the Secretary-General: Possible features of a model law on international commercial arbitration (A/CN.9/207).

(b) Report of the Working Group on International Contract Practices on the work of its third session (New York, 16-26 February 1982) (A/CN.9/216).

(c) Note by the Secretariat: Possible features of a model law on international commercial arbitration: Questions for discussion by the Working Group (A/CN.9/WG.II/WP.35).

(d) Provisional agenda for the session (A/CN.9/WG.II/WP.36).

1/ Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 70.

2/ Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216.

(e) Note by the Secretariat: Model law on international commercial arbitration: draft articles 1 to 24 on scope of application, arbitration agreement, arbitrators, and arbitral procedure (A/CN.9/WG.II/WP.37).

(f) Note by the Secretariat: Model law on international commercial arbitration: draft articles 25 to 36 on award (A/CN.9/WG.II/WP.38).

9. The Working Group adopted the following agenda:

(a) Election of officers

(b) Adoption of the agenda

(c) Consideration of possible features and of draft articles of a model law on international commercial arbitration

(d) Other business

(e) Adoption of the report

DELIBERATIONS AND DECISIONS

10. The Working Group continued and completed its preliminary exchange of views on the questions contained in the note by the Secretariat (A/CN.9/WG.II/WP.35). The Group considered questions 6-6 to 6-9 and some further issues of arbitral procedure.

11. The Working Group also considered tentative draft articles 1 to 36 of a model law on international commercial arbitration as prepared by the Secretariat (set forth in A/CN.9/WG.II/WP.37 and 38). The Group requested the Secretariat to redraft these articles in the light of its discussion and decisions at the present session.

12. The Working Group decided to hold its fifth session from 22 February to 4 March 1983 in New York, as authorized by the Commission at its fifteenth session. 3/

I. CONSIDERATION OF POSSIBLE FEATURES OF A DRAFT MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

13. The Working Group decided to commence its work by considering the four questions prepared by the Secretariat which had not been discussed at the third session of the Working Group.

Means of recourse

Setting aside or annulment of award (and similar procedures)

Question 6-6: Should the model law provide for only one type of action of "attacking" an award, e.g. setting aside (leaving aside here recourse against exequatur, but see question 6-8)?

3/ Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, Official Records of the General Assembly, Thirty-seventh Session, Supplement No.17 (A/37/17), para. 148.

14. There was general agreement that the model law should streamline the various types of recourse against an arbitral award and should provide for only one type of action of "attacking" an award. However, it was observed that the acceptability of this approach may depend on the decision as to which arbitral awards were international, and therefore subject to this law, and that the position on this question may not be final.

> Question 6-7: If so, on what grounds should such an action be successful? For example, would it be acceptable to restrict the grounds to those listed in article V, paras. (1)(a-d) and (2)(b) of the 1958 New York Convention, with a possible restriction of the "public policy" ground to "international public policy"?

15. There was general agreement that a restrictive approach in listing the grounds for the setting aside of awards should be adopted. Some doubt was expressed as to whether the reasons for setting aside needed to be restricted to those which are mentioned in the 1958 New York Convention. However, the prevailing view was that the grounds for setting aside should be restricted to those listed in article V, paras. (1)(a-d) and (2)(b) of that Convention.

16. Under one view the "public policy" ground for refusal of recognition or enforcement (article V, paragraph (2)(b)) should be further restricted and qualified as "international public policy". In this connexion it was noted that the case law and doctrine of many countries showed a clearly detectable trend to apply a different standard of public policy in cases of international commercial arbitration from that applied in cases of domestic arbitration. 4/

17. Under another view the introduction of a concept of "international public order" was unnecessary and could give rise to difficulties in interpretation. It was noted that there might be a conflict between the grounds for setting aside of an award for violation of "international public policy" under the model law and the grounds for refusing execution of a foreign award for violation of "public policy" under the 1958 New York Convention.

18. The Working Group requested the Secretariat to prepare draft provisions for the attacking of an award reflecting two alternative approaches. One alternative should use the concept of "international public policy" while the other should retain the traditional concept of public policy, leaving it to the courts to interpret this concept adequately.

19. In this connexion the Working Group recalled its position in respect of questions 6-3, 6-4 and 6-5 as expressed in paragraph 109 of the Report on the work of its third session (A/CN.9/216) in which it said that the model law should not set forth rules on remedies against decisions granting or refusing enforcement of awards. In view of the discussion at this session which favoured the listing of grounds for attacking awards the Working Group decided to reconsider at a later stage its position adopted at its third session in respect of questions 6-3, 6-4 and 6-5.

4/ See Report of the Secretary-General: study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), A/CN.9/168, paras. 46-47.

Question 6-8: Assuming that an action to set aside may be brought only on the same grounds as an appeal against the order of enforcement of the same award, should the recourse system be streamlined, e.g. by allowing only the action to set aside and regard it as implying an appeal against the exequatur, or by requiring in enforcement proceedings that the party against whom enforcement is sought would be given an opportunity to raise objections and, if he does so, to transfer the case to setting aside proceedings?

20. The Working Group expressed different views regarding the extent to which different means of recourse against arbitral awards could be streamlined. Under one view a maximum streamlining in respect of procedure and grounds for attacking awards was desirable. Under another view only the substantive grounds could be unified but not the various procedural aspects of the different means of recourse. The task would be complicated by the fact that in some countries there is no special exequatur procedure and an award is enforceable once it is issued.

21. The Working Group decided that the model law should not have detailed procedural rules on exequatur and setting aside but should place emphasis on the grounds for attacking awards. The Working Group requested the Secretariat to prepare draft provisions along these lines.

Question 6-9: Which rules of procedure concerning an action to set aside the award should the model law lay down, including any time-limits for bringing such action?

22. There was general agreement that the model law should contain no procedural rules for attacking an award except for a rule in respect of the time-limit during which the award could be attacked. There was general agreement that the time-limit should be rather short. A period of about three months was suggested. It was noted, however, that the period of time should be long enough to allow for the preparation and translation of the necessary documents. It was also suggested that the model law should specify the moment when the time-limit would begin to run.

Further issues of arbitral procedure

23. The Working Group noted that at its third session it had agreed that there were other issues of arbitral procedure that might be dealt with in the model law. 5/ Together with proposals accepted by the Working Group at its fourth session the issues still to be considered for possible inclusion in the model law are:

- The point of time at which the limitation period is considered to have been interrupted by the commencement of an arbitration proceeding;
- The period during which action must be taken to enforce an arbitral award;
- The minimum contents of the statement of claim and defence;
- The termination of arbitration proceedings;
- The language to be used in the arbitration proceedings.

5/ A/CN.9/216, para. 72.

II. CONSIDERATION OF TENTATIVE DRAFT ARTICLES (1-36)

24. The Working Group proceeded to a consideration of tentative draft articles for a model law on international commercial arbitration prepared by the Secretariat on the basis of the discussion and decisions of the Working Group at its third session. 6/

25. The Working Group noted that the structure and classification of the issues used in the basic report on possible features of a model law (A/CN.9/207) and in the working paper submitted to its third session (A/CN.9/WG.II/WP.35) as well as the report of that session (A/CN.9/216) had been maintained in the presentation of the draft articles so as to facilitate reference to the earlier discussions. It was agreed that the order of the articles as well as the headings and sub-headings would be altered once a clearer picture of the contents of the model law had emerged.

Scope of application

Article 1

26. The text of two alternative versions of article 1 as considered by the Working Group was as follows:

Alternative A:

Article 1

This Law applies:

(a) to arbitration agreements concluded by parties to a commercial [or economic] transaction whose places of business are in different States [or, if their places of businesss are in the same State, where their contract is to be performed outside that State or where the subject-matter in dispute is property situated outside that State]; if a party has more than one place of business the relevant place of business is that which has the closest relationship to [the contract and its performance] [the conclusion of the arbitration agreement];

(b) to the preparation and conduct of arbitration proceedings based on agreements referred to in paragraph (a);

(c) to arbitral awards rendered in proceedings referred to in paragraph (b).

Alternative B:

Article 1

(1) This Law applies to international commercial arbitration as specified in paragraphs (2), (3) and (4) of this article.

6/ The draft articles prepared by the Secretariat are contained in documents A/CN.9/WG.II/WP.37 and 38.

(2) "Arbitration" covers arbitration agreements, the preparation and conduct of arbitration proceedings based on such agreements whether or not administered by a permanent arbitral institution, and the arbitral awards resulting therefrom.

(3) "Commercial" refers to the settlement of a dispute arising in the context of any commercial transaction /or similar economic relationship/ /including supply or exchange of goods, construction of works, financing, joint venture and other forms of business co-operation, provision of services, except labour under a contract of employment/.

(4) "International" are those cases where the arbitration agreement is concluded by parties whose places of business are in different States /or, if their places of business are in the same State where their contract is to be performed outside that State or where the subject-matter in dispute is property situated outside that State/. If a party has more than one place of business, the relevant place of business is that which has the closest relationship to /the contract and its performance/ /the conclusion of the arbitration agreement/.

In general

27. There was general agreement that the drafting technique used in alternative B was more precise than that used in alternative A and that it should, therefore, be used in the model law.

28. It was observed that a State could modify the provisions of the model law when adopting it. However, it was not felt that an express provision to this effect was needed.

Alternative B:

Paragraph (2)

29. Under one view paragraph (2) was superfluous and could be deleted. Under another view paragraph (2) was useful in that it gave a broad definition of "international commercial arbitration" and made it clear that it applied both to ad hoc and to institutional arbitrations. It was also noted that the definition was similar to that used in respect of the scope of application of the 1961 Geneva Convention.

Paragraph (3)

30. There was general agreement that the term "commercial" should be defined in a broad sense. Different views were expressed as to how this result could best be achieved, especially in view of the fact that in some legal systems the term "commercial" is defined more narrowly than it is in others.

31. Under one view it was unnecessary to include a definition of "commercial". Furthermore, no definition could delineate between the cases which should be included and those which should be excluded.

32. Among the suggestions made for altering the definition were that (a) a full stop be placed after the words "commercial transactions" with the rest of the definition deleted, (b) the word "commercial" be changed to "business", (c) additional examples, such as investment, factoring and leasing be added to the list of commercial transactions, and (d) the term "commercial" should be defined by way of listing legal relationships which were not commercial (e.g. consumer and employment relations). If an illustrative list of commercial activities were to be adopted the inclusion of "investment" was widely supported. A combined approach was also suggested by which the provision would list examples of both legal relationships which would be considered commercial and those which would not be considered commercial.

33. It was also suggested that some of the problems might be solved by an official commentary to the text.

Paragraph (4)

34. There was general agreement that the test of "internationality" should depend upon the character of the parties rather than the subject matter of the dispute.

35. Under one view the determining test should be the nationality of the parties, whether they were natural or legal persons. It was suggested that for this purpose the nationality of a legal person might be determined either by the place of incorporation or by the element of control.

36. The prevailing view, however, was that the determining test should be the place of business of the parties, even though it was recognized that the concept of place of business was a complex one and could give rise to difficulty of application in certain cases (e.g. when the party was temporarily doing business in a State or when the dispute involved business activities of a State). It was suggested that it was preferable to align the test of internationality with that in the 1961 Geneva Convention and the 1980 Vienna Sales Convention.

Arbitration agreement

Form, contents, parties, domain

Article 2

37. The text of article 2 as considered by the Working Group was as follows:

Article 2

"Arbitration agreement" is an undertaking by /parties/ /physical persons or legal persons of private or public law/ to submit to arbitration all or certain differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not /, concerning a subject-matter which could be disposed of by agreement of the parties under the applicable law/.

38. It was agreed that an "arbitration agreement" should be defined as an "agreement" rather than as an "undertaking" so as not to raise doubts as to the difference between an agreement and an undertaking.

39. The prevailing view was that the term "parties" was preferable to "physical persons or legal persons of private or public law." It was observed that the term "parties" was sufficiently clear and its use did not lead the Working Group to deal with questions of capacity, which it had decided at its previous session not to consider in the model law.

40. It was also decided to delete the words "concerning a subject matter which could be disposed of by agreement under the applicable law." It was felt that there was no need to refer to national law in this context. It was also noted that at a later stage the Working Group would discuss the general question of choice of law.

Article 3

41. The text of article 3 as considered by the Working Group was as follows:

Article 3

(1) The arbitration agreement, whether an arbitration clause in a contract or a separate agreement, shall be /concluded or evidenced/ in writing.

(2) "Agreement in writing" includes an agreement contained in a document signed by the parties or contained in an exchange of letters, telegrammes or communications in another, /visible and/ sufficiently permanent form. The reference in a contract to general conditions containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing. /However, an arbitration agreement also exists where one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner/.

42. The prevailing view was to delete the words "concluded or evidenced". It was felt that they did not add any significant meaning to the provision. On the other hand it was noted that the word "evidenced" could be interpreted to mean that an oral agreement evidenced in writing would be considered to be a written arbitration agreement.

43. There was general agreement that the model law should contain a broad definition of that which constituted a writing, possibly broader than existing texts on international commercial arbitration. In this connexion it was agreed that the words "in another visible and sufficiently permanent form" were useful in that they referred to new technological means of communicating and storing data, including arbitration agreements. On the other hand it was noted that the provision itself was unclear and it was not certain what technological means would fall within its scope.

44. The idea of the second sentence of paragraph (2) referring to arbitration agreements contained in general conditions was approved in principle. However, the Working Group thought that the term "reference" expressing the manner in which an arbitration agreement became a part of the contract was too vague. In this connexion several approaches were suggested. Under one view the text of the arbitration agreement has to be before both parties in order to bind them. Under another view a reference in the contract between the parties to general conditions or other documents containing the arbitration clause was sufficient. As a middle ground between these positions, it was suggested that the document containing the arbitration agreement must be referred to in the contract in such a way that it becomes a part of the contract. The view was also expressed that in the resolution of this problem account must be taken of the fact that general conditions are usually prepared by the economically stronger party.

45. In respect of the last sentence of paragraph (2), it was noted that the problem it considers frequently arises in practice. However, the Working Group decided to delete this provision since it raised difficult problems of interpretation.

46. The Working Group considered whether national rules outside this model law would govern an oral arbitration agreement. The prevailing view was that this model law was intended to govern all international commercial arbitration agreements.

Separability of arbitration agreement

Article 4

47. The text of article 4 as considered by the Working Group was as follows:

Article 4

For the purposes of determining whether the arbitral tribunal has jurisdiction, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

48. The Working Group agreed that the text of article 4 was satisfactory.

Effect of the agreement

Article 5

49. The text of article 5 as considered by the Working Group was as follows:

Article 5

A court before which an action is brought in a matter which is the subject of an arbitration agreement, shall, at the request of either party, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

50. There was general agreement that article 5 should be included in the model law. There was also general agreement to include a provision along the lines of article VI, paragraph 1 of the 1961 Geneva Convention which would limit the period of time during which a party could object to the jurisdiction of the court on the grounds of the existence of an arbitration agreement.

51. It was suggested that article 5 should be modified to permit a court to refuse to refer the parties to arbitration if an award made in such an arbitration could not be enforced in the State in question. It was pointed out, however, that such a suggestion goes against the idea of this model law, which is to promote international commercial arbitration. Moreover, until the award has been made it may not be clear whether it could be enforced in that State. In any case the award might well be enforceable in other States.

Article 6

52. The text of article 6 as considered by the Working Group was as follows:

Article 6

A request for interim measures of protection addressed by any party to a court, whether before or during arbitration proceedings, shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

53. The Working Group was in agreement that the policy expressed by the current text should be retained. It was suggested, however, that the provision should be redrafted to express the view that it was the action of the court in granting interim relief that was compatible with the arbitration agreement. It was pointed out that the text of article 6 was based upon article 26(3) of the UNCITRAL Arbitration Rules, which were drafted from the viewpoint of the parties, while a different approach was appropriate in a model law.

54. On the other hand it was pointed out that the provision was intended to say that a party had the right to request interim measures of relief from a court pending the final award in the arbitration proceedings. This approach to the question had already been taken in article VI, paragraph 4 of the 1961 Geneva Convention.

55. The Working Group decided to retain the current text at this time.

56. A drafting suggestion was made that "any party" should be used whenever multi-party arbitration could be covered and "either party" should be used only if two-party arbitration alone could be envisaged.

Arbitrators

Qualifications, challenge (and replacement)

Article 7

57. The text of article 7 as considered by the Working Group was as follows:

Article 7

A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

58. There was general agreement that the article was acceptable. It was suggested that the duty to disclose was a continuing one and that this should be reflected more clearly in the wording of the article.

Article 8

59. The text of article 8 as considered by the Working Group was as follows:

Article 8

(1) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

(2) A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

60. It was noted that the word "only" in paragraph (1) (which was omitted in the French text) was intended to limit the grounds for challenging an arbitrator to justifiable doubts as to his impartiality or independence. It was suggested that this decision should be reviewed since there might be other grounds on which a party should be able to challenge an arbitrator. In this connexion a question was raised as to the relationship between article 8 and article 11.

Article 9

61. The text of article 9 as considered by the Working Group was as follows:

Article 9

(1) Subject to the provisions of article 10, the parties are free to agree on the procedure for challenging an arbitrator.

(2) Failing such agreement, the following procedure shall be used:

(a) A party who intends to challenge an arbitrator shall, within fifteen days after knowing about the appointment of that arbitrator or about the circumstances mentioned in articles 7 and 8, send a written statement of the reasons for the challenge to the other party and to all arbitrators;

(b) When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge;

(c) If within /20/ days after the challenge, the other party does not agree to the challenge and the challenged arbitrator does not withdraw, /the decision on the challenge shall be made by the Authority specified in article 17/ /the challenging party may pursue his objections before a court only in an action for setting aside the award or any recourse against recognition and enforcement of the award/.

62. It was suggested that articles 9, 10 and 11 should be reorganized to make them more concise. It was further suggested that the relationship between the time-period of 15 days in paragraph (2)(a) and the time-period of 20 days in paragraph (2)(c) should be more clearly expressed and that the starting points of these time-limits should be clarified. It was noted that the implementation of this observation may become unnecessary if in redrafting this article the time-limits were deleted.

63. Practical and theoretical arguments were presented in favour of both alternatives in paragraph (2)(c). Although the view in favour of the first alternative received more support than did the second, the Working Group decided to retain both alternatives for future discussion.

Article 10

64. The text of article 10 as considered by the Working Group was as follows:

Article 10

If, under any procedure for challenge agreed upon by the parties, the challenged arbitrator does not withdraw or the challenge is not sustained by the person or body entrusted with the decision on the challenge, the challenging party may /request the Authority specified in article 17 to make a final decision on the challenge/ /pursue his objections before a court only in an action for setting aside the award or any recourse against recognition and enforcement of the award/.

65. The Working Group deferred the discussion on this article until the rearrangement of articles 9, 10 and 11 has been made in accordance with the decision under article 9.

Article 11

66. The text of article 11 as considered by the Working Group was as follows:

Article 11

Unless the parties have agreed otherwise, the following procedure shall be used in the event that an arbitrator /fails to act/ /does not perform his functions in accordance with the instructions of the parties and in an impartial, proper and speedy manner/ or in the event of the de jure or de facto impossibility of his performing his functions:

(a) Any party who wishes that, for any of these reasons, the mandate of an arbitrator be terminated shall send a written statement of the reasons to the other party and to all arbitrators;

(b) If, within /20/ days after the notification, the other party does not agree to the termination of the mandate and the arbitrator does not withdraw from his office, the party may request the Authority specified in article 17 to make a final decision thereon.

67. The view was expressed that the provisions of this article were too detailed and that a party might rely on them merely to prolong the arbitral proceedings.

68. The prevailing view was that the first alternative text in the square brackets was more appropriate. The second alternative text was considered to be too broad in scope because it dealt both with cases in which the actions of an arbitrator gave rise to challenge and cases in which the conduct of the proceedings was not sufficiently expeditious.

69. It was suggested that the expression "fails to act" might in some cases not be sufficiently precise and that some additional clarifying provisions might be appropriate. It was concluded, however, that such further clarifications would not facilitate the interpretation of the article and might make it too inflexible.

Article 12

70. The text of article 12 as considered by the Working Group was as follows:

Article 12

In the event of the termination of the mandate of an arbitrator or in the event of his death or resignation during the course of the arbitration proceedings, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, unless the parties agree on another appointment procedure /or decide to terminate the arbitration proceedings/.

71. The Working Group accepted the principle of this article. It was understood that article 12 also covered the case where the mandate of an arbitrator was terminated, or where an arbitrator withdrew from his office, as a result of a challenge in accordance with articles 9 to 11.

72. The view was expressed that it should be made clear that the parties may deviate from this provision. With such a clarification the last words in square brackets could be deleted. A special provision was suggested for cases in which the arbitrator named in the arbitration agreement became incapacitated or died. It was thought that in such cases the arbitration agreement should lapse. It was also suggested that the articles on challenge and replacement should be placed after the articles on appointment of arbitrators.

Number and appointment of arbitrators

Article 13

73. The text of article 13 as considered by the Working Group was as follows:

Article 13

(1) In arbitration governed by this Law, nationals of any State may be appointed as arbitrators.

(2) An arbitration agreement is invalid [if] [to the extent that] it accords one of the parties a predominant position with regard to the appointment of arbitrators.

74. The Working Group supported the policy underlying paragraph (1) of article 13. It was also agreed that such a rule should be addressed to the national legislators, who in some cases have restricted the freedom of the parties in this respect, and not to the parties or to the party-appointed arbitrators. One possible way to achieve that was to add to paragraph (1) of this article the words "subject to the arbitration agreement". It was also suggested that this point could be made clearer by a provision that no person should be disqualified by law from being appointed as an arbitrator on the ground of his nationality.

75. As to paragraph (2) under one view it dealt with an exceptional situation that did not need to be regulated by the model law. Under the prevailing view, however, the model law should offer protection to a party when the other party had a predominant position with regard to the appointment of arbitrators.

76. Arguments were expressed in favour of both alternative wordings in square brackets and no decision was reached. Under one view the arbitration agreement giving a predominant position to one party should be invalid. In support of this view it was stated that an arbitration agreement contrary to the fundamental principle of equality of parties should not be enforceable. Under another view only the appointing procedure giving a predominant position to one party should be inoperative while the basic agreement of the parties to resort to arbitration should be respected.

77. In discussing this article a general suggestion was made that it would be useful to make it clear in the model law (possibly in a separate article) from which provisions of the model law the parties cannot derogate.

Article 14

78. The text of article 14 as considered by the Working Group was as follows:

Article 14

(1) Subject to the provisions of article 13 (2), the parties are free to determine the number of arbitrators.

(2) Failing such determination,

Variant A: three arbitrators shall be appointed.

Variant B: the number of arbitrators shall be equal to the number of parties but increased by one if the number of parties is even.

Variant C: a sole arbitrator shall be appointed.

79. It was noted that the opening words to this article "subject to the provisions of article 13 (2)" were erroneously included.

80. It was agreed that variant B in paragraph (2) was not acceptable. It was pointed out that if a party were to commence arbitration proceedings against ten respondents in a single case, there would be one party-appointed arbitrator by the claimant and ten party-appointed arbitrators by the respondents.

81. Important arguments were expressed in favour of variants A and C. Under one view, supporting variant A, more weight should be given to the presumption that a panel of three arbitrators is more likely to guarantee equal treatment of both parties. Under another view the costs of arbitration make one arbitrator more favourable. Under a third view the model law should provide for one arbitrator but that on the request of either party the Authority provided in article 17 should have the power to decide that given the circumstances of the case, there should be three arbitrators.

82. The Working Group decided to defer its decision on this point. It was suggested that in order to aid the Working Group in making its decision an evaluation should be made of international commercial arbitration practice, taking into account that policies in regard to the number of arbitrators may differ in international and national arbitration.

Article 15

83. The text of article 15 as considered by the Working Group was as follows:

Article 15

(1) Subject to the provisions of article 13 (2), the parties are free to agree on the procedure of appointing the arbitrator or arbitrators.

(2) If a party does not fulfill his obligations under an agreed appointment procedure, the other party may request the Authority specified in article 17 to take the required measure instead.

84. The objectives of this article were supported by the Working Group. The view was expressed that paragraph (2) should be elaborated to make it clear that the Authority specified in article 17 is the last resort after all other attempts for appointment have failed. In this respect it was suggested that a recourse to the Authority specified in article 17 should be available when the appointing authority under the arbitration agreement fails to appoint the arbitrator but that the diligent party must first apply to the appointing authority before it can apply to the Authority specified in article 17.

85. As an alternative, it was suggested that when a party does not fulfill his obligations under the agreed appointment procedure, the arbitrator appointed by the diligent party should act as a sole arbitrator. In response it was stated that such a result would be too harsh and could work well only in a legal system in which the courts exercised a higher level of supervision than was provided for in these draft articles.

Article 16

86. The text of article 16 as considered by the Working Group was as follows:

Article 16

(1) If the parties have not agreed on the appointment procedure,

(a) in an arbitration with a sole arbitrator, the arbitrator shall be appointed by the Authority specified in article 17;

(b) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator;

[(c) in an arbitration with a number of arbitrators that is equal to the number of the parties or a multiple thereof, each party shall appoint one arbitrator or the respective multiple thereof;]

[(d) in a multi-party arbitration with one arbitrator more than there are parties, each party shall appoint one arbitrator and the additional arbitrator shall be appointed by the Authority specified in article 17.]

(2) If a party, in an arbitration referred to in paragraph (1) (b), [(c) or (d)], fails to make the required appointment within [30] days after having been so requested by the other party, or if, in an arbitration referred to in paragraph (1) (b), the two arbitrators fail to appoint the third arbitrator within [30] days after their appointment, the appointment shall be made by the Authority specified in article 17.

87. There was general agreement that subparagraphs (c) and (d) of paragraph (1) could be deleted. It was suggested that a provision on multi-party arbitration and on agreements for more than three arbitrators should be included in sub-paragraph (b).

88. There was general agreement that the article should be redrafted to make it clear that the parties should first try to reach an agreement on the appointment procedure and that the provisions of this article should come to their aid only if the parties were not able to agree.

Article 17

89. The text of article 17 as considered by the Working Group was as follows:

Article 17

(1) The Authority, referred to in articles 9 (2) (c), 10, 11 (b), 15 (2), 16 (1) (a), (d), (2) and ..., shall be the ..... (e.g. specific chamber of a given court, president of a specified court, to be determined by each State when enacting the model law).

(2) The Authority shall act upon request by any of the parties or by the arbitral tribunal, unless otherwise provided for in a provision of this Law.

(3) The Authority, in appointing an arbitrator, shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or an additional arbitrator under article 16 (1) (a), (b) [or (d)], shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

90. It was agreed that the name of the Authority would be left blank in the model law and that each State which adopted the model law would have the option of designating that Authority it thought most appropriate. It was agreed that in doing so the State should name a judicial organ. A view was expressed that the Authority should possess experience in the field of arbitration and, therefore, that it would be useful if its competence would be centralized to the extent possible.

91. It was noted that the procedure to be used by the Authority would be determined by the rules of civil procedure governing that court.

92. The general view was that the procedure before the Authority should be as expeditious as possible. For this purpose it was suggested that there should be no appeal against the decisions of the Authority. Under another view any provision in respect of appeal against the decisions of the Authority should not be contrary to the basic principles of court control of arbitration. The proponents of this view suggested that a final decision on this question should be taken only after an analysis had been made of all cases which the Authority may be called upon to decide.

93. The question was raised as to the Authority of which State should exercise the functions of an Authority under article 17. In this connexion differing views were expressed as to the nature of the rules which should be set forth in the model law.

94. Under one view it is not appropriate to set out special rules of international competence of the Authority because such rules would have to be too detailed. According to this view the question of international competence could be left to general rules on international conflicts of competence.

95. Under another view the model law should have a system of rules on international competence. Such a system should be based on the special functions of the Authority. In this connexion it was suggested that the place of arbitration should be the primary criterion. In case the place of arbitration had not been designated, the procedural law to which the arbitral procedure was subjected might be the appropriate criterion. It was also suggested that the party refusing to co-operate in the appointing procedure should be put at risk that the other party could seize the Authority of his country.

96. Under a third view some rules on international competence would be useful and in this context the place of arbitration should be the decisive factor. The Secretariat was requested to draft provisions to this effect and to indicate that where the place of arbitration had not been decided, reference should be made to the rules of private international law.

97. In respect of paragraph (2) of this article it was suggested that individual arbitrators could apply to the Authority in cases in which not all the members of the arbitral tribunal were appointed and therefore the arbitral tribunal could not be constituted. It was also suggested that arbitrators should be authorized to apply to the Authority only for appointment of other arbitrators and not in other cases in which the parties could apply to the Authority.

98. It was suggested that it would be useful to authorize the Authority to consult an arbitral institution in the fulfillment of its tasks. In response it was observed that the Authority was free to consult institutions of its choice and that a special provision to this effect was unnecessary.

Arbitral procedure

Place of arbitration

Article 18

99. The text of article 18 as considered by the Working Group was as follows:

Article 18

(1) The parties to an arbitration agreement are free to determine, or to authorize a third person or institution to determine, the place where the arbitration is to be held.

(2) Failing such stipulation, the arbitral tribunal shall determine the place of arbitration, having regard to the circumstances of the arbitration [, including the convenience of the parties].

100. It was agreed that the words "including the convenience of the parties" in paragraph (2) should be deleted. It was stated that there are many other circumstances to be taken into account and it was not appropriate to mention only one of them.

Arbitration proceedings in general, evidence, experts

Article 19

101. The text of article 19 as considered by the Working Group was as follows:

Article 19

(1) The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate

(a) subject to the provisions of articles 20 to 24 and any instructions given by the parties in the arbitration agreement;

(b) provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

(2) The power conferred upon the arbitral tribunal under paragraph (1) includes the power to adopt its own rules on evidence and to determine the admissibility, relevance, materiality and weight of the evidence offered. /Notwithstanding the provision of paragraph (1) (a), the parties may not preclude the arbitral tribunal from calling an expert if it deems that necessary for deciding the dispute./

102. It was suggested that the wording of paragraph (1) of this article should emphasize more clearly that the parties are free to determine either directly or by reference to arbitration rules the procedure to be followed and only in the absence of such agreement by the parties may the arbitral tribunal conduct the arbitration in such a manner as it considers appropriate.

103. The Working Group agreed to decide to what extent the provisions of articles 20 to 24 should be mandatory in deliberations on each of those articles.

104. It was felt that the words "at any stage" in paragraph (1) (b) might be relied upon by a party who wished to prolong the proceedings or to make unnecessary submissions. It was therefore suggested that the provision be rephrased in order to eliminate this possibility.

105. In respect of paragraph (2) it was suggested that the sentence in square brackets should be deleted. It was felt that such a provision unduly restricted the principle of freedom of the parties.

106. It was also suggested that the provision on the power of the arbitral tribunal to adopt rules on evidence should be deleted.

Article 20

107. The text of article 20 as considered by the Working Group was as follows:

Article 20

(1) If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

(2) All documents or information supplied to the arbitral tribunal by one party shall [at the same time] be communicated [by that party] to the other party.

108. The Working Group was of the view that the rule in paragraph (1) calling for a hearing at the request of either party could be modified by the agreement of the parties. However, if the parties had not so agreed, the rule was binding on the arbitral tribunal.

109. The Working Group was also of the view that the parties could not modify the rule expressed in paragraph (2) to the extent that it required that all documents or information supplied to the arbitral tribunal by one party had to be furnished to the other party. However, the method by which they were to be furnished to the other party could be determined by the parties or by the arbitral tribunal.

110. It was suggested that paragraph (2) might be moved to article 19 (1) (b) as an example of the principle of equality.

111. The Working Group expressed the view that the provision allowing a request for oral hearings "at any stage" of the proceedings was too broad and that this right should be appropriately limited so as to be available at the appropriate stage of the proceedings in the interest of expeditious proceedings. A suggestion was made that a party should have a right to request oral hearings only for substantive arguments but not for procedural arguments.

Article 21

112. The text of article 21 as considered by the Working Group was as follows:

Article 21

Notwithstanding the provisions of article 18, the arbitral tribunal may

(a) hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration;

(b) meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

113. It was agreed that the text should make it clear that when witnesses were to be heard, the parties should always be given sufficient notice to enable them to be present at the hearing. Except for the requirement of notice, the Working Group was of the view that the provision was not binding on the parties.

Article 22

114. The text of article 22 as considered by the Working Group was as follows:

Article 22

(1) The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal.

(2) Unless otherwise provided in the arbitration agreement,

(a) A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties;

(b) The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision;

(c) Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report;

(d) At the request of either party, the expert, after delivery of the report, [may] [shall] be heard at a hearing where the parties shall have the opportunity to be present, to interrogate the expert, and to present expert witnesses in order to testify on the points at issue.

115. Regarding paragraph (1) it was agreed that the text should be clear that this provision is subject to the contrary agreement of the parties.

116. It was also agreed that the requirement of writing in paragraph (1) should be deleted. It was felt that the form of the expert's opinion could be left to arbitral practice and to the agreement of the parties.

117. There was general agreement that paragraph (2) should express only statements of principle and that the procedural elements should be deleted. However, different views were expressed as to which subparagraphs contained statements of principle. There was wide support for retaining subparagraphs (b) and (d) and less support for retaining subparagraphs (a) and (c). It was suggested that some of the provisions in paragraph (2) could be incorporated in article 20.

118. There was general agreement that the word "shall" in subparagraph (d) was more appropriate than "may" and was in line with the discussion of article 20.

Interim measures of protection

Article 23

119. The text of article 23 as considered by the Working Group was as follows:

Article 23

The arbitral tribunal [, if so authorized by the parties,] may order [or take], at the request of either party, [any interim measures it deems necessary in respect of the subject-matter of the dispute, including] measures for the conservation of the goods forming the subject-matter in dispute, such as their deposit with a third person or the sale of perishable goods. The arbitral tribunal shall be entitled to require security for the costs of such measures.

120. Different views were expressed whether the existence of an arbitration agreement implied that the arbitral tribunal had the right to order an interim measure of protection. Under one view the arbitral tribunal could order such measures only if it had been authorized to do so by the parties. Under another view the authorization to order such measures is presumed unless the parties excluded it expressly.

121. As to the type of interim measures which the arbitral tribunal should be authorized to order, the view was expressed that the arbitral tribunal should be empowered to order any interim measures of protection it deemed necessary. Under another view the interim measures of protection which could be ordered by the arbitral tribunal should be limited, e.g. to measures for the conservation of the goods forming the subject-matter in dispute.

122. It was suggested that as the basis for further discussion a text might be drafted which recognized that an arbitral tribunal had an implied authority to order interim measures of protection but that the types of interim measures of protection which could be ordered by an arbitral tribunal should be limited. It was further suggested that it might facilitate the agreement on the policy to be followed if the question of ordering interim measures of protection was separated from the question of enforcement of the order.

123. It was agreed to delete the words "or take" in the second square brackets.

Article 24

124. The text of article 24 as considered by the Working Group was as follows:

Alternative A:

Article 24

(1) If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his statement of claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitration proceedings.

(2) If, within the period of time fixed by the arbitral tribunal, the respondent fails to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

(3) If one of the parties, invited in writing at least [20] days in advance, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration; if the tribunal decides to do so, it shall notify the parties in writing.

(4) If one of the parties, invited in writing to produce documentary evidence within a specified period of time of not less than [20] days, fails to do so, the arbitral tribunal may make the award on the evidence before it; if the tribunal decides to do so, it shall notify the parties in writing.

[(5) The defaulting party may, within 15 days after issuance of the order referred to in paragraph (1) or (2) or the notification referred to in paragraph (3) or (4), request the Authority specified in article 17 to review the decision of the arbitral tribunal as to whether the conditions laid down in the respective paragraph of this article were fulfilled.]

Alternative B:

Article 24

If, without showing sufficient cause for the failure,

(a) the respondent fails to communicate his statement of defence within the period of time fixed by the arbitral tribunal; or

(b) one of the parties, invited at least [20] days in advance, fails to appear at a hearing; or

(c) one of the parties, invited in writing to produce documentary evidence within a specified period of time of not less than [20] days fails to do so,

the other party may request the Authority specified in article 17 to [authorize] [instruct] the arbitral tribunal to proceed with the arbitration.

125. The Working Group supported the policy underlying paragraphs (1) to (4) of alternative A. It was generally agreed that these provisions were subject to the contrary agreement of the parties. It was noted that in paragraph (4) of article 24 (Alternative A) the words "without showing sufficient cause for such failure" had been erroneously omitted and should be added after the words "fails to do so".

126. It was agreed that paragraph (5) of alternative A as well as the entire text of alternative B should be deleted since they introduced a degree of court supervision of international commercial arbitration which was neither necessary nor desirable.

127. The view was expressed that this article should set forth principles in a general way without detailed procedural rules.

128. The Working Group was in agreement that this article should in its result preserve a balance of equality between the parties. It was noted, however, that it was difficult to preserve a formal equality since the parties were in different situations. The claimant has every reason to pursue his claim if he believes it is justified, since otherwise he will have incurred expenses for no substantive purpose. On the other hand the respondent may fail to act in the arbitration so as to impede its progress.

129. It was suggested that the parties might be in a situation of greater equality if the failure of the defendant to communicate his statement of defence was treated as a denial of the claim. In such a case, even though the respondent was in default in respect of the arbitral procedure, the calimant would have to establish the merits of his case before the arbitral tribunal.

130. It was suggested that the time-limits provided for in this article might be too short, taking into account the distances and possible delays in communications. It was also suggested that a flexible approach in giving the arbitral tribunal some discretion in setting time-limits might be appropriate.

131. The view was also expressed that it would be appropriate to make clear in paragraph (3) that the arbitral tribunal should give a party a period of time to show that he had sufficient cause for his failure to appear at a hearing.

Award

Types of award

Article 25

132. The text of article 25 as considered by the Working Group was as follows:

Article 25

Where the arbitral tribunal makes an award which [is apparently] [indicates that it is] not intended to settle the dispute in full, the making of such an (interim, interlocutory, or partial) award does not terminate the mandate of the arbitral tribunal.

133. The Working Group agreed that it was useful to have a provision on awards which do not settle the dispute in full.

134. The Working Group was of the view that if an enumeration of different types of awards not settling the claim in full (i.e. interim, interlocutory and partial) were to be retained at all, it should be made by way of illustration only. By such an approach difficulties arising from possible differences in the meaning of these words in various legal systems would be avoided.

135. The Working Group noted that both articles 25 and 34 seek to ensure the continuation of the mandate of the arbitral tribunal in cases of awards which do not settle the dispute in full and that co-ordination in the drafting of these two articles would be appropriate.

Making of an award

Article 26

136. The text of article 26 as considered by the Working Group was as follows:

Article 26

(1) When there are three or another uneven number of arbitrators, any award [or other decision of the arbitral tribunal] shall be made by [all or] a majority of the arbitrators, provided that all arbitrators have taken part in the deliberations leading to the award [or decision].

[(2) In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.]

137. There was general agreement that this article was not mandatory on the parties and that the article should so state.

138. There was general agreement that the actual participation of all the arbitrators in the deliberations should not be a condition for the validity of the award. The prevailing view was that it should be expressly stated in this article that the award could be made by a majority of the arbitrators provided that all the arbitrators had had the opportunity to take part in the deliberations. Under another view such a condition was self-evident and, if expressly mentioned in the model law, could give rise to a wrong impression that an arbitrator had a right to refuse to take part in the deliberations. The proponents of this view therefore proposed that the model law should not mention the condition that the arbitrators must be given an opportunity to take part in the deliberations.

139. It was suggested that the wording of the article should leave no doubt that the term "majority" means "more than half of all appointed arbitrators" and does not mean "more than half of those who made the award".

140. There was general agreement that the provisions of paragraph (2) should be retained , even though it was recognized that it is not always easy to distinguish between substance and procedure. The view was expressed that once the presiding arbitrator decided a procedural question on his own, the other arbitrators should not have the possibility to change his decision. However, the prevailing view was that the arbitral tribunal should retain the possibility of controlling all the decisions made by the presiding arbitrator.

Form of award

Article 27

141. The text of article 27 as considered by the Working Group was as follows:

Article 27

(1) An award shall be made in writing and shall be signed by the arbitral tribunal. If, in arbitration proceedings with more than one arbitrator, the signature of an arbitrator cannot be obtained, the signatures of a majority of the arbitrators shall suffice, provided that the fact and the reason for the missing signature are stated.

(2) An award shall be made at the place of arbitration (article 18). It shall state the place where and the date on which it is made. [The award shall be deemed to have been made at the place and on the date indicated therein.] [Failing such indication, the award shall be deemed to have been made at the place of arbitration and on the date on which it is signed by the arbitral tribunal.]

(3) The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given. The arbitral tribunal is not obliged to give reasons for an award on agreed terms.

142. The policy underlying paragraph (1) of this article was supported. It was suggested that the words "arbitral tribunal" in the first sentence of paragraph (1) should be replaced by the word "arbitrators" to make it clear that it was the arbitrators who must sign the award and not for example the presiding arbitrator or secretary of the arbitral tribunal on behalf of the tribunal. It was also observed that in cases of arbitral tribunals composed of five or more arbitrators the award could be valid even if more than one signature was missing. It was agreed that paragraph (1) covered all such cases.

143. Regarding paragraph (2) of this article there was general agreement that as a matter of principle the arbitral tribunal should make the award at the place of arbitration. However, it was recognized that for reasons of convenience of the arbitrators and the parties an award was often decided upon and signed in some other place.

144. Under the prevailing view the model law should not make doubtful the validity of the award for the sole reason that the final agreement by the arbitrators on the award was not reached at the place of arbitration. It was suggested, however, that the model law should not imply that the arbitral tribunal has a right to state a fictitious place of making the award. Therefore, under this view no provision establishing a presumption on the place of making the award should be included in the model law. After the discussion it was agreed that the basis of further discussions would be a provision to be drafted by the Secretariat providing that the place of arbitration should be stated in the award and that the award is deemed to be made at the place of arbitration.

145. There was general agreement that paragraph (3) of this article was acceptable.

Pleas as to arbitrator's jurisdiction

Article 28

146. The text of article 28 as considered by the Working Group was as follows:

Article 28

(1) [Subject to the provisions of paragraph (3) of this article,] a plea that the arbitral tribunal does not have jurisdiction, including any objections

with respect to the existence or validity of the arbitration agreement, may be raised only in the arbitration proceedings and not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim. /A plea that the arbitral tribunal has exceeded its terms of reference shall be raised during the arbitration proceedings promptly after the matter is raised on which the tribunal is alleged to have no jurisdiction./ /Where the delay in raising the plea is due to a cause which the arbitral tribunal deems justified, it shall declare the plea admissible./

/(2) The fact that a party has appointed, or participated in the appointment, of an arbitrator does not preclude that party from raising a plea referred to in paragraph (1) of this article./

/(3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, a court subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay its ruling on the jurisdiction of the arbitral tribunal until the arbitral award is made, unless it has good and substantial reasons to the contrary./

147. Under one view the policy expressed by paragraph (1), that court intervention on the question of the jurisdiction of the arbitral tribunal should not be permitted prior to the making of the final arbitral award, was correct. It was said that in many countries courts are not prepared to act promptly on such questions with the result that the arbitration might be unduly delayed.

148. Under the prevailing view, however, while arbitral tribunals should have the power to rule on their own jurisdiction, as is recognized under article 29, it would be improper to divest the courts of a concurrent power to rule on the jurisdiction of the arbitral tribunal. In regard to the wording of paragraph (1), this result was achieved by deletion of the word "only" in the first sentence. It was noted, however, that this deletion did not affirmatively state the power of the courts in this regard.

149. It was suggested that it should be made clear in the model law that the arbitral tribunal could proceed with the case during the period a court was considering whether the arbitral tribunal had jurisdiction over the dispute.

150. With this recognition of the concurrent power of the court and the arbitral tribunal the rest of paragraphs (1) and (2) were generally acceptable to the Working Group.

151. The prevailing view was in favour of deleting paragraph (3). It was recognized, however, that paragraph (3) derived from an existing convention and that it should not therefore be discarded without a second consideration. As a possible solution the Secretariat was requested to draft a text incorporating the basic idea of paragraph (3) into an expanded article 5.

Article 29

152. The text of article 29 as considered by the Working Group was as follows:

Article 29

(1) The arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration clause, in accordance with the provisions of article 4, or of the separate arbitration agreement.

(2) The arbitral tribunal may rule on a plea concerning its jurisdiction either as a preliminary question or in the final award.

153. The Working Group was in general agreement with this article. Some support was expressed for an additional provision that a ruling by the arbitral tribunal on jurisdiction as a preliminary question should always be made in the form of an interlocutory award so as to allow an appeal to the courts from the interlocutory award.

Article 30

154. The text of article 30 as considered by the Working Group was as follows:

Article 30

A ruling by the arbitral tribunal that it has jurisdiction may be contested by either party,

Alternative A: whether it was made as a preliminary question or in the final award, only by way of recourse against the award under the procedure laid down in article ...

Alternative B: (a) if it was made as a preliminary question, /within one month/ before the Authority specified in article 17, which has the power to order the termination of the arbitration proceedings for lack of jurisdiction;

(b) if it was made in the final award, by way of recourse against the award under the procedure laid down in article ...

155. Under one view it was not necessary to regulate the time for appeal against a ruling by the arbitral tribunal since the decision of the Working Group in respect of article 28 would permit a party to resort directly to a court at any time. The prevailing view, however, was that, despite the possibility of direct resort to a court, it would be useful to regulate the time for appeal for those cases in which a party chose to raise its objections regarding jurisdiction before the arbitral tribunal. Nevertheless, it was generally agreed that the final decision on this point could be taken only after the final wording of article 28 had been established.

156. Under the prevailing view a party should be able to contest a ruling by the arbitral tribunal that it had jurisdiction only by recourse against the final award, as provided in alternative A.

157. The Working Group was divided as to whether the parties should have the possibility of contesting a ruling by the arbitral tribunal that it had no jurisdiction. The Working Group reserved its final position on this point.

Law applicable to substance of dispute

Article 31

158. The text of article 31 as considered by the Working Group was as follows:

Article 31

(1) The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. /Parties may so designate any national law or, even if not yet in force, a pertinent international convention or uniform law./

(2) Failing such designation by the parties, the arbitral tribunal shall apply

Alternative A: the law determined by the conflict of laws rules which it considers applicable.

Alternative B: the substantive law rules which it considers most appropriate /, taking into account the various factors of the transaction and the interests of the parties/. /Such rules may form part of a given national legal system or of an international convention or uniform law, even if not yet in force./

(3) The arbitral tribunal /shall decide in accordance with the terms of the contract and/ shall take into account the usages of the trade applicable to the transaction. /It shall apply any usage to which the parties have agreed; the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned./

159. Under one view the model law should not contain conflict of law rules on the substance of the dispute. It was noted that such rules are complex and cannot be reduced properly to short formulas. It was also noted that in some States the rules on conflict of laws are contained in a single law or code governing private international law in general. The introduction into this model law of rules on the conflict of laws for use in international commercial arbitration would make it difficult for those States to assimilate the model law into their legal system.

160. Under the prevailing view, however, it would be useful to have general guidelines as to the law applicable to the substance of the dispute in international commercial arbitrations. The Working Group decided, therefore, to retain a text based upon this article.

161. The Working Group was agreed that the basic rule should be the autonomy of the parties to designate the applicable law. It decided, therefore, to retain the first sentence of paragraph (1). It also decided that the sentence should be drafted so as to indicate clearly that the designation by the parties of the law of a given State referred to the substantive rules of law of that State and not to its conflict of law rules, unless the parties have otherwise indicated.

162. There was general agreement to delete the second sentence of paragraph (1). It was felt that the designation of an international convention or uniform law which was not yet in force in any State would cause difficulties in determining the relationship between that text and the other national law applicable to the substance of the dispute. It was suggested that such a text could become applicable to the dispute only as a part of the contract and then only if the parties had so indicated. However, it was also suggested that the statement as to the autonomy of the parties might be broadened in this article to enable the parties implicitly to designate parts of different systems of law as applicable to the substance of their dispute. It was suggested that the autonomy of the parties could be broadened implicitly by a rule according to which "the tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties".

163. There was general agreement that alternative A of paragraph (2) was preferable. It was agreed, however, that the choice of either alternative A or alternative B would probably lead to the same result in practice.

164. Under one view trade usages are part of the applicable law. Under this view the obligation to apply trade usages was impliedly incorporated in paragraph (1). Therefore, paragraph (3) could be deleted.

165. Under the prevailing view, however, the model law should contain an express provision that the arbitral tribunal should decide according to the terms of the contract and take into account the usages of the trade applicable to the transaction.

166. It was agreed to delete the second sentence of paragraph (3). This sentence, which was taken from the 1980 Vienna Sales Convention, was thought to be applicable to contracts of sale and perhaps other international trade contracts but not to be applicable to some other types of contracts which might give rise to disputes subject to this law, such as investment contracts.

167. Noting the strong support for maintaining the autonomy of the parties in choosing the law applicable to the substance of the dispute, a view was expressed that similar freedom of choice should be given to parties in transactions having international links to include a provision in their agreement that the model law shall apply, thereby avoiding possible uncertainty in determining whether the model law or domestic law applies. This view could be considered in connexion with the next draft of article 1.

Article 32

168. The text of article 32 as considered by the Working Group was as follows:

Article 32

The arbitral tribunal shall decide ex aequo et bono [or as amiable compositeur] [only] if the parties have expressly authorized it to do so.

169. There was general agreement that this article was acceptable, even though many States do not provide for such arbitrations. The prevailing view was to retain both expressions ex aequo et bono and amiable compositeur in the model law because under some national laws there might be a difference in meaning between them.

170. The prevailing view was to maintain the word "only" in the second square brackets in order to indicate that the procedure was an exceptional one.

Settlement

Article 33

171. The text of article 33 as considered by the Working Group was as follows:

Article 33

Alternative A: (1) If, during the arbitration proceedings, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.

Alternative B: (1) If, during the arbitration proceedings, the parties agree on a settlement of the dispute, the arbitral tribunal shall, if requested by [both parties] [a party, unless the arbitration agreement requires a request by both parties], record the settlement in the form of an arbitral award on agreed terms, unless the arbitral tribunal has [good and substantial] [compelling] reasons, in particular grounds of international public policy, not to follow that request.

(2) An award on agreed terms shall be made in accordance with the provisions of articles 27 and 35 and shall state that it is an award [on agreed terms]. Such an award [has the same status and executory force as] [shall be treated like] any other award on the merits of the case.

172. There was general agreement that alternative A of paragraph (1) was preferable.

173. However, in this context a view was expressed that the procedure for recording a settlement as an award on agreed terms would not be necessary if the model law would provide for the enforceability of the settlement agreement as such.

174. It was suggested that the arbitral tribunal should be empowered to record a settlement in the form of an arbitral award on agreed terms on the request of either party. It was pointed out that it is often the case that only the party who is to receive payment under the award has an interest in converting the settlement into an award which can then be enforced under the 1958 New York Convention.

175. On the other hand, it was noted that a settlement may be ambiguous or subject to conditions that might not be apparent to the arbitral tribunal. According to this view, which received a majority of the support, there were fewer dangers of injustice by requiring both parties to request an award on agreed terms.

176. The Working Group was of the view that the arbitral tribunal should have the right to decide whether it would record the settlement in the form of an agreed award.

Correction and interpretation of award

Article 34

177. The text of article 34 as considered by the Working Group was as follows:

Article 34

(1) [Unless otherwise agreed by the parties,] within thirty days after the receipt of the award, either party, with notice to the other party, may request the arbitral tribunal

(a) to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature; the arbitral tribunal may, within thirty days after the communication of the award, make such corrections on its own initiative;

(b) to give, within forty-five days, an interpretation of a specific point or part of the award; such interpretation shall form part of the award;

(c) to make an additional award as to claims presented in the arbitration proceedings but omitted from the award; if the arbitral tribunal considers such request to be justified and that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

(2) The provisions of articles 27, paragraphs (1) and (2), and 35 shall apply to a correction, interpretation or an additional award.

178. The Working Group was in general agreement that the arbitral tribunal should have the right to correct any errors in computation, any clerical or typographical errors, or any errors of similar nature as provided in paragraph (1) (a), and that the parties should not be able to stipulate to the contrary. The Working Group did not feel, however, that the time-limit of 30 days was of a similar mandatory character.

179. In respect of paragraph (1) (b) the prevailing view was that the right of a party to request an interpretation of the award was not subject to the contrary agreement of the parties. The Working Group was not in agreement as to whether the interpretation should form part of the award and it was decided to put this portion of the paragraph in square brackets.

180. The Working Group agreed to retain paragraph (1) (c). The Working Group also agreed that the provision was not binding on the parties.

181. A question was raised and referred for later decision as to whether it was preferable to provide in each article of the model law whether that article or a part of it was binding on the parties or whether it was preferable to have a single provision on that subject.

182. It was noted that the time-limits should be in harmony with the time-limits for "attacking" an award in the courts.

183. The Working Group also noted that this article should be harmonized with the provisions of articles 25 and 36.

Delivery and registration of award

Article 35

184. The text of article 35 as considered by the Working Group was as follows:

Article 35

(1) After an award is made under article 27, copies thereof signed by the arbitral tribunal shall be communicated to the parties.

(2) Upon request by [the parties] [either party], the original award shall be filed with the Authority specified in article 17. [This provision shall not be interpreted as making such filing a pre-condition for recognition or enforcement of the award.]

185. There was general agreement that paragraph (1) should be retained. It was suggested that the words "by the arbitral tribunal" should be replaced by the words "by the arbitrators in accordance with article 27". It was also noted that arbitrators sometimes withheld their award until the parties had paid the fees and expenses for the arbitration and that this practice should not be precluded by the model law.

186. The Working Group decided to delete paragraph (2).

Executory force and enforcement of award

Article 36

187. The text of article 36 as considered by the Working Group was as follows:

Article 36

Alternative A: Subject to any multilateral or bilateral agreement entered into by the State in which this Law is in force, an arbitral award as defined in article 1

Alternative B: An arbitral award as defined in article 1 and considered as a domestic award in the State in which this Law is in force

shall be recognized as binding and enforced in accordance with the following rules of procedure:

(a) An application for recognition and enforcement of an arbitral award shall be made in writing to [the Authority specified in article 17];

(b) The party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 3 or a duly certified copy thereof. [If the said award or agreement is not made in an official language of [the Authority] [this State], the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language, certified by an official or sworn translator or by a diplomatic or consular agent.]

188. There was general agreement that the model law should provide a uniform system of enforceability for the international awards rendered in the country which adopted the model law. It was also agreed that if according to the law of that country enforceability of such international awards was recognized under less stringent conditions than those of the model law, the less stringent conditions should prevail.

189. The Working Group requested the Secretariat to prepare as a separate article draft provisions on the enforceability of international awards rendered abroad.

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