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REPORT OF THE WORKING GROUP ON
INTERNATIONAL CONTRACT PRACTICES
ON THE WORK OF ITS FIFTH SESSION
(New York, 22 February-4 March 1983)

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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. At its fourth session the Working Group completed its discussion on questions prepared by the Secretariat on possible features of a draft model law and some further issues of arbitral procedure possibly to be dealt with in a draft model law. At that session the Working Group also considered draft articles 1 to 36 of a draft model law prepared by the Secretariat. 3/
4. 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.
5. The Working Group held its fifth session in New York from 22 February to 4 March 1983. All the members were represented except Ghana.
6. The session was attended by observers from the following States: Argentina, Australia, Brazil, Bulgaria, Burma, Chile, China, Ecuador, Egypt, Fiji, Finland, German Democratic Republic, Germany, Federal Republic of, Greece, Holy See, Iraq, Italy, Malaysia, Mexico, Norway, Peru, Republic of Korea, Rwanda, Spain, Sudan, Sweden, Switzerland, Thailand, Turkey and Uruguay.
7. The session was attended by observers from the following United Nations Secretariat units: United Nations Conference on Trade and Development and United Nations Industrial Development Organization. The session was also attended by observers from the following intergovernmental organizations: Asian-African Legal Consultative Committee, European Economic Community and Hague Conference on Private International Law, and from the following international non-governmental organizations: International Bar Association, International Chamber of Commerce, International Council for Commercial Arbitration and International Law Association.
8. The Working Group elected the following officers:

 Chairman: Mr. I. Szasz (Hungary)

 Rapporteur: Mr. P. K. Mathanjuki (Kenya)

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.

3/ Report of the Working Group on International Contract Practices on the work of its fourth session, A/CN.9/232.

9. 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) Report of the Working Group on International Contract Practices on the work of its fourth session (Vienna, 4-15 October 1982) (A/CN.9/232);
 - (d) Provisional agenda for the session (A/CN.9/WG.II/WP.39);
 - (e) Note by the Secretariat: revised draft articles I to XXVI on scope of application, arbitration agreement, arbitrators, arbitral procedure and award (A/CN.9/WG.II/WP.40);
 - (f) Note by the Secretariat: possible further features and draft articles of a model law (A/CN.9/WG.II/WP.41);
 - (g) Note by the Secretariat: draft articles 37 to 41 on recognition and enforcement of award and on recourse against award (A/CN.9/WG.II/WP.42).
10. 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

11. The Working Group considered possible further features and tentative draft articles of a model law prepared by the Secretariat, as contained in document A/CN.9/WG.II/WP.41. The Working Group requested the Secretariat to redraft those articles in the light of its discussion and decisions at the present session.
12. The Working Group also considered revised draft articles I to XII, XXV and XXVI of a model law prepared by the Secretariat, as contained in document A/CN.9/WG.II/WP.40. The Working Group decided to continue at its next session its discussion on revised draft articles XIII to XXIV not yet considered. The Working Group requested the Secretariat to redraft revised draft articles I to XII, XXV and XXVI in the light of its discussion and decisions at the present session.
13. The Working Group further considered tentative draft articles 37 to 41 of a model law prepared by the Secretariat, as contained in document A/CN.9/WG.II/WP.42. The Working Group requested the Secretariat to redraft those articles in the light of its discussion and decisions at the present session.

14. The Working Group noted that probably two more sessions would be required to complete the task entrusted to it by the Commission. Subject to approval by the Commission, the Working Group decided to hold its sixth session from 29 August to 9 September 1983 at Vienna and the seventh session some time in February 1984, subject to the progress to be made at the sixth session. With regard to the languages to be used at meetings of the Working Group, a view was expressed that Arabic interpretation should be provided whenever such service was available.

I. CONSIDERATION OF FURTHER FEATURES AND DRAFT ARTICLES OF A
MODEL LAW (A/CN.9/WG.II/WP.41)

A. Adaptation of contracts and filling of gaps in contracts

15. The Working Group considered the question whether the model law should deal with the power of an arbitral tribunal to adapt a contract or fill gaps in a contract (on the basis of a note by the Secretariat, WP.41, paras. 2-11 and draft article A).

16. The Working Group noted that, especially in contracts performed over a longer period of time, the parties are often faced with the need to adapt or supplement their contract. It was also noted that it was inherent in the principle of autonomy of the parties that the parties may entrust a third person to decide on how the contract should be adapted or supplemented.

17. However, divergent views were expressed on the question whether the arbitral tribunal in this very capacity may be empowered by the parties to adapt or supplement their contract and whether an express rule to this effect should be included in the model law.

18. Under one view, the arbitral tribunal may assume the role of a third party intervener if the parties so wish, and by assuming such a role it still functions as an arbitral tribunal. Under this view, a rule to this effect would be useful because it would ensure that the process of adapting or supplementing a contract by the arbitral tribunal would be subject to the same procedural safeguards as the process of settling legal disputes. Also, the decision of the arbitral tribunal adapting or supplementing a contract should form an integral part of the contract between the parties and it should be subjected to the same rules as an arbitral award.

19. Under another view, the question of adapting or supplementing contracts by arbitral tribunals should not be dealt with in the model law. There were difficulties and uncertainties in drawing the line between procedural and substantive questions. It was also difficult to distinguish between gaps left intentionally by the parties and those "gaps" which tended to exist in every contract, since a contract is unlikely to expressly deal with each and every possible contingency, and which may become apparent only in the course of the performance of the contract.

20. The Working Group postponed its decision on whether the model law should contain a provision on this issue. It requested the Secretariat to study the matter and, if appropriate, prepare a revised draft provision on adaptation and supplementation of contracts taking into account the views and concerns expressed in the discussion.

B. Commencement of arbitral proceedings and cessation of running of limitation period

21. The Working Group considered the question whether the model law should deal with issues relating to the cessation of the running of limitation periods by instituting arbitration proceedings (on the basis of a note by the Secretariat, WP.41, paras. 12-18 and draft article B). Divergent views were expressed as to whether such a rule should merely define the point of time at which a limitation period, if provided in a national law, would cease to run or whether the rule, for the sake of unification of laws, should itself regulate the cessation of the running of any limitation period. Some support was expressed for a broader rule which would indicate the cessation of the running of a limitation period as a legal consequence of the commencement of arbitral proceedings.

22. However, there was wide support in the Working Group that the model law should contain a rule which would define the moment of the commencement of arbitral proceedings. It was pointed out in support of that view that such a rule was sufficient for the model law and that any consequences of the commencement of arbitral proceedings, such as cessation of the running of the limitation period, touched upon questions which were outside the field of arbitral procedure and should therefore not be dealt with in the model law. It was also felt that a rule on the cessation itself, in order to be useful and workable, would have to be much more elaborate and settle many details which, in turn, could easily be in conflict with existing laws on prescription.

23. The Working Group requested the Secretariat to prepare a draft provision in the light of the discussion at this session.

C. Minimum contents of statements of claim and defence

24. The Working Group considered the question whether the model law should contain a provision, whether mandatory or not, on the minimum contents of the statements of claim and defence (on the basis of a note by the Secretariat, WP.41, paras. 19-21).

25. There was general agreement that the model law should contain a rule on the initial pleadings by the parties. The prevailing view was that such a rule should only deal with those elements of initial pleadings which were essential for defining the dispute on which the arbitral tribunal is to give a decision. Some support was expressed for adding procedural rules along the lines of articles 18 to 20 of the UNCITRAL Arbitration Rules to provide guidance to the parties and the arbitrators in cases where the parties have not themselves made any provision.

26. The Working Group deferred its decision on the question whether rules on initial pleadings by the parties should be mandatory or non-mandatory. The Working Group requested the Secretariat to draft tentative provisions on the basis of the discussion and conclusions at the present session.

D. Languages in arbitral proceedings

27. The Working Group considered whether the model law should contain a provision on the language or languages to be used in arbitral proceedings (on the basis of a note by the Secretariat, WP.41, paras. 22-26 and draft article D).

28. There was general agreement that a provision on the language to be used in arbitral proceedings was useful. The Working Group supported the principle that the parties and, in the absence of an agreement by the parties, the arbitrators should be free to determine the language or the languages of the proceedings. A clear statement of that principle appeared desirable to avoid a possible interpretation that the official (court) language used at the place of arbitration should also be decisive for the arbitral proceedings.

29. The Working Group expressed the view that there was no need for the model law to suggest to the parties to use their best efforts to agree on a single language because such a suggestion was either superfluous or without effect for lack of sanction. The view was also expressed that, while it was implied that in determining the language of the proceedings the arbitral tribunal must have regard to the circumstances of the case, it was not appropriate to expressly state that requirement because it could create unnecessary disagreements over the weighing of different circumstances and because it was in a way self-evident.

30. It was also suggested that, in order to avoid misunderstandings, the model law should make it clear that the determination of a language or languages may relate to all or only certain documents or communications to be specified (e.g., as envisaged in article 17 of the UNCITRAL Arbitration Rules). In that context it was suggested that the arbitral award might be regarded as not forming part of the arbitral proceedings and that the question of the language of the award should be covered by such provision.

E. Court assistance in taking evidence

31. The Working Group considered the question whether the model law should deal with issues relating to the right of an arbitral tribunal or the parties to request a court for assistance in taking evidence (on the basis of a note by the Secretariat, WP.41, paras. 27-37 and draft articles E1 to E3).

32. Divergent views were expressed as to the question whether the model law should deal with court assistance in taking evidence. The prevailing view was that a possibility of requesting such assistance would facilitate the functioning of international commercial arbitration and that, therefore, rules on these issues were desirable. Under another view, the possibility of a court being active in taking evidence to be used in arbitral proceedings was contrary to the private nature of arbitration and might lead to undesirable intervention of courts in arbitral proceedings.

33. The Working Group discussed the two alternative approaches contained in draft article E1. The first alternative was that the requested court merely contributed the element of compulsion and thus enabled the arbitral tribunal to take evidence, and the second alternative was that the requested court took the evidence itself. Some support was expressed for each alternative. However, the view prevailed that a combination of both alternatives was desirable. Such a combined approach would allow the court which was requested to give assistance to decide whether assistance is to be given in such a way that the court itself takes evidence or whether compulsion is to be provided by the court to enable the arbitral tribunal to take evidence. Such a combined approach would also have the advantage of allowing the court to give assistance according to its own rules of procedure.

34. Divergent views were expressed as to the question whether a party should have a right to directly request a court for assistance. The prevailing view was that a party should request for court assistance only through the arbitral tribunal or with its approval, in order to prevent abuse of court assistance. Under another view, account should be taken of arbitration practice according to which arbitral tribunals are not involved in gathering evidence. According to this view, the mere fact that court assistance was needed in procuring evidence did not warrant involving the arbitral tribunal in the process of gathering evidence.

35. In respect of article E2, which contained provisions on the contents of a request for court assistance, there was general agreement that this provision was too detailed and should not be included in the model law.

36. In respect of article E3, which contained provisions on assistance by the courts of the State which adopted the model law to foreign arbitral tribunals, the prevailing view was that, if court assistance were to be regulated at all in the model law, a provision on such international court assistance would be useful. The Working Group supported the view that requests by foreign arbitral tribunals should be treated like similar requests by foreign courts (as expressed in paragraph (2) of article E3). It was suggested that this rule would be more easily acceptable if a request for assistance from a foreign court would have to be made through a court in the State in which the arbitration took place.

37. It was further suggested that the model law should not contain detailed procedural rules on international court assistance to arbitral tribunals and that it might be desirable to elaborate such rules either in a separate convention or by extending an existing convention. The Working Group requested the Secretariat to take note of that suggestion as a possible future item of work to be discussed by the Commission.

F. Termination of arbitral proceedings

38. The Working Group considered the question whether it would be appropriate to include in the model law a provision on termination of arbitral proceedings (on the basis of a note by the Secretariat, WP.41, paras. 38-41 and draft article F).

39. There was wide support in the Working Group for the view that the model law should contain a provision on termination of arbitral proceedings. Such a provision would be useful because it would provide certainty in respect of important consequences of the termination of arbitral proceedings.

40. The prevailing view was that there should be no automatic termination of arbitral proceedings and that a procedural decision by the arbitral tribunal was needed for terminating the arbitral proceedings. However, it was suggested that the wording should indicate that a special order of termination was not always necessary, for example, when the dispute was settled by an agreement of the parties or by an award on the merits of the claim.

41. It was also suggested that the model law should contain a rule empowering the arbitral tribunal to decide whether it was appropriate to terminate the proceedings after the tribunal gave suitable notice to the parties of its intention to terminate the proceedings.

G. Period for enforcement of arbitral awards

42. The Working Group considered the question whether the model law should contain a provision on the period during which an arbitral award may be enforced (on the basis of a note by the Secretariat, WP.41, paras. 42-45 and draft article G).

43. The prevailing view was that such a provision was useful for reasons of certainty. Under another view, such a rule was not necessary because States had solutions to this question and there was no need that the model law attempted a unification of this issue. In support of this view it was pointed out that a number of national laws treated arbitral awards like court decisions in this respect.

44. The Working Group felt that alternative B providing a period with a fixed time-limit was to be preferred for reasons of simplicity in its application.

45. Divergent views were expressed concerning the starting point for the period for enforcement of arbitral awards. Under one view, the period should start to run from the date when the award was made. Under another view, the starting point should be the date when the award was received by the party requesting the enforcement. Under yet another view, the starting point should be the date when the award was received by the party against whom enforcement is sought. The Secretariat was requested to prepare a draft provision reflecting the views expressed by the Working Group.

II. CONSIDERATION OF REVISED DRAFT ARTICLES I TO XXVI OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (A/CN.9/WG.II/WP.40)

46. The Working Group proceeded to a consideration of revised draft articles I to XXVI for a model law on international commercial arbitration (set forth in document A/CN.9/WG.II/WP.40). Those revised draft articles had been prepared by the Secretariat on the basis of the discussion and decisions of the Working Group at its fourth session (see the report of the Working Group, A/CN.9/232, paras. 24-189). Of these revised draft articles, the Working Group considered, at the present session, articles I to XII and then articles XXV and XXVI.

A. Scope of application

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

Article I

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

(2) "Arbitration" includes [all matters of arbitration, in particular]

(a) arbitration agreements [as defined in article II, para. (1)];

(b) the preparation and conduct of arbitration proceedings based on such agreements whether or not administered by a permanent arbitral institution; and

(c) the arbitral awards resulting therefrom.

(3) "Commercial" refers to any [defined legal] relationship of a commercial [or economic] nature [including, for example, any trade transaction for the supply or exchange of goods, factoring, leasing, construction of works, consulting, engineering, commercial representation, investment; joint venture and other forms of industrial or business co-operation, financing, or providing of services].

(4) "International" are those cases where the arbitration agreement is concluded by parties whose places of business are in different States. If a party has more than one place of business, the relevant place of business is [that which has the closest relationship to the arbitration agreement] [the seat of the head office].

Paragraph (1)

48. The Working Group was agreed that the model law should specify its scope of application. It was also agreed that this scope - in line with the mandate given to the Working Group by the Commission - was "international commercial arbitration", as stated in paragraph (1).

49. However, divergent views were expressed as to the "definitions" of the three elements ("arbitration", "commercial", "international") suggested in paragraphs (2), (3) and (4). As a result of the decisions on those paragraphs (see below, paras. 50-60), the Working Group decided to delete the words "as specified in paragraphs (2), (3) and (4) of this article" and requested the Secretariat to consider combining the remaining words of paragraph (1) with other provisions in a revised concise draft of the whole article.

Paragraph (2)

50. Some support was expressed for retaining paragraph (2) with some modifications. The prevailing view, however, was that the provision should not be retained, except for the useful clarification that the model law covered arbitration whether or not administered by a permanent arbitral institution. It was thought that paragraph (2) did not contain a definition of the term "arbitration" but merely a table of contents and was therefore superfluous (since *lex ipsa loquitur*). In addition, it might even be harmful by not being complete.

51. The Working Group, after deliberation, decided to delete paragraph (2) but to retain the idea expressed by the words "whether or not administered by a permanent arbitral institution" in subparagraph (b). It was suggested that those words might be inserted in article II, paragraph (1), after the words "submit to arbitration".

Paragraph (3)

52. The Working Group was agreed that the term "commercial" should be given a wide interpretation but divergent views were expressed as to whether and, if so, in what manner the term should be defined in the model law. There was even some concern as to the use of the term as such in that, under some legal systems, it might be construed as applying only to transactions by "commercial persons" (merchants) as defined by a given national law.

53. Under one view, the model law should not attempt to define the term "commercial" since no satisfactory definition had been found to date. Under another view, which also recognized the great difficulties in finding a workable definition, it was sufficient to state in general terms that "commercial" referred to a "relationship of a commercial nature or", as supported by some

representatives, "of an economic character". In support of those views, it was pointed out that the illustrative list of commercial transactions set forth in paragraph (3) was inappropriate for various reasons: (a) inclusion of a list of examples was contrary to the legislative techniques in a number of legal systems; (b) courts might interpret the list as exhaustive despite its express illustrative nature; (c) the examples contained in the list were unbalanced in that important transactions were missing (e.g., maritime transport, banking, insurance, licensing); (d) some of the examples (e.g., consulting, providing of services) were too wide or vague and thus more harmful than helpful.

54. Under yet another view, however, it was useful to include in the model law a list, despite its shortcomings, since it would provide some guidance and help to prevent too restrictive interpretations as found in some national laws or legal doctrine. The proponents of that view suggested various amendments to the list.

55. In view of the divergency of views in the Working Group, it was also suggested that the list could be placed in a footnote to article I rather than in the body of the text itself. Yet another suggestion was to include the list in a commentary, if one were to be published with the final model law.

56. The Working Group, after deliberation, decided not to retain paragraph (3). It requested the Secretariat to draft a footnote to the term "commercial" in paragraph (1), which would contain the substance of paragraph (3) and take into account the suggested amendments and the need for clarifying that not only transactions between merchants but also others were covered.

Paragraph (4)

57. There was general agreement that the term "international" should be given a wide interpretation. However, divergent views were expressed as to how this could be done in a satisfactory and clear manner.

58. Under one view, the definition suggested in paragraph (4) did not fully correspond with international practice and excluded some important international situations (e.g., arbitration between parties of same State about foreign subject-matter; arbitration between parties of same State, one of which is controlled and managed by foreign company). It was suggested, therefore, to adopt a more general formula such as, e.g., "transaction involving international trade interests". Another suggestion in this direction was to add to paragraph (4) a provision allowing parties to agree on the application of the model law provided that there was an international element in their relationship (possibly to be established by objective criteria such as the ones mentioned in footnote 7 of WP.40).

59. The prevailing view was that the first sentence of paragraph (4) presented a solid basis for determining the international character. As to the second sentence, divergent views were expressed as to which of the alternative solutions was to be preferred. In support of the second alternative (i.e. seat of head office, or better: principal place of business) it was noted that that text provided greater certainty and would enhance the applicability of the model law. There was wider support, however, for the first alternative (closest relationship) since it was similar to the solution adopted in the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980; article 10 (a)) and because it reflected the probable interests and wishes of the parties. It was suggested that the relevant connecting factor was not only the arbitration agreement but also its implementation and, possibly, the subject-matter of the dispute.

60. The Working Group, after deliberation, decided to retain paragraph (4), except for the second alternative, as a basis for future reconsideration and requested the Secretariat to prepare, for future consideration, an additional draft provision containing a wider and more general definition, possibly with an enumeration of objective criteria. Such a formula could be used in an "opting-in" provision or as a substitute for paragraph (4) itself.

B. Arbitration agreement

Article II

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

Article II

(1) ["Arbitration agreement" is an agreement by parties to] [In an "arbitration agreement" parties may] submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) The arbitration agreement, whether an arbitration clause in a contract or a separate agreement, shall be in writing [, i.e.] [. An agreement is in writing if it is] contained in a document signed by the parties or in an exchange of letters, telegrams or other communications [in sufficiently permanent form] [of equal evidential value]. The reference in a contract to general conditions, or similar legal texts, containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a part of the contract.

Paragraph (1)

62. The Working Group was agreed that a provision along the lines of paragraph (1) should be retained in the model law. As to the text placed between square brackets, some support was expressed for the second alternative. The prevailing view, however, was in favour of the first alternative since it was deemed useful to cast the provision in the form of a definition.

63. Some support was also expressed in favour of deleting the words "defined legal" since they might lead to an undesirable restriction. However, the prevailing view was to retain those words which were also found in the 1958 New York Convention (art. II (1)).

64. Accordingly, the Working Group decided to retain paragraph (1) with the first alternative. In that context, it was noted that that provision would be an appropriate place for expressing the idea that the model law covered arbitration whether or not administered by a permanent arbitral institution (see above, para. 51).

Paragraph (2)

65. The Working Group was agreed that a provision along the lines of paragraph (2) should be included in the model law.

66. There was some support for expressing the idea that the model law should not invalidate arbitration agreements which did not comply with the requirement of written form. Oral agreements which were common in some places and trades should not be covered by the model law, thus leaving open their regulation and recognition under another law. The prevailing view, however, was that the model law should

govern all international commercial arbitration agreements and, as provided in paragraph (2), require that they be in writing. It was noted in that context that the model law, in its present form, did not fully specify the legal consequences of non-compliance with that form requirement. A suggestion was made to envisage the possibility of parties curing such defect by participating in the arbitration proceedings - an idea, which might be embodied in a waiver rule of more general application (e.g., article 30 of the UNCITRAL Arbitration Rules).

67. As regards the first two alternatives in square brackets, some support was expressed for each of them and additional drafting proposals were made. As regards the second set of alternatives attempting to qualify "the other communications", some support was also expressed for each of them. However, the prevailing view was that neither of those attempts was fully satisfactory. It was, therefore, suggested to adopt the first sentence without any of the alternatives unless the Secretariat could find a more satisfactory wording to express the idea, supported by all, that modern means of communication should be included.

68. As regards the last sentence, some doubts were expressed as to its clarity. The Working Group adopted a suggestion to redraft the sentence as follows: "The reference in a contract to an arbitration clause contained in another legal text constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a term of the contract".

C. Arbitration and the courts

Article III

69. The text of article III as considered by the Working Group was as follows:

[Article III]

In matters governed by this Law, no court shall intervene except where so provided in this Law.]

70. Divergent views were expressed as to the appropriateness of including in the model law a provision along the lines of article III. Under one view, such a provision was unacceptable for a number of reasons:

(a) Its scope and effect could not be determined in view of the disparity between national laws as regards instances of court intervention;

(b) It created the impression that court intervention was something negative and to be limited to the utmost;

(c) It could adversely affect the positive and helpful attitude of courts towards arbitration.

71. Under another view, however, article III should be retained since it provided certainty as to when a court might intervene in arbitration matters and obliged the drafters of the model law to enumerate all such instances. It was also pointed out that the model law, in its present form, already covered most of the cases where control or assistance by courts seemed justified and that in international commercial arbitration control by courts should be kept to a minimum.

72. Under yet another view, it was premature to take a decision on article III since it was not clear at this point what the model law would cover in its final form. It was more important to clarify in model law instances where court intervention was appropriate.

73. That view was adopted by the Working Group after deliberation. Accordingly, the decision on article III was postponed and its underlying policy accepted as an intention of the Working Group to clarify, in the course of the preparation of the draft model law, instances of court intervention.

Article IV

74. The text of article IV as considered by the Working Group was as follows:

Article IV

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

(2) A plea that the court [referred to in paragraph (1)] has no jurisdiction because of the existence of a valid arbitration agreement may be raised by a party not later than in his statement on the substance of the dispute.

(3) Where arbitration proceedings have commenced and such a plea is raised before the court or a party requests from [a court] [the Court specified in article V] a ruling that the arbitral tribunal has no jurisdiction the arbitral tribunal may either continue or suspend the arbitration proceedings until its jurisdiction is decided on by that court.

(4) Any party may address to a court a request for interim measures of protection, whether before or during arbitration proceedings. This shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

75. The Working Group was agreed that article IV should be retained with some suggested modifications. A drafting proposal of general relevance was to make clear in all languages that the term "court" referred to the court of a State as distinguished from an arbitral tribunal.

Paragraph (1)

76. Some support was expressed for deleting the words "at the request of a party". The prevailing view, however, was to retain those words, in line with the corresponding provision in the 1958 New York Convention (article II (1)). Also for the sake of consistency with that important Convention, it was decided to retain the words "shall refer the parties to arbitration" and not to substitute, as suggested by some, the words "shall decline jurisdiction". A suggestion was made to replace the words "shall, at the request of a party, refer the parties to arbitration" by the words "shall, at the request of the parties, refer the issue to arbitration".

77. A suggestion was made that paragraph (1) should not be understood as requiring the court to examine in detail the validity of an arbitration agreement and that this idea could be expressed by requiring only a prima facie finding or by rephrasing the closing words as follows: "unless it finds that the agreement is manifestly null and void". In support of that idea it was pointed out that it would correspond with the principle to let the arbitral tribunal make the first ruling on its competence, subject to later control by a court. However, the prevailing view was that, in the cases envisaged under paragraph (1) where the parties differed on the existence of a valid arbitration agreement, that issue should be settled by the court, without first referring the issue to an arbitral tribunal, which allegedly lacked jurisdiction. The Working Group, after deliberation, decided to retain the text of paragraph (1).

Paragraph (2)

78. The Working Group adopted this paragraph subject to the deletion of the word "valid" and the insertion of the word "first" before the word "statement". A suggestion was made that the words "has no jurisdiction" be modified to reflect the position in some legal systems that, while a court may have jurisdiction, it should decline to exercise that jurisdiction if there is a valid arbitration agreement.

Paragraph (3)

79. It was noted that this provision was related to the issue dealt with in article XIII. It might, therefore, have to be reconsidered in the light of the discussion on that article. It was also suggested to consider rearranging the order of the provisions.

80. As regards the alternatives placed between square brackets, the Working Group was divided on which was the better solution and decided, for the time being, to adopt the first alternative (i.e. "a court"). The Working Group was agreed that the arbitral tribunal should have the procedural power to either continue or suspend the arbitration proceedings when its jurisdiction was challenged before a court. It was noted, however, that the possibility of a suspension might encourage a party to challenge the jurisdiction merely for dilatory purposes. It was, therefore, suggested to seek a wording which could meet this concern. ✓

Paragraph (4)

81. The Working Group requested the Secretariat to redraft this provision so as to express more clearly the idea that the involvement and decision of a court (or other judicial authority) with regard to interim measures of protection was not incompatible with the arbitration agreement. A suggestion was made to include also interim measures of securing evidence (e.g., inspection of goods by independent expert).

Article V

82. The text of article V as considered by the Working Group was as follows:

Article V

(1) The special Court entrusted by this Law with functions of arbitration assistance and control [under articles VIII (2), (3), X (2)/(3), XI (2), XIII (3), XIV, XXV, XXVI ...]

shall be the ... (blanks to be filled by each State when enacting the model law).

(2) Unless otherwise provided in this Law,

(a) this Court shall act upon request by any party or the arbitral tribunal; and

(b) the decisions of this Court shall be final.

Paragraph (1)

83. The Working Group decided to delete the word "special" and requested the Secretariat to redraft the provision without using the term "control".

Paragraph (2)

84. Divergent views were expressed as to the appropriateness of a provision along the lines of paragraph (2). Under one view, the provision was useful in that it regulated some basic features of the procedure to be followed by the Court, with the possibility of making exceptions thereto in the model law itself. In support of subparagraph (b), it was pointed out that it would serve the purpose of expediting the proceedings which was of special importance in international commercial arbitration.

85. Under the prevailing view, however, the provision should not be retained. It was pointed out that paragraph (2), in particular its subparagraph (b), infringed upon fundamental concepts and rules of court procedure. Nevertheless, its procedural features (right to request and finality of decision) might be included in individual provisions of the model law entrusting the Court with certain functions.

86. The Working Group, after deliberation, decided not to retain paragraph (2) and to consider settling the procedural questions in the context of the individual provisions referring to the Court specified in article V.

D. Composition of arbitral tribunal

Article VI

87. The text of article VI as considered by the Working Group was as follows:

Article VI

(1) No person shall be by reason of his nationality precluded from acting as arbitrator, unless otherwise agreed by the parties.

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

Paragraph (1)

88. The Working Group decided to retain this provision.

Paragraph (2)

89. Divergent views were expressed as to the appropriateness of a provision along the lines of paragraph (2). Under one view, such a rule was useful in that it served the purposes of equality and fairness, although the need for such a rule in international commercial arbitration may be limited to few instances. The proponents of this view expressed a preference for the second of either set of alternatives (i.e. "to the extent that" and "manifestly unfair advantage").

90. The prevailing view, however, was to delete paragraph (2) since (a) there was no real need for such a rule in view of the fact that the few instances aimed at could appropriately be dealt with by other provisions of the model law (e.g., on challenge of arbitrator or setting aside of award); (b) the wording was too vague and could thus lead to controversy or dilatory tactics and, above all, to a misinterpretation which could endanger well-established and recognized appointment practices; (c) the legal sanction, in particular the idea of partial invalidity, was not sufficiently clear.

91. The Working Group, after deliberation, decided to delete paragraph (2). That decision, however, should not be understood as condoning practices where one party had a clearly greater influence on the appointment without good reasons.

Article VII

92. The text of article VII as considered by the Working Group was as follows:

Article VII

The parties are free to determine the number of arbitrators. Failing such determination, [three arbitrators] [a sole arbitrator] shall be appointed.

93. The Working Group adopted this article with the first alternative (i.e. "three arbitrators"). It was pointed out that, in view of the parties' freedom recognized in the first sentence, the number of arbitrators provided in the second sentence was of limited practical relevance and merely a last resort in case of non-agreement. In particular, where parties wanted a sole arbitrator for the sake of saving time and costs, they would normally agree thereon.

Article VIII

94. The text of article VIII as considered by the Working Group was as follows:

Article VIII

- (1) Subject to the provisions of article VI (2), the parties are free to agree on a procedure of appointing the arbitrator or arbitrators.
- (2) Failing such agreement,
 - (a) if, in an arbitration with a sole arbitrator, the parties are unable to agree on the arbitrator, he shall be appointed by the Court specified in article V;
 - (b) in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third arbitrator.
- (3) Where [the composition of an arbitral tribunal becomes unduly delayed because] the parties, or two arbitrators, are unable to reach agreement or where one of the parties, or any designated appointing authority, fails to act as required under an agreed appointment procedure or under this Law, the Court specified in article V may be requested [by any party or arbitrator] to take the necessary measure instead.
- (4) The Court, 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 a third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

Paragraph (1)

95. The Working Group noted that, pursuant to its decision on article VI (2) (see para. 91 above), the opening words "Subject to the provisions of article VI (2)" were obsolete. Subject to this deletion, the text of paragraph (1) was adopted.

Paragraph (2)

96. The Working Group adopted this paragraph. A suggestion was made to reverse the order of sub-paragraphs (a) and (b).

Paragraph (3)

97. It was noted that paragraph (3) was not sufficiently clear because it attempted to cover too many different fact situations. The first distinction to be drawn was between appointment procedures agreed upon by the parties and those procedures provided in the model law; it was submitted that in that second category the need for court assistance was greater than in the first one. Another distinction to be made related to the person or institution that failed to act (i.e. a party, the parties, two arbitrators, or an appointing authority).

98. The Working Group was agreed that the words "becomes unduly delayed" were too vague and that more definite time-periods should be set. It was suggested, for example, to fix a time-period of, for example, thirty days or, as between two parties or arbitrators, to require a notice in which a time-period for action would be fixed.

99. The Working Group requested the Secretariat to redraft paragraph (3) in the light of the views expressed in the Working Group.

Paragraph (4)

100. While some concern was expressed about giving a court instructions of the type set forth in paragraph (4), the Working Group decided to retain this provision. A suggestion was made to add to the criteria mentioned in that provision other important features such as competence, qualification, experience.

New rule of interpretation

101. In connection with the discussion on article VIII, the Working Group considered a suggestion by the Secretariat (set forth in the introductory note to document A/CN.9/WG.II/WP.40, para. 4). The suggestion was to express in a general rule of interpretation that (a) the freedom of the parties to determine a certain point included the freedom to authorize a third person or institution to make that determination; and (b) agreement by the parties included any reference to arbitration rules.

102. The Working Group was agreed that such clarification was helpful in view of the common practice of using arbitration rules and entrusting certain decisions to third persons or institutions. It was also preferable to clarify that matter in a general rule rather than in each of the many provisions, where that point was relevant.

Article IX

103. The text of article IX as considered by the Working Group was as follows:

Article IX

(1) 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 [, from the time of his appointment,] shall disclose any such circumstances to the parties unless they have already been informed by him of these circumstances.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

104. The Working Group was agreed that a provision along the lines of article IX was useful. It was noted that the provision should not be understood as requiring the arbitrator to act as a judge on his own impartiality or independence.

105. Some concern was expressed that the provisions of article IX, in particular its paragraph (2) using the word "only", were too restrictive by not covering, for example, the notion of competence or other qualifications possibly included in the agreement on the appointment. The prevailing view was, however, that the issue of competence or other qualifications was more closely related to the conduct of the proceedings than to the initial appointment and that the article should be retained with its present scope.

106. As regards the second sentence of paragraph (1), it was suggested to express more clearly the idea that the duty to disclose was a continuing one, for example, by adding to the words submitted between square brackets the words "and thereafter" or by other appropriate wording.

Article X

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

Article X

(1) The parties are free to agree on the procedure for challenging an arbitrator subject to the provisions of paragraph (3) of this article.

Alternative A:

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after knowing about the appointment or the circumstances referred to in article IX (2), send a written statement of the reasons for the challenge to the other party and to all arbitrators. The mandate of the arbitrator terminates when the other party agrees to the challenge or the arbitrator withdraws from his office; in neither case does this imply acceptance of the validity of the grounds for the challenge.

(3) If a challenge

(a) under paragraph (2) of this article is not successful within 30 days after the receipt of the written statement by the other party and by the challenged arbitrator, or

(b) under any challenge procedure agreed upon by the parties, is neither accepted by the other party or the challenged arbitrator nor sustained by any person or body entrusted with the decision on the challenge,

the challenging party may [request the Court specified in article V to decide on the challenge] [pursue his objections before a court only in an action for setting aside the arbitral award].

Alternative B:

(2) Where an arbitrator is challenged without success, whether or not under a procedure agreed upon by the parties, the challenging party may [request the Court specified in article V to decide on the challenge] [pursue his objections before a court only in an action for setting aside the arbitral award].

Paragraph (1)

108. The Working Group adopted that paragraph.

Paragraphs (2) and (3) of alternative A and paragraph (2) of alternative B

109. The Working Group was divided on whether alternative A or alternative B presented the better approach. Under one view, alternative A was too detailed for a model law, in particular subparagraphs (a) and (b) of paragraph (3), although it was recognized that a time-period was useful. Under another view, alternative A was useful in providing procedural guidance, while alternative B was regarded as too concise. The Working Group, after deliberation, decided to take alternative A as the basis for future consideration and requested the Secretariat to prepare a revised draft with a shorter version of paragraph (3).

110. Divergent views were expressed on whether the challenging party may (a) request the Court specified in article V to decide on the challenge or (b) pursue his objections before a court only in an action for setting aside the arbitral award. The main reason in support of the first alternative was that it would help to settle the question expeditiously and to avoid the unfortunate situation that arbitration proceedings, with a party having challenged an arbitrator, would have to be carried through. The main reason in support of the second alternative was that it would help to prevent dilatory tactics by a party. In response to this, some proponents of the first alternative pointed out that this concern could be alleviated by setting a time-limit for resort to court and by allowing the arbitral tribunal to continue with the proceedings until the decision by the court.

111. The Working Group, after deliberation, decided to retain both alternatives placed between square brackets, with possible drafting amendments. It was understood, however, that the final text of the model law should contain only one of the alternatives.

Article XI

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

Article XI

(1) The mandate of an arbitrator terminates in the event of the de jure or de facto impossibility of his performing his functions or, unless otherwise agreed by the parties, in the event that he fails to act [in accordance with his mandate under the arbitration agreement].

(2) If a dispute arises concerning any of the cases envisaged in paragraph (1), any party or arbitrator may request the Court specified in article V to decide on the termination of the mandate.

Paragraph (1)

113. Concern was expressed about the approach suggested in this provision which linked an automatic legal consequence (i.e. termination of mandate) to a vague cause (in particular: "fails to act"). It was suggested to adopt, instead, an approach similar to the one taken in the second sentence of paragraph (2) of alternative A of article X.

114. As regards the words "fails to act", various amendments were suggested, e.g., to add the word "adequately" or to focus on a misconduct of the proceedings by the arbitrator. The prevailing view, however, was that the words "fails to act", though not abundantly clear, were to be preferred to any suggested amendment. In that context it was noted that paragraph (2) provided a procedure in cases of uncertainty or controversy about a failure to act. No support was expressed in favour of the words placed between square brackets.

115. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft, taking into account the concerns and views expressed during the discussion.

Paragraph (2)

116. It was suggested not to use the technical term "dispute" in that context and to replace it by more general wording such as "difficulty" or "controversy". Some concern was expressed about giving an arbitrator the right to request a court decision, while, under another view, such a right may be appropriate in some cases.

117. The Working Group, after deliberation, requested the Secretariat to revise that provision, taking into account the views expressed in the Group.

Article XII

118. The text of article XII as considered by the Working Group was as follows:

Article XII

In the event of the death or resignation of an arbitrator or the termination of his mandate under article X or XI, 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 otherwise. [However, if the arbitrator to be replaced was named in the arbitration agreement, that agreement shall lapse ipso jure].

119. A suggestion was made to retain the sentence placed between square brackets since in the case envisaged therein the parties had expressed clearly that they had confidence only in the person named in the arbitration agreement. The prevailing view was, however, that that sentence was not needed in view of the faculty of the parties, provided at the end of the first sentence, to agree "otherwise". It was also pointed out that an automatic lapsing of the arbitration agreement was not necessarily in the interest of the parties.

120. The Working Group, after deliberation, decided to retain the first sentence of that article.

J. Recognition and enforcement of award

Article XXV

121. The text of article XXV as considered by the Working Group was as follows:

Article XXV

An arbitral award made in the territory of this State shall be recognized as binding and enforced in accordance with the following procedure [unless recognition and enforcement of such awards are granted under less onerous conditions]:

An application shall be made in writing to the [competent court] [Court specified in article V], accompanied by the duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement referred to in article II, or a duly certified copy thereof.

122. The Working Group noted that the provisions of article XXV which dealt with arbitral awards made in the territory of the State where recognition or enforcement was sought were not essentially different from the provisions of article XXVI which dealt with arbitral awards made in a foreign State. However, the view prevailed that, for the sake of clarity and possible different treatment of domestic and foreign awards in other respects, it was advisable to have separate articles on those two types of awards.

123. The Working Group was agreed that the objective of article XXV was to set forth maximum procedures for recognition or enforcement of an award made in the same State and that it was not contrary to the harmonization to be achieved by the model law if a State retained an even less onerous procedure.

124. As to the demarcation line between the awards dealt with in article XXV and the awards dealt with in article XXVI, the Working Group supported the territorial principle as opposed to the principle of wider recognition of the autonomy of the parties, i.e., arbitral awards dealt with in article XXV are only those made in the State where recognition or enforcement was sought excluding awards made in a foreign State but submitted by the agreement of the parties to the procedural law of the State where recognition or enforcement was sought. It was noted, however, that this preference for the territorial approach was limited to the articles under consideration here and would not preclude the possibility of drawing the line differently in respect of other provisions (e.g., on setting aside of awards).

125. It was noted that an arbitral award made in the State where recognition or enforcement was sought may be written in a language other than the language officially used in that State. The Working Group was agreed that the model law had to make it clear that in such cases the award had to be translated into the language of the court (as suggested in article XXVI in respect of foreign awards).

126. The Working Group expressed the view that there was no need to unify national rules on court competence for recognition or enforcement of awards made in the territory of the State where the award was made and that, therefore, an application for recognition or enforcement should be made to the competent court and not to the Court specified in article V.

Article XXVI

127. The text of article XXVI as considered by the Working Group was as follows:

Article XXVI

An arbitral award made outside the territory of this State shall be recognized as binding and enforced in accordance with the following procedure, subject to any multilateral or bilateral agreement entered into by this State:

An application shall be made in writing to the [competent court] [Court specified in article V], accompanied by the duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement referred to in article II, or a duly certified copy thereof. If the said award or agreement is not made in an official language of this State, the party applying for recognition and enforcement of the award shall supply a translation of these documents into such language, certified by an official or sworn translator or by a diplomatic or consular agent.

128. There was general agreement in the Working Group that the rules of procedure for recognition or enforcement of arbitral awards made abroad should be subject to any multilateral or bilateral agreements entered into by the State. It was felt, however, that that principle was not only relevant for article XXVI and should, therefore, be expressed as a general rule in a separate provision.

129. Divergent views were expressed as to whether the model law should contain provisions on recognition and enforcement of foreign arbitral awards since, for those States that had ratified or acceded to the 1958 New York Convention or other relevant Conventions, there was no need for adopting (and "duplicating") such provisions and other States were unlikely to accept such "liberal" provisions. The prevailing view, however, was that such provisions should be retained in the model law as an important step towards creating, in addition to the multilateral and bilateral network, a unilateral system of recognition and enforcement of foreign arbitral awards. As regards the concern of granting unlimited recognition and enforcement by, for example, not requiring reciprocity, it was pointed out that the following articles (in particular: article 38) could provide the necessary safeguards.

130. As regards the alternatives placed between square brackets, a preference was expressed for the Court specified in article V.

131. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft of article XXVI, taking into account the views expressed by the Group.

III. CONSIDERATION OF DRAFT ARTICLES 37 TO 41 ON RECOGNITION AND
ENFORCEMENT OF AWARD AND ON RECOURSE AGAINST AWARD
(A/CN.9/WG.II/WP.42)

132. The Working Group commenced its consideration of draft articles 37 to 41 on recognition and enforcement of awards and on recourse against awards, as set forth in document A/CN.9/WG.II/WP.42. Those draft articles had been prepared by the Secretariat in the light of the pertinent discussions and conclusions by the Working Group at its third and fourth sessions (see the reports of the Working Group, A/CN.9/216, paras. 103-104 and 106-109, and A/CN.9/232, paras. 14-22).

Article 37

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

Article 37

(1) Recognition and enforcement of an arbitral award made in the territory of this State may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that:

(a) A party to the arbitration agreement referred to in article II was, under the law applicable to him, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s) or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award [deals with] [decides on] a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement or not referred to the arbitral tribunal]; however, if any decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the mandatory provisions of this Law, or the agreement by the parties, unless in conflict with any mandatory provision of this Law, or, failing such agreement, the non-mandatory provisions of this Law [, provided that, if the parties have agreed on the application of the law of another State, the provisions of that law are relevant]; or

(e) The award [has not yet become binding on the parties] [is still open to appeal before a higher instance arbitral tribunal] or has been set aside [or suspended] by a court of this State [or, if the award was made under the law of another country, by a competent authority of that country].

(2) Recognition and enforcement of an award may also be refused if the court finds that the recognition or enforcement would be contrary to the [international] public policy of this State [, including any public policy rule on the arbitrability of the subject matter of the dispute].

General considerations

134. The Working Group was agreed that article 37 was connected, in terms of substance and approach, with other draft articles, in particular articles XXV, XXVI, 38 and 41. The Group noted that article 37 was drafted in a similar way as article 38, which was closely modelled on article V of the 1958 New York Convention. Those observations led to various policy considerations and general drafting suggestions.

135. One such policy question was whether the model law should contain provisions on the recognition and enforcement of awards rendered in the State where recognition and enforcement were sought. As done earlier with regard to article XXV, a suggestion was made to delete article 37. The prevailing view, however, was to retain a provision on refusal of recognition or enforcement of domestic awards, following the decision by the Working Group on article XXV.

136. It was noted that article 41 envisaged similar safeguards as article 37. In view of the reference in article 41 to the reasons set forth in article 37, two suggestions were made. The first one was to later consider streamlining the system of recourse against awards and their enforcement, which was not only of interest to States which did not provide for an "exequatur" procedure. The other suggestion was to consider with utmost care whether the exclusive list of reasons was not too restrictive to be widely acceptable. The Working Group noted that those suggestions could be adequately considered only in the context of article 41.

137. A further question of policy was how closely any provisions on recognition and enforcement of awards should be modelled on the 1958 New York Convention. It was understood that the issue of harmony with that Convention was directly relevant only to the provisions on foreign awards. Nevertheless, that issue became relevant to provisions covering "domestic" awards in an indirect way, i.e. the idea of striving for harmony between articles 37 and 38, which would leave open the possibility, as supported by some, of later combining them for the sake of a uniform treatment of awards in international commercial arbitration irrespective of where they were rendered.

138. As regards the general issue of harmony with the 1958 New York Convention, divergent views were expressed. Under one view, that Convention could serve as a starting point but should not be followed closely since it might well be revised in the not so distant future and since there was a need for not hampering future developments in the field of international commercial arbitration. Under another view, however, the 1958 New York Convention should be deviated from only where cogent reasons existed for such deviation. In support of that view, reference was made to the mandate of the Working Group which included the instruction to have due regard to that Convention. The Working Group, after deliberation, decided to take the Convention as the basis for its work but to deviate therefrom where there were good reasons for doing so.

139. As regards the special issue of harmonizing article 37 with article V of the New York Convention, some support was expressed for aligning both provisions in order to achieve a similar or uniform system for "domestic" and foreign awards. The prevailing view, however, was that with regard to article 37 there was less need for harmony than in respect of article 38. A general drafting suggestion was, therefore, not to feel bound by the structure of article V of the New York Convention and to consider preparing a more concise and simple version of article 37.

Opening words of paragraph (1)

140. The Working Group noted that under this provision recognition and enforcement "may be refused" and that that wording was ambiguous in that it might be construed as giving discretion to the court. While some support was expressed in favour of such discretion, the prevailing view was that, for the sake of certainty and predictability, the court should not be given such discretion and that that interpretation could be made clear by using the wording "shall be refused". It was understood that that solution did not preclude the possibility of providing some flexibility as regards individual reasons for refusal (e.g., exclusion of minimal or trivial infraction of procedural rule).

Subparagraph (a)

141. Divergent views were expressed with regard to subparagraph (a). Under one view, that provision should not be retained since it gave insufficient answers to complicated issues of private international law which could better be dealt with in a separate legal text, e.g., a convention. For example, the rule offered with regard to the complex issue of capacity was too simplistic and not accepted in all legal systems. Similar concerns applied to the rule on the law applicable to the validity of the arbitration agreement, an issue which was noted to be on the agenda of the Hague Conference on Private International Law. It was also pointed out that that provision was not consistent with article XIII (3) of the model law.

142. Under another view, it was desirable to have a provision which, like the corresponding provision in the 1958 New York Convention, would settle the essential questions of conflicts of laws in respect of capacity and validity without necessarily adopting the same rules as that Convention.

143. The prevailing view, however, was to retain subparagraph (a) without including any conflicts rule. Various drafting proposals were made to express that idea to merely mention incapacity and invalidity as reasons for refusal.

144. The Working Group, after deliberation, adopted that view and requested the Secretariat to revise the provision accordingly. It was understood that the decision to exclude rules on conflicts of laws was limited to that provision and that the Working Group would at a later stage, on the basis of a study, consider the general question whether the model law should contain any provisions on conflicts of laws.

Subparagraph (b)

145. The Working Group supported the policy underlying that provision.

146. It was suggested, however, that there was no need for expressing those principles in the provision since they could be regarded as covered by the public policy ground in paragraph (2) and by mandatory provisions of the model law. The prevailing view was, however, that the principles were of such importance that they should be emphasized, as in the 1958 New York Convention.

Subparagraph (c)

147. The Working Group adopted that provision, subject to the deletion of the words placed between the first square brackets, i.e. "deals with". It was felt that the alternative wording "decides on" was more appropriate since it was more precise and referred to the point relevant to the question of the arbitrators' competence. For example, the mere fact that the reasons of an award mentioned a matter outside the scope of the submission should not constitute a ground for refusing enforcement.

148. As regards the second set of alternatives in square brackets, the Working Group was divided on the question whether it was sufficient to refer to disputes not submitted to arbitration, or whether it should be made more clear that the authority of the arbitral tribunal had to be measured by two standards: the arbitration agreement and the often narrower mandate given to the arbitral tribunal by way of reference, submission or statement of claim. The Working Group decided to retain both alternatives for future reconsideration.

Subparagraph (d)

149. The Working Group was agreed that the provision should more clearly express the principle that the composition of the arbitral tribunal and the arbitral procedure had to comply with the agreement of the parties. It was understood - and possibly to be expressed in that provision - that the agreement was subject to the mandatory provisions of the law.

150. Divergent views were expressed as to whether, failing such agreement, non-mandatory rules should be included in that provision. Under one view, such rules should be included since they were binding in view of the fact that the parties had not excluded them. Under another view, such rules should not be referred to in that provision, in order to give the arbitral tribunal discretion in conducting the proceedings and to prevent the undesirable result that enforcement could be refused because of a minor violation of a non-mandatory rule.

151. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft with possible alternatives, reflecting the views expressed during the discussion.

Subparagraph (e)

152. The Working Group adopted the wording of the first alternative between square brackets, i.e. "has not yet become binding on the parties", and decided to delete the text between the three other square brackets.

153. The view was expressed that the words "or has been set aside by a court of this State" were superfluous since in such case the award was not binding on the parties. The prevailing view was, however, that the reason of setting aside should be separately stated since, at least in view of the usual interpretation of the same wording in the 1958 New York Convention, there were serious doubts as to whether the words "not yet binding" would be interpreted as covering setting aside.

Paragraph (2)

154. While some support was expressed in favour of retaining the word "international", the view prevailed that that word should be deleted because its underlying idea was not generally accepted and, above all, the term "international public policy" lacked precision.

155. As regards the words in the second square brackets, a view was expressed that the ground of non-arbitrability should be set forth in a separate subparagraph, following the structure of paragraph (2) of article 38. The prevailing view was, however, that the phrase need not be retained since rules on non-arbitrability normally formed part of the public policy of a State.

156. The Working Group, after deliberation, adopted paragraph (2) without the words placed between square brackets.

Article 38

157. The text of article 38 as considered by the Working Group was as follows:

Article 38

(1) Subject to any multilateral or bilateral agreement entered into by this State, recognition and enforcement of an arbitral award made outside the territory of this State may be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that:

(a) A party to the arbitration agreement referred to in article II was, under the law applicable to him, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s) or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award [deals with] [decides on] a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement or not referred to the arbitral tribunal]; however, if any decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place [, provided that, if the parties have agreed on the application of the law of another State, the provisions of that law are relevant]; or

(e) The award [has not yet become binding on the parties] [is still open to appeal or other ordinary recourse] or has been set aside [for one of the reasons set forth in sub-paragraphs (a) to (d) or in paragraph (2) of this article], or suspended, by a competent authority of the country in which [, or under the law of which,] that award was made.

(2) Recognition and enforcement may also be refused if the court [from which recognition and enforcement is sought] finds that:

(a) The subject matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(b) The recognition or enforcement of the award would be contrary to the [international] public policy of this State.

General considerations

158. As done earlier with regard to article XXVI, a suggestion was made to delete article 38, since it envisaged recognition and enforcement of foreign awards without proper safeguards (e.g., reciprocity), which could only be established in multilateral or bilateral agreements, and because the model law would, thus, establish a system more favourable to recognition and enforcement than the 1958 New York Convention. The prevailing view was, however, that provisions along the lines of article 38 (and XXVI) should be retained in the model law since (a) even a unilateral system of recognition and enforcement was useful in supplementing the multilateral and bilateral network; (b) the two paragraphs of article 38 provided sufficient safeguards; (c) in international commercial arbitration, the place of arbitration was of limited importance; (d) those States not yet adhering to the 1958 New York Convention could avail themselves of the reciprocity mechanism in relation to a great number of States by ratifying or acceding to that Convention.

159. Divergent views were expressed on whether and to what extent article 38 should be aligned with article 37 or modelled on article V of the 1958 New York Convention. Under one view, there should be full harmony between articles 37 and 38, for the sake of uniform treatment in the model law of all awards in international commercial arbitration, and, thus, the decisions of the Working Group on article 37 should be followed with regard to article 38.

160. Under another view, however, article 38 should accord with the text of article V of the 1958 New York Convention, since both articles dealt with the same subject-matter (i.e. refusal of recognition or enforcement of foreign arbitral awards) and any disparity between the two legal régimes should be avoided. It was pointed out that such harmonization was in the interest of all States whether or not they adhered to the 1958 New York Convention.

161. Under yet another view, which the Working Group adopted, article 38 should be closely modelled on article V, without precluding the possibility of a substantive modification in exceptional cases for cogent reasons, and mere drafting amendments should be avoided. As a result, the decisions of the Working Group on article 37 were not binding in respect of article 38. It was noted, however, that that approach did not necessarily exclude the option of later striving for greater harmony between articles 37 and 38.

162. A suggestion was made to consider, at a later stage, the appropriateness of presenting, e.g., in a footnote to the model law or in a commentary, the views and intentions of the Working Group as regards the interaction between the model law and the 1958 New York Convention. Such clarification on the relationship between the two legal régimes could provide assistance and guidance to States when adopting the model law.

Paragraph (1)

Opening words of paragraph (1)

163. The Working Group was agreed that the words "Subject to any multilateral or bilateral agreement entered into by this State" should be deleted in view of its decision (taken in respect of article XXVI) to express that proviso in a separate provision of more general application. A suggestion was made to consider adding to such proviso the "principles of mutual benefit".

Subparagraph (a)

164. The Working Group noted that the last words of this subparagraph "under the law of this State" were erroneously included and should be replaced by the words "under the law of the country where the award was made".

165. Divergent views were expressed on the conflicts of law rules included in that provision. Under one view, the concern expressed with regard to the same provision in article 37 was equally relevant here. Some proponents of that view proposed the deletion of the subparagraph, while others were in favour of merely excluding the conflicts rules, as decided with regard to article 37.

166. Under another view, however, it was desirable to adopt the wording of the corresponding provision of the 1958 New York Convention, despite its short-comings. Under yet another view, some modification should be considered whereby a substantial improvement could be achieved.

167. The Working Group, after deliberation, decided to adopt the wording of article V (1) (a) of the 1958 New York Convention without excluding the possibility of a substantive improvement.

Subparagraph (b)

168. The Working Group adopted that subparagraph.

Subparagraph (c)

169. Some support was expressed for aligning that subparagraph with article 37 (1) (c), as approved by the Working Group. The prevailing view, however, was to adopt the wording of article V (1) (c) of the 1958 New York Convention.

Subparagraph (d)

170. The Working Group adopted that subparagraph without the words between square brackets. It was understood that the text between square brackets was redundant since a stipulation on the procedural law formed part of the agreement of the parties.

Subparagraph (e)

171. Some support was expressed for retaining the text between the third square brackets which was modelled on article IX of the European Convention on International Commercial Arbitration (Geneva 1961). The prevailing view, however, was to delete that text since the restriction expressed therein was not generally acceptable and, thus, too ambitious and its application could lead to difficulties.

172. The Working Group adopted the text of that subparagraph, including the texts between the first and the fourth square brackets, which accorded with article V (1) (e) of the 1958 New York Convention.

Paragraph (2)

173. Some support was expressed for deleting subparagraph (a), in accordance with the decision of the Working Group on the similar rule in article 37 (2), i.e. the text between the second square brackets. The prevailing view was, however, to retain that provision for the sake of consistency with article V (2) (a) of the 1958 New York Convention.

174. As regards subparagraph (b), some support was expressed for retaining the word "international", with a possible clarification by expressing the idea as follows "public policy of this State with regard to international commercial transactions". The prevailing view, however, was to delete the word "international" for the reasons stated in the context of the discussion of article 37 (2).

175. The Working Group adopted the text of paragraph (2), including the words between the first square brackets but without the word "international" in subparagraph (b).

Article 39

176. The text of article 39 as considered by the Working Group was as follows:

Article 39

If an application for the setting aside or suspension of an award has been made to a competent authority referred to in article 37, paragraph (1) (e) or 38, paragraph (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

177. The Working Group adopted that article, subject to the deletion of the words "in article 37, paragraph (1) (e) or", so as to limit the scope of that article to recognition and enforcement of only foreign awards.

Recourse against arbitral award

Article 40

178. The text of article 40 as considered by the Working Group was as follows:

Article 40

No recourse against an arbitral award made under this Law [, whether or not rendered in the territory of this State,] may be made to a court except an action for setting aside in accordance with the provisions of article 41.

179. The Working Group expressed its support for the policy underlying that article. It was noted, however, that that rule of exclusion could be finally assessed only after having considered article 41. It was also noted that the reference to "an action for setting aside" was too restrictive if article 41 would include other remedies such as remission to the arbitral tribunal, as envisaged in its paragraph (4), or correction or interpretation of an award by the court. In such case it would be more appropriate to delete the words "an action for setting aside" and merely retain the general reference "in accordance with the provisions of article 41".

180. The Working Group was divided on whether the words placed between square brackets should be retained. Under one view, that text provided a useful clarification (as suggested in footnote 24 of WP.42). Under another view, that text should not be retained for either of the following reasons: (a) the words "made under this Law" were sufficiently clear so as to make any clarification superfluous; (b) the text between square brackets created uncertainty, by allowing the possible misinterpretation that article 40 adopted in State A would also apply to an award made in State B under the model law adopted there and, even if correctly interpreted, touched upon the difficult issue of court competence (for setting aside awards made abroad but under the model law of State A), which was a matter probably outside the scope of the model law.

Article 41

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

Article 41

(1) An action for setting aside [an arbitral award referred to in article 40] may be brought [before the Court specified in article V] within four months from the date on which the party bringing that action has received the award in accordance with article XXII (4).

(2) An arbitral award may be set aside only on one of the grounds on which recognition or enforcement may be refused under article 37, paragraph (1) (a), (b), (c), (d) or (2) [or on which an arbitrator may be challenged under article IX (2)].

(3) The court may, where appropriate, set aside only a part of the award, provided that this part can be separated from the other parts of the award.

(4) If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] [a party may within three months request re-institution of the arbitration proceedings], unless such measure is incompatible with a ground on which the award is set aside.

(5) Any decision by the court on an action for setting aside is subject to appeal within three months.

Structure and order of provisions

182. It was suggested to place that article (and art. 40) before the articles on recognition and enforcement of awards and, then, to specify in paragraph (2) the reasons for setting aside instead of referring to article 37. A further suggestion was to reverse the order of paragraphs (1) and (2). Yet another suggestion was to combine the provisions on setting aside with the articles on recognition and enforcement of domestic awards and, thereby, to streamline the system established in the model law. The Working Group was agreed that those suggestions could be considered at a later stage.

Paragraph (1)

183. As regards the words between the first square brackets, the Working Group was agreed that they could either be deleted, in view of the close proximity of that provision with article 40, or replaced by the same words as used in article 40 specifying which awards were covered. As regards the words between the second square brackets, the Working Group agreed with their contents but felt that a reference to article 41 in article V was sufficient.

184. As regards the time period stated in paragraph (1), various suggestions were made for shortening or for extending that period. After deliberation, a time-period of three months was accepted. It was noted that the provision might be expanded so as to accommodate cases of appeal to another arbitral tribunal (as suggested in footnote 27 of WP.42).

185. The Working Group decided to retain paragraph (1), subject to the above modifications.

Paragraph (2)

186. Divergent views were expressed as to the grounds for setting aside an award. Under one view, the list of reasons set forth in paragraph (2) was too restrictive since it did not cover some important grounds recognized in some legal systems, sometimes even forming part of the public policy of a State. It was suggested, therefore, to add to the list some more grounds as, e.g., mentioned in footnote 29 of WP.42 (in particular, under (c) and (d)). An alternative suggestion was to replace the list by a general formula such as "in cases of procedural injustice" and to rely on the common sense of the judge.

187. The prevailing view, however, was to limit the reasons for setting aside to those grounds on which under article 38 recognition and enforcement may be refused. That solution would facilitate international commercial arbitration by enhancing predictability and expeditiousness and would go a long way towards establishing a harmonized system of limited recourse against awards and their enforcement. It was stated in support that the reasons set forth in article V of the New York Convention provided sufficient safeguards, and that some of the grounds suggested as additions to the list were likely to fall under the public policy reason.

188. As regards the reason set forth in subparagraph (d) of article V (1), there was wide support for providing for a certain qualification (as suggested in footnote 28 of WP.42), by adopting a general rule of "estoppel" or implied waiver and, possibly, by excluding minor defects which had no influence on the award. Subject to such possible addition, which would also apply to articles 37 and 38, the Working Group adopted paragraph (2).

Paragraph (3)

189. The Working Group adopted that paragraph.

Paragraph (4)

190. Divergent views were expressed as to the appropriateness of retaining a rule along the lines of paragraph (4). Under one view, the provision should be deleted since it dealt in an insufficient manner with procedural questions which were answered in a way not easily reconciled with the different concepts of the various legal systems. It was also pointed out that setting aside should be regarded as a remedy separate from remission to the arbitral tribunal and that the wording between the second square brackets and the following proviso lacked clarity.

191. However, there was more support for retaining a provision along the lines of paragraph (4), subject to various modifications. The main reasons for retention were that the provision made it clear that the arbitration agreement had not necessarily lapsed and that it opened the way for remission to an arbitral tribunal. While some support was expressed for leaving the decision on retrial of the case solely to the court and its discretion, the prevailing view was to leave that matter to the parties, possibly subject to some control or authorization by the court.

192. Various suggestions were made for clarifying, in a revised draft, in particular, the following issues: (a) to whom would a party have to address its request for "re-institution"; (b) "re-institution" should not necessarily mean that the proceedings would be conducted by the previous arbitrators; (c) remission or retrial might relate to the whole award or only to part of it, including the instruction to correct a certain procedural defect; (d) the proviso at the end of the paragraph should be more detailed and, for example, should mention the reasons of non-existence of a valid arbitration agreement and non-feasibility of remission to the previous arbitral tribunal.

193. The Working Group, after deliberation, requested the Secretariat to prepare a revised draft on the basis of the views expressed during the discussion.

Paragraph (5)

194. Divergent views were expressed with regard to that paragraph. Under one view, that provision should be retained, though possibly with a different time-period or no time-period at all. Under the prevailing view, however, that provision should be deleted since it dealt, without need, with a fundamental issue governed by national procedural laws, and sometimes even backed by constitutional guarantees.

195. The Working Group, after deliberation, decided not to retain paragraph (5).

Reference to conciliation

196. A suggestion was made to include in a preamble, or in an appropriate provision of the model law, a reference to conciliation as an additional method of settling disputes where parties so wished.