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INTERNATIONAL COMMERCIAL ARBITRATION

Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration

Report of the Secretary-General

Addendum

INTRODUCTION

1. This addendum to document A/CN.9/263 contains a compilation of those comments received between 31 January and 29 March 1985 from the following States and international organizations: Canada, Sudan, Yugoslavia; Asian-African Legal Consultative Committee (AALCC), 1/ Hague Conference on Private International Law (Hague Conference) 2/ and International Chamber of Commerce (ICC). 3/

2. The structure and the way of presentation used in this addendum are the same as those used in document A/CN.9/263. 4/

1/ The comments of AALCC reflect the unanimous or prevailing views expressed during the consideration of the draft text of the model law by its Sub-Committee on International Trade Law Matters at its twenty-fourth session (Kathmandu, Nepal, 7-12 February 1985).

2/ The comments were submitted by the Permanent Bureau of the Hague Conference. Where a comment, as on article 27, refers to the Hague Conference on Private International Law itself, the name of the international organization is not abbreviated.

3/ The comments of ICC were adopted by its Commission on International Arbitration on 29 November 1984.

4/ See paras. 4 to 6 of the introduction to document A/CN.9/263.

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ANALYTICAL COMPILATION OF COMMENTS

A. General comments on the draft text

1. Canada expresses the view that the model law is a valuable step forward in promoting a simple, workable set of rules that will recognize and encourage international arbitrations. Overall, the model law is well designed to achieve the primary goals of international commercial arbitration, being speed and reasonable costs of the proceedings, limited but effective judicial support, and neutrality of the proceedings. It contains a number of drafting and procedural problems, but none of them appears to reflect a concept which is unacceptable to Canada or to the underlying principles of Canada's two legal systems, the common law and the civil law.

2. ICC is of the view that the disparity between various national arbitration laws and the difficulties for the international businessmen in foreseeing how a dispute will be resolved within a specific legal system and enforced in another judicial system call for a harmonization of those laws that govern the settlement of disputes arising in international transactions. Important steps have already been taken through the many bilateral and multilateral agreements and conventions that are in existence. Harmonization should preferably be done through the elaboration of a model law rather than a convention, which, as experience shows, is less readily accepted by a great number of nations unless important reservations are made to it, thus diminishing its value as a uniform instrument. The need for a model law will be looked upon differently by those industrialized countries with a long commercial tradition and dispute settlement experience, on the one hand, and by countries which are entering the international trade community, on the other hand. ICC therefore believes that the model law should neither limit the freedom of parties to tailor their arbitrations nor suppress existing concepts and practices in different parts of the world. A model law should set a standard framework for what is universally accepted as being required to ensure due process of law, fairness and equality, i.e. the fundamental principles of justice. Therefore, in individual questions raised by the model law where there exist important differences in opinion, concepts and tradition amongst trading nations, ICC prefers leaving these to develop freely and unbound rather than changing present concepts and practices already in force in various countries. Thus, rather than a detailed regulation bringing a high degree of precision and certainty to a particular problem to which different solutions are given in various countries, ICC favours an attitude where the model law adopts a common denominator. A model law that forces solutions envisaged as foreign by the receiving nations is not likely to be generally accepted and would therefore be counter-productive.

B. Specific comments on individual articles

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. Territorial scope of application

1. AALCC, noting that the model law does not contain any provision on the territorial scope of application, is of the view that the model law should not incorporate territorial limits.

2. Model law yields to treaty law

2. AALCC recommends replacing in paragraph (1) the words "which has effect in this State" by the words "which is in force in this State".

3. Substantive scope of application: "international commercial arbitration"

"Commercial"

3. With respect to the definition of "commercial", Canada recognizes that, although it is not usual statutory drafting practice to place definitions in footnotes, any jurisdiction which decides that a definition of "commercial" is necessary in its arbitration legislation will apply its own techniques of drafting and interpretation in that regard. It is the view of Canada that business activities of governments and their agencies, including sovereign risk loans, are included in the definition of "commercial". If it is not intended that such governmental activities or loans be covered by the definition, this should be made explicit. It would seem preferable to provide that such activities come under the model law, leaving it open to a government which wishes to exempt itself to identify this fact in its legislation.

4. AALCC recommends that, instead of an illustrative list, a definition of the term "commercial" should be given and included in the text of article 1 itself.

5. In the view of ICC, the technique of leaving the definition of the term "commercial" in a footnote is not advisable. The term is essential to the scope of the model law and should find its place in the law itself. ICC is not of the opinion that the law must bring about a harmonization of the concept "commercial". On the contrary, various interpretations and meanings given by different countries must be respected, but the law should elaborate on the definitions so that the examples which will eventually be included in the model law are precise and provide guidance to the persons involved in arbitration. ICC adds that it seems indispensable for the usefulness of the model law to indicate whether it applies to commercial transactions undertaken by sovereign States and State owned enterprises.

"International"

6. As to the term "international", the view of ICC is that the present compromise solution in article 1(2) is acceptable. ICC interprets it as covering the common case where two parties having their places of business in the same country enter into a contract which has to be performed abroad.

Places, other than place of business, determining international character of arbitration (article 1, paragraph (2)(b))

7. Canada notes that some of those consulted, including its provincial governments, expressed concern that under paragraph (2)(b) an arbitration became international merely by virtue of the fact that the place of arbitration was selected outside of the jurisdiction. This could permit a type of "forum shopping" which could prove unacceptable to some jurisdictions.

Yet other international link (article 1, paragraph (2)(c))

8. In the view of Canada, paragraph (2)(c) is too vague. Canada is uncertain what the sub-paragraph is intended to accomplish and believes it is unlikely that many jurisdictions, especially those that follow the common law, would enact such a provision.

9. Yugoslavia is of the opinion that the definition of the term "international" contained in article 1 is too broad since, according to paragraph (2)(c), an arbitral award is considered international where both parties have their places of business in the same State provided that "the subject-matter of the arbitration agreement is otherwise related to more than one State". In addition, the definition of international commercial arbitration implies that the arbitral tribunal may examine issues of substance in order to determine its competence, which is contrary to the existing international practice. Since such a solution could create complex situations it is suggested simplifying article 1 so as to ensure effective determination of the arbitral tribunal's competence. The solutions contained in article 1 are contrary to Yugoslav laws and regulations, and it is feared that this can be one of the reasons for a negative attitude towards the model law as a whole. The definition contained in article 1 is reflected particularly in articles 35 and 36 according to which a domestic award may in some cases be subject to the exequatur procedure, which is contrary to the practice in Yugoslavia as well as in many other countries. It is suggested that the definition contained in article 1 should be re-examined and re-formulated in accordance with the existing international practice and the solutions provided in existing conventions relating to recognition and enforcement of foreign arbitral awards.

Article 2. Definitions and rules of interpretation

Article as a whole

1. AALCC, noting that article 2 sets forth definitions of certain terms and rules of interpretation, recommends that the definitional provisions and those provisions setting forth rules of interpretation should be divided into two independent articles entitled "Definitions" and "Rules of interpretation". It would be appropriate to place the article containing the rules of interpretation towards the end of the model law.

Article 2, sub-paragraph (c)

2. In the view of the Hague Conference, sub-paragraph (c) seems hardly compatible with article 28 of the model law. The freedom of the parties to choose the law applicable to the substance of the dispute constitutes a fundamental principle of private international law. It seems not desirable to permit the parties, by a provision in the model law, to entrust this choice to a third party or, even less desirable, to an institution such as the International Chamber of Commerce (which, moreover, would have to declare itself not competent in the matter). The possibilities should be limited in that either the parties choose the applicable law, and this choice is to be respected by the arbitral tribunal, or, failing any designation by the parties, the arbitral tribunal, and only it, determines the applicable law according to article 28(2). (It is observed that it is not necessary, in this context, to discuss whether an authorization given to an arbitral tribunal to choose freely the law applicable to the substance of the dispute, without any reference to a conflicts rule, is equivalent to an authorization, as dealt with in article 28(3), to decide as amiable compositeur.) The provision of article 2(c) should therefore be modified by a reservation concerning article 28.

Article 2, sub-paragraph (e)

3. Canada expresses the view that the modalities of delivery by each system described in sub-paragraph (e) will have to be considered by each State, having regard to the rules of delivery it accepts in the case of judicial procedures and to local circumstances. For example, Rules of Court may deem service to take place within a certain number of days following the date of posting.

Article 4. Waiver of right to object

1. In the view of Yugoslavia, the general rule on presumed waiver of the right to object can constitute an unjust and heavy sanction which, at the same time, gives considerable power to the arbitral tribunal. The requirement "without delay" is too strict, particularly when the party is from a developing country, since it results in an extremely unfavourable position for a party which has failed to object. It is suggested that, instead of having a general rule on a party's failure to object, the failure of a party should be assessed in each specific case taking into account all relevant circumstances.

2. AALCC expresses the view that the term "without delay" is vague and that it would be appropriate if some time-limit were indicated.

3. Canada observes that the English language version of this article seems less than clear to the reader. The question is whether it means non-compliance with the law or with the agreed upon derogation. If it means the former, then the question is whether the clause should not read "from which the parties may not derogate" rather than "from which the parties may derogate". However, the French language version would appear to indicate that it is the latter which is intended; if this is true, the ambiguity in the English language version could be removed by adding, after the word "non-compliance", the words "with the agreed upon derogation or requirement under the arbitration agreement".

Article 5. Scope of court intervention

AALCC suggests modifying the heading of article 5 so that it would read "Limitation of court intervention".

Article 6. Court for certain functions of arbitration assistance and supervision

1. Yugoslavia, noting that this article deals with the competence of the Court within a legal system and not the question of its international jurisdiction, proposes formulating a solution according to which, in the first place, international jurisdiction would be given, in principle, to the Court of the State to whose procedural law the parties have agreed to subject their arbitration, and, in the absence of such an agreement, the jurisdiction would depend on the place of arbitration. It is noted that a problem would arise where the parties have not reached such an agreement and where the place of arbitration has not been determined, if there is a need for court intervention before the arbitral proceedings have commenced.

2. AALCC expresses the view that it should be made clear that the courts designated by the national authority should have the jurisdiction to deal with matters concerning the model law. It is suggested modifying this article as follows:

> "Article 6. Courts with jurisdiction to perform the functions provided in the Model Law
>
> The courts with jurisdiction to perform the functions provided in the Model Law shall be ... ."

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

Article as a whole

1. AALCC recommends splitting this article into two articles, one dealing with the definition of arbitration agreement and the other with the form of the arbitration agreement.

Article 7, paragraph (1)

2. In the opinion of Canada, the word "defined" in connection with the words "legal relationship" appears to raise a question. The expression "defined legal relationship" does not convey any particular concept in common law, and it raises a question as to where the legal relationship was defined - in a statute, a contract or elsewhere. It is, therefore, asked whether this word is necessary.

3. AALCC recommends replacing in paragraph (1) the expression "defined legal relationship" by the expression "defined legal issues" or "defined legal disputes".

Article 7, paragraph (2)

4. In the opinion of Canada, paragraph (2) should provide for paperless transactions, i.e. automatic data processing in international trade.

5. Canada observes that where a contract incorporates the terms of another contract and that other contract contains an arbitration clause, there has in practice been uncertainty as to whether the arbitration clause has been incorporated in the first contract. It is assumed that this incorporation by reference is now covered by the language contained in paragraphs (1) and (2), but if there is any doubt, it should be made explicit that it is so covered by the article. One way to do this might be to add language to paragraph (2) to the effect that where a contract incorporates the terms of another contract and the other contract contains an arbitration clause, the arbitration clause shall be deemed to be incorporated in the first contract.

6. AALCC, regarding the question whether a signature on a document should be handwritten or could be effected by mechanical means, recommends that the mode of signature should be left to the national laws.

7. Yugoslavia suggests supplementing this article so as to enable the parties, in spite of non-compliance with the requirement of written form, to validate the arbitration agreement (e.g. by taking part in a hearing on the substance of the dispute without objecting, or by a statement of the defendant, entered in the record of the arbitration, that he submits to the jurisdiction of the arbitral tribunal). The provision on the written form contained in this article should make clear that it should not be interpreted as a provision aimed at protecting public interests but as one aimed at protecting private interests. It is observed that the rules requiring evidence of the arbitration agreement in the exequatur proceedings (article 35) can be softened by providing that the party requesting recognition or enforcement must give evidence of a valid submission of the other party to arbitration, which does not necessarily mean that a written arbitration agreement has to be presented as evidence.

Proposed addition to article 7

8. ICC, noting that the model law is intended to be enacted in countries with different judicial systems and rules of interpretation, expresses the view that the jurisdiction of arbitral institutions ought to be preserved in the clearest possible terms, and that there should be a provision on the possible conflict between the rules of the model law and the rules of the institution. It is proposed adding the following paragraph to article 7:

> "(1 bis) Where the parties have agreed to refer all or any of the disputes specified in article 7(1) to arbitration administered by a permanent arbitral institution, the arbitration shall be conducted in accordance with, and be governed by, the rules of such arbitral institution in so far as these are not contrary to, or inconsistent with, the mandatory provisions of this Law, which, in case of conflict, shall prevail."

Article 8. Arbitration agreement and substantive claim before court

Article 8, paragraph (1)

1. Canada expresses the view that paragraph (1) is not clear. The question is whether it is intended to provide for only a stay of the action or for its total removal from a court, or whether it is, perhaps, intended to leave this question for determination by the legislature adopting the model law.

2. Yugoslavia observes that, where the State court finds that it has no competence to decide the dispute, it is not customary for the court to instruct the parties to approach a certain institution for the purpose of settling their dispute. This should be left to the parties. Resort to arbitration may not be the only (or best) solution for the parties.

3. AALCC suggests deleting the words "incapable of being performed" since they are considered as superfluous.

Article 8, paragraph (2)

4. AALCC recommends re-formulating paragraph (2) as follows:

> "Where, in such cases, arbitral proceedings have already commenced, the arbitral tribunal shall continue its proceedings unless the court grants an interim order to suspend the proceedings."

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

1. The Sudan proposes, for the sake of comprehensiveness and clarity, adding the following new paragraph to article 10:

> "(3) Notwithstanding paragraph (1) of this article, where the arbitral tribunal is constituted of more than one arbitrator, the number of arbitrators shall be uneven."

The proposal is meant to deal with the possibility that the parties appoint an even number of arbitrators in their agreement.

2. ICC expresses the view that, since the parties may agree on any number of arbitrators, provision ought to be made for the question how, failing an agreement by the parties, the appointment should be made. The present provisions in article 11(3) provide only for the most common cases of one or three arbitrators. A general rule seems to be required for the appointment of an even number of arbitrators and of an uneven number of arbitrators in excess of three.

Article 11. Appointment of arbitrators

Article 11, paragraph (1)

1. The Sudan proposes replacing in paragraph (1) the clause "unless otherwise agreed by the parties" by the clause "however, if a sole arbitrator is to be appointed, such arbitrator shall be of a nationality other than the nationality of the parties". This provides more clarity and satisfaction.

Article 11, paragraph (3)

2. In the view of Canada, paragraph (3) should provide specifically that an arbitrator may be appointed, even after the expiry of the period of time, right up to the time a request is made to the Court. As presently drafted, paragraph (3) implies that, after the expiry of the specified period of time, a party cannot appoint an arbitrator, or the two arbitrators that have been appointed cannot appoint a third arbitrator. It is also asked whether, in practice, 30 days is a long enough period of time to allow the two arbitrators, who have been appointed, to appoint the third one.

3. ICC notes that the model law does not require expressly that the arbitrators shall be independent of the parties and impartial. While it is true that article 11(5) provides that a Court, when asked to intervene, shall secure the appointment of an independent and impartial arbitrator, nothing in the model law excludes the possibility that the parties themselves appoint somebody who is not independent or impartial, for example, their counsel. Although, according to article 12, an arbitrator should disclose circumstances that may cast doubt on his impartiality and independence, an express provision that all arbitrators must be impartial and independent is preferable.

Article 12. Grounds for challenge

Article as a whole

1. Canada, noting that the English language version of this article uses the expression "justifiable doubts" in paragraphs (1) and (2) as an equivalent of the French language expression "doutes légitimes", observes that the expression "justifiable doubts" creates difficulties of application for an English speaking common law lawyer. In the opinion of Canada, the expression "reasonable doubt" would be a more appropriate expression to convey the meaning intended by the article. Furthermore, it is suggested that the requirement of disclosure in paragraph (1) should be more stringent than that of paragraph (2), with a bias in favour of disclosure in paragraph (1), and that article 12 should be revised accordingly.

2. The Sudan submits that article 12 would be more comprehensive if the following wording were added at its end:

> "Such circumstances include, but are not limited to, any financial or personal interest in the outcome of the arbitration or any commercial tie with either party or with a party's counsel or agent, if any."

Article 12, paragraph (2)

3. Yugoslavia is of the view that the grounds for challenge of arbitrators should be widened. Article 12(2) specifies only doubts as to impartiality and independence, which is good but insufficient. It should be provided that an arbitrator can be challenged if he does not perform his functions without undue delay or, in the case of permanent arbitral tribunals, in compliance with the rules.

Article 13. Challenge procedure

Article 13, paragraph (1)

1. ICC observes that, although paragraph (1) leaves freedom to the parties to agree on a challenge procedure, paragraph (3) unfortunately limits the scope of the freedom considerably by giving a party the right to request the Court to decide on the challenge if the challenge under the procedure agreed upon is not successful. In the opinion of ICC, this limitation of the parties' right to agree on the challenge procedure is undesirable for the following reason. Parties prefer arbitration to court proceedings, among other reasons, because of its confidential character. If a State Court is to try a case according to paragraph (3), it is feared that the dispute will become public (parties' identity, amount in dispute, etc.) with sometimes devastating effects to the parties' image and financial position. Dilatory tactics must be curtailed. Arbitration would become less attractive to the parties, if desirable at all, where arbitration proceedings could be held up and matters sent to a State Court by simply challenging, bona or mala fide, an arbitrator; arbitration would become less attractive also to the arbitrators knowing that their competence and ethics are at risk of being discussed publicly in a Court every time they accept to arbitrate. The model law should therefore treat different cases differently. Recourse to Court is acceptable in ad hoc arbitrations, but parties should be free to exclude such intervention where the institutional rules they have chosen contain provisions in this respect.

Article 13, paragraph (2)

2. Yugoslavia and ICC object to paragraph (2) according to which the arbitral tribunal, including the challenged arbitrator, decides on the challenge. ICC is of the view that arbitrators should not be their own judge in matters of challenge. Yugoslavia observes that it is hard to expect an arbitral tribunal to be objective if the arbitrator whose challenge is requested participates in the decision-making; this is particularly so where a sole arbitrator is challenged. In the view of Yugoslavia, it seems to be more appropriate, at least in the case of a permanent arbitral institution, that a governing council or an ad hoc body should make decisions in such matters.

Article 13, paragraph (3)

3. Canada, with regard to the provision in paragraph (3) that the decision of the Court shall be final, poses the question whether it means a "final decision" of the Court and, therefore, one subject to appeal to a higher court, or whether it means that the decision itself is final and cannot be appealed. The provision is unclear, at least in a common law context, and

should be clarified. If the second meaning is the one intended, the paragraph might convey it better if the words "and binding" were added after the word "final".

4. The Sudan is of the opinion that it would be safer and more just to add the following text at the end of paragraph (3): "only where such continuance does not prejudice the claim or defence of the challenging party".

Article 14. Failure or impossibility to act

1. It is the view of Canada that the procedures in articles 13 and 14 should mesh. At present, the relationship of article 14 to article 13 is not entirely clear. For instance, one may ask whether the apparent bias of an arbitrator might be regarded as a de jure impossibility to act.

2. In the view of ICC, present article 14, dealing with de jure or de facto impossibility of an arbitrator to act and giving exclusive jurisdiction to the State Court where a controversy remains regarding the termination of the arbitrator's mandate, is not compatible with those rules of arbitral institutions which provide that, in such cases, the institution takes a final decision. ICC proposes that article 14 be modified so as to give the parties the freedom to agree on the procedure to be followed and to give jurisdiction to the State Court only as a last resort in case the agreed upon procedure for some reason fails (as is done in article 11(4) of the model law). It is noted, however, that, since parties may agree on the termination of the mandate of an arbitrator (article 14, first sentence), article 14 might be interpreted as meaning that the mere fact that the parties submit a dispute to the rules of an arbitral institution implies that they have given the institution the power to decide the issue (by virtue of article 2(c) giving the parties the right to authorize an institution to make a determination for the parties). If it is considered impossible to amend the model law so as to give jurisdiction to the State Court only as a last resort, and if the interpretation noted above is correct, it would be desirable, if possible, to make a record of that interpretation.

3. Canada is of the view that, in an arbitration with three arbitrators, a party ought to be able to request the other members of the arbitral tribunal to terminate the mandate of the third arbitrator before being required to request the Court to do so, in order to reduce the necessity of petitioning the Court.

4. The Sudan proposes adding the following new paragraph to article 14:

> "(2) If the sole or presiding arbitrator is replaced for any of the reasons embodied in the above paragraph, any hearings held previously shall be repeated. Likewise, if any other arbitrator is replaced, such prior hearings shall be repeated at the discretion of the arbitral tribunal."

5. AALCC, in view of its suggested re-formulation of article 6 (see paragraph 2 of the compilation of comments on article 6), observes that certain consequential amendments would need to be incorporated in this article, namely "the Court specified in article 6" would need to be replaced by "the Courts specified according to article 6".

Article 14 bis

AALCC recommends that the opening words "The fact that" should be deleted as superfluous.

Article 15. Appointment of substitute arbitrator

The Sudan, noting that article 15 does not provide a period of time for the appointment of a substitute arbitrator, proposes adding, after the words "a substitute arbitrator shall be appointed", the following words:

> "provided that such appointment shall be made within one month from the date of the termination of the mandate of the arbitrator being replaced".

For linguistic reasons, the words "arbitrator being replaced", contained in the wording that follows the proposed addition, should be replaced by the words "such arbitrator".

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence to rule on own jurisdiction

1. AALCC recommends that this article be entitled "Competence".

2. Canada expresses the view that paragraph (3) seems unduly restrictive in limiting the right of a party to contest a finding of jurisdiction to an action to set aside the award. The acceptance of such a principle is unlikely in any Canadian jurisdiction because it is considered that the resolution of jurisdictional issues should not have to await the final award. A party should be able to deal with the question of jurisdiction as a preliminary matter. The problem with leaving it to the enforcement State is that there will be a difference between those States which are parties to the 1958 New York Convention and those that are not. Furthermore, the recent decision of the French Court of Appeal in Paris in the case Arab Republic of Egypt v. Southern Pacific Properties, Ltd. et al. (International Legal Materials, vol. 23, no. 5, September 1984, pp. 1048-1061) illustrates the importance of resolving such questions at an early stage. Paragraph (3) should be revised to address this problem, perhaps by providing that an arbitral tribunal can refer the question of its jurisdiction to the Court.

Article 18. Power of arbitral tribunal to order interim measures

1. The Sudan proposes the following text, which is an amalgamation of different international arbitration rules, in replacement of the text of this article:

> "Unless otherwise agreed by the parties, the arbitral tribunal, on its own motion or at the request of either party, may take any interim measure of protection as it considers fit in respect of the subject-matter of the dispute, such as ordering the deposit of goods, if any, with a third party or the opening of a banker's credit or the sale of perishable goods."

2. AALCC recommends that the title of this article be "Interim measures", and proposes re-formulating the text of the article as follows:

> "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of one of the parties, order such interim measures of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide security for the cost of such measures."

3. Canada suggests, in the interest of clarity, that this article be combined with article 9.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19. Determination of rules of procedure

Article 19, paragraph (2)

1. In the opinion of Yugoslavia, it seems insufficient to restrict the power of the arbitral tribunal to conduct the proceedings in such manner as it considers appropriate only by providing that the parties are to be treated with equality and given a full opportunity of presenting their case. The arbitral tribunal should be obliged to respect a wider scope of minimum-standard procedural rules of the legal system to which the parties agreed to submit the arbitration, or, in the absence of such agreement, of the legal system in whose territory the arbitration takes place. The procedural rules of the applicable legal system which provides the grounds for setting aside of the award may be inspiring in determining such minimum-standard rules.

Article 19, paragraph (3)

2. In the view of the Sudan, the following addition would be important at the end of paragraph (3): "on his own or through a counsel or agent".

Article 20. Place of arbitration

AALCC is of the view that the best practical solution to the concern raised by member States of AALCC, namely that article 20 may work to the disadvantage of parties from developing countries, would be to append a footnote to paragraph (1) of article 20, as follows:

> "The Asian-African countries are recommended to include in their agreements the use of Cairo and Kuala Lumpur Arbitration Centre and any other Centre established by the Asian-African Legal Consultative Committee, as a venue of arbitration."

Article 21. Commencement of arbitral proceedings

Canada observes that this article is illustrative of the reason why the matter of deemed receipt in article 2(e) is very important for each jurisdiction to resolve (as to Canada's comments on article 2(e), see paragraph 3 of the compilation of comments on article 2). It is suggested that the words "or deemed to have been received" be inserted in article 21 between the words "is received" and the words "by the respondent".

Article 22. Language

Article 22, paragraph (1)

1. AALCC recommends an expansion of paragraph (1) of this article to provide for the situtation where, failing agreement by the parties, the language of one of the parties is not the language, or among the languages, chosen by the arbitral tribunal for use in the arbitral proceedings. In this situation, this party should have the right to have translations of the proceedings into his own language at his own expense.

2. ICC is of the opinion that paragraph (1) ought to be modified so as to make clear that a party may express himself in any language he chooses provided he arranges for interpretation into the language to be used in the proceedings, as decided by the arbitrators. It is of fundamental importance in an international arbitration that, failing an agreement by the parties, each party is given a full opportunity of presenting his case in the language he chooses.

Article 23. Statements of claim and defence

Article 23, paragraph (2)

1. AALCC recommends that the words "or supplement" be added in paragraph (2) between the words "to allow such amendment" and the words "having regard to the delay".

Proposed addition to article 23

2. AALCC recommends that the following new paragraph be added to article 23:

> "(3) In any case the court may fix a date before which the parties shall present their documents and their final statements."

Article 24. Hearings and written proceedings

Article 24, paragraphs (1) and (2)

1. Canada observes that the drafting of paragraphs (1) and (2) can be confusing to the reader. In the absence of a contrary agreement, a party should have the right to an oral hearing. This should not be in the discretion of the arbitral tribunal. Even if the parties have agreed previously not to have oral hearings, a party should still be able subsequently to require an oral hearing (on terms and conditions - such as

costs - which could be established by the arbitral tribunal) in the interest of giving him a full and fair opportunity to present his case. In any event, the arbitral tribunal should always have the power to order an oral hearing on its own initiative if it feels such a hearing is necessary to get out all the evidence to reach a proper decision in the dispute. Although pacta sunt servanda is an extremely important principle, which should be overriden only in rare instances, the achievement of a just resolution of a dispute is also an objective which ought not to be disregarded. This is especially so in a case where the parties may have agreed early in their contractual relationship to arbitration with no oral hearings without being able to foresee the nature of the difficulties that subsequently arise in that connection. In all cases, it is very important that sufficient advance notice should be given before oral hearings are held.

Article 24, paragraph (4)

2. In the view of Canada, the expression "expert report or other document", as used in the second sentence of paragraph (4), is too vague. It is suggested that more clarity is required as to what other kinds of documents are to be covered.

3. Since paragraph (4) is not clear as to whether the documents supplied to the arbitral tribunal are required to be submitted to the other party in original or copies thereof and whether the other party has the right to examine them, AALCC recommends the deletion of the reference to "documents" or "document" from paragraph (4) and the addition of the following provision as paragraph (5):

> "(5) Each party shall have the right to examine any document presented by the other party to the arbitral tribunal. Unless otherwise decided by the arbitral tribunal, copies of such documents shall be communicated by the supplying party to the other party."

Proposed addition to article 24

4. The Sudan suggests that the following new paragraph be added to this article:

> "(5) Subject to any agreement of the parties to the contrary, the hearings shall be held in camera."

Article 27. Court assistance in taking evidence

1. The Hague Conference welcomes the decision of the Working Group not to include in the model law a provision on international court assistance in taking evidence. 5/ The delegates in the Working Group recognized, in the view of the Hague Conference with good reason, that the problem of international court assistance in taking evidence fell within the domain of

5/ A/CN.9/246, para. 96; A/CN.9/245, para. 43.

international co-operation, and that, therefore, it did not seem possible to deal with and organize such co-operation by a model law, which, by its nature, was intended to become a national law. In fact, international co-operation could only be based on a convention which provided clearly defined international obligations. It is pointed out that the Hague Conference on Private International Law, at its fifteenth session in October 1984, decided to include in the agenda of one of its future sessions the discussion of the possibility of using the Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (The Hague, 1970) for arbitral proceedings. The Hague Conference on Private International Law is aware that a possible extension of the scope of the Convention of 1970 to arbitral proceedings, for example, by a protocol to the Convention, depends ultimately on whether the interested international arbitration circles consider it useful to have such international instrument. With respect to this question, the Hague Conference on Private International Law intends to consult with international organizations dealing with arbitration and the member States of those organizations. For this purpose, the Hague Conference on Private International Law requested a special commission to conduct an exchange of views on the possibility of using the Convention of 1970 in aid of arbitration for the taking of evidence abroad. This special commission will meet at the Hague from 28 May to 1 June 1985 and will, at this stage, include only the Central Authorities provided for by the Convention of 1970; it would be appropriate to know, initially, whether a broadening of the scope of the Convention of 1970 to cover arbitral proceedings is technically feasible. The Hague Conference envisages convening a second session of this special commission which should then include arbitration experts and which should express its view on the substance of the problem. The Hague Conference would, of course, appreciate if the States members of the United Nations Commission on International Trade Law and observers at the eighteenth session of the Commission, when discussing article 27 of the model law, would express their opinion on the problem.

2. Canada notes, with respect to paragraph (2), that in May 1985 the Hague Conference on Private International Law will be considering the question of taking evidence abroad in the case of an arbitral proceeding.

3. AALCC recommends modifying in paragraph (1) the opening phrase of the second sentence "The request shall specify" so as to read "The request shall be in conformity with the rules accepted before the court and shall specify".

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

Article 28, paragraph (2)

1. In the view of ICC, paragraph (2) of this article is not consistent with modern practice in international commercial arbitration. The model law requires the arbitral tribunal to apply a law, i.e. the law of a State, and the arbitral tribunal must choose a conflict of laws rule to determine the applicable law. In finding the law applicable to the merits of the case, arbitrators do not necessarily first decide on an existing conflict of laws rule but find the appropriate law on substance by more direct means. This development has been made possible by the great freedom allowed by national

laws and international regulations. ICC holds that to introduce strict limitations in the model law would be detrimental to the further development in this domain and would be regarded by many international arbitrators and practitioners as a step backwards. ICC proposes that the arbitral tribunal, failing any designation by the parties, should apply the rules of law that it considers applicable in the particular case.

Proposed addition to article 28

2. In the view of Yugoslavia, article 28 should be supplemented, along the lines of article 33(3) of the UNCITRAL Arbitration Rules, so as to require the arbitral tribunal also to take into account "the usages of the trade applicable to the transaction".

Article 29. Decision making by panel of arbitrators

1. Canada observes that this article refers for the first time to a "presiding arbitrator" which raises the question of how the presiding arbitrator was appointed. This procedural gap could be rectified in article 11.

2. Yugoslavia observes that the formulation of the second sentence of article 29 might imply that the presiding arbitrator is empowered to make the decision on the merits of the case, which certainly is not intended. This article should be re-formulated so as to make clear that it refers to the role of the presiding arbitrator as regards the procedure.

3. ICC notes that the model law provides for decisions by a majority of the arbitrators, whereas under certain existing arbitration rules the chairman of an arbitral tribunal can decide alone where no majority can be obtained. Since the provision in article 29 is not mandatory, article 31(1), which requires the signatures of a majority of the arbitrators in arbitral proceedings with more than one arbitrator, should be amended accordingly.

4. AALCC recommends that the title of this article should be "Decision-making".

Article 30. Settlement

Article 30, paragraph (1)

1. Canada poses the question whether the request of the parties mentioned in paragraph (1) must be a joint request or whether it may be made by either of the parties. If the former, a party might easily block the arbitral tribunal from recording a settlement in the form of an arbitral award. It would seem preferable that article 30 should provide that either party has the right to make such a request.

2. In the view of Yugoslavia, it would be necessary to determine, at least by using general terms, the criteria on the basis of which the arbitral tribunal would be empowered to reject the parties' proposal to record their settlement

in the form of an arbitral award. Objections of the arbitral tribunal should be limited to establishing that the stipulated settlement is incompatible with the public order of the legal system applicable to the arbitration.

3. AALCC is of the view that if the parties settle the dispute during the arbitral proceedings they must be obliged to notify the arbitral tribunal, and the arbitral tribunal should terminate the proceedings only upon receipt of such notification. Paragraph (1) of article 30, therefore, needs to be amended accordingly.

Article 31. Form and contents of award

Article 31, paragraph (1)

1. The Sudan proposes adding at the end of paragraph (1) the following sentence: "However, the award shall not include any dissenting judgement".

Article 31, paragraph (4)

2. AALCC recommends that, since paragraph (1) uses the wording "the arbitrator or arbitrators", the same wording should be used in paragraph (4).

Proposed addition to article 31

3. The Sudan suggests adding the following new paragraph to article 31:

> "(5) The award shall not be published except with the written consent of both parties."

Article 32. Termination of proceedings

Article 32, paragraph (2)(b)

1. Canada states that paragraph (2)(b) apparently gives the arbitral tribunal complete discretion to terminate the proceedings whenever it decides that the continuation of the proceedings becomes "unnecessary or inappropriate". It might be desirable to provide that such a decision is reviewable by the Court.

2. In the view of Yugoslavia, the grounds for the termination of arbitral proceedings specified in paragraph (2)(b) are too general and vague and may result in terminating the proceedings even where this is not in the interest of the parties. The suggestion is that an attempt be made to identify some grounds more precisely.

Article 33. Correction and interpretation of awards and additional awards

Article 33, paragraph (2)

1. AALCC is of the view that where an arbitral tribunal contemplates correcting an award on its own initiative it should be obliged to notify the parties concerned. It is therefore recommended modifying paragraph (2) accordingly.

Article 33, paragraph (3)

2. AALCC is of the view that, where a party requests the arbitral tribunal to make an additional award, the arbitral tribunal should first decide on the admissibility of the request within a certain period of time, and only after it has convinced itself of the admissibility of the request should it reopen the proceedings in order to deliver an additional award. Consequently, AALCC proposes the incorporation of the following wording in paragraph (3):

> "The arbitral tribunal shall decide on the admission or rejection of the request within thirty days of the receipt of such request. If the arbitral tribunal considers the request to be justified, it may initiate the necessary proceedings to deliver an additional award within sixty days".

Article 33, paragraph (5)

3. AALCC recommends the deletion in paragraph (5) of the opening words "The provisions of".

Proposed addition to article 33

4. The Sudan suggests adding the following new paragraph to article 33:

> "(6) Unless the award is set aside under article 34, it has the authority of res iudicata."

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

Article 34, paragraph (1)

1. Canada and ICC suggest the deletion of the words "under this Law" placed between the second pair of square brackets. Canada states that it does not appear desirable to permit a court to set aside a foreign award; foreign awards should be subject to attack only under the procedure in article 36. ICC considers that it would best correspond to the practice of most countries to apply the territorial criterion, and, thus, to limit the scope of the model law to awards made in the territory of the State that has adopted the model law.

2. Yugoslavia is of the opinion that in defining the scope of application of article 34 due account should be taken of the freedom of the parties to choose the law applicable to the arbitral procedure.

Article 34, paragraph (2)(a)(i)

3. Canada states that in paragraph (2)(a)(i) the phrase "failing any indication thereon" seems vague and unclear and does not appear to provide much assistance to a court which must decide to which law the parties have subjected themselves. It is suggested that the phrase and the words following

it to the end of the sentence be either deleted or replaced by a clearer statement as to when the parties shall be regarded as having subjected themselves to a certain law, e.g. "... subjected it as determined by the tribunal".

Article 34, paragraph (2)(a)(iv)

4. In the view of Canada, paragraph (2)(a)(iv) covers the situation where non-observance of an agreement is in conflict with mandatory provisions of the law, but it does not appear to cover the situation where observance occurs of an agreement which is in conflict with the mandatory law. The provision could be redrafted to read "... not in accordance with the agreement of the parties or with a provision of this Law from which the parties may not derogate".

5. Yugoslavia suggests that in paragraph (2)(a)(iv) a distinction should be drawn between rules whose violation always results in nullity and rules whose violation may lead to nullity; in other words, one should not accept the view that violation of every procedural rule of the applicable law should result in setting aside the award. In this context, there is again the question of the choice of law, that is, on the basis of which norms the correctness of the arbitral proceedings shall be judged for the purpose of deciding on an application for setting aside the award. If priority is given to the law of the State to which the parties subjected the arbitration, then the decision on the setting aside should be made by the Court of that State in accordance with its mandatory procedural rules.

Article 34, paragraph (2)(b)

6. The Hague Conference endorses the arguments expressed in the Working Group against the provision of paragraph (2)(b)(i). 6/ In the view of the Hague Conference, the drafters of the model law did not fully assess the effect of this provision. If retained, this provision would permit a party capriciously to obtain the setting aside of the award, with effect in all States, even where the subject-matter of the dispute is capable of settlement by arbitration according to the law applicable to the substance of the dispute and according to the law of the place of arbitration. Such a consequence seems to be entirely unacceptable and would be contrary to the relevant general principles according to which the question of arbitrability, failing an agreement by the parties, should be decided in accordance with the law applicable to the substance of the dispute. It is, therefore, suggested that this provision be deleted.

7. In the opinion of Yugoslavia, the distinction made in paragraph (2)(b)(ii) between "the award" and "any decision contained therein" appears to be unclear, and the question is whether it is useful. Such formulation may lead to the interpretation, incompatible with contemporary trends towards restrictive interpretation of public policy, that an award could be set aside on a ground which did not influence the decision on the merits of the case.

6/ A/CN.9/246, paras. 136 and 137.

8. The Sudan suggests adding to paragraph (2)(b) the following new sub-paragraph:

"(iii) the award was obtained by fraud or is based on false evidence."

Article 34, paragraph (3)

9. AALCC considers the period of time of three months to be somewhat long. However, it expresses the view that this period of time could be retained subject to the qualification "unless the parties have agreed otherwise".

Proposed addition to article 34

10. The Sudan suggests adding the following new paragraph to article 34:

"(5) The decision of the Court to set aside the award shall not be appealable but shall be subject to revision by the same Court upon application by the interested party."

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

ICC recommends that chapter VIII on recognition and enforcement of awards should be limited to awards made in a country that has adopted the model law, i.e. domestic awards, since, in principle, recognition and enforcement of foreign awards are dealt with in the 1958 New York Convention.

Article 36. Grounds for refusing recognition or enforcement

Article as a whole

1. Although suggestions have been received for some modifications to the language of article 36, Canada notes that this article closely tracks articles V and VI of the 1958 New York Convention. Understanding that the Convention works rather well, Canada feels it important that the Convention be followed even though its language has been the subject of some criticism (see, for example, UNCITRAL's Project for a Model Law on International Commercial Arbitration, International Council for Commercial Arbitration, Congress series no. 2, Interim Meeting Lausanne, May 9-12, 1984, General editor: Pieter Sanders, Deventer, Kluwer 1984, p. 212, paragraph 24, and p. 221, paragraph 47, concerning lack of capacity of the parties and invalidity of the arbitration agreement).

2. ICC, noting its recommendation for limiting the provisions on recognition and enforcement to domestic awards only (see the comment on chapter VIII of the model law), proposes that the various grounds for refusing recognition or enforcement enumerated in paragraph (1)(a) of article 36 should be deleted and that the non-existence of an arbitration agreement should be included in sub-paragraph (b). Thus, the possibility of double control, offered by the present text of articles 34 and 36(1)(a), would be eliminated, since a party who opposes an award on any of the grounds referred to in present sub-paragraph (a) could then invoke them only in a setting aside procedure under article 34.

Article 36, paragraph (1)(a)(i)

3. The Hague Conference notes that paragraph (1)(a)(i) was taken directly from article V of the 1958 New York Convention and that it became very clear from the discussions in the Working Group that the only reason for including it in the model law was the existence of such provision in the 1958 New York Convention. The Hague Conference points out that it is known that this provision has been criticized and that it has not provided satisfaction. To subject the question of the validity of the arbitration agreement, failing agreement by the parties, to the law of the country where the award was made no longer corresponds to the trend in the majority of national systems of private international law towards subjecting the validity of the arbitration agreement to the law governing the main contract. It would be regrettable if the model law would maintain the system of the 1958 New York Convention which has been considered not to be satisfactory. The Hague Conference suggests, so as to avoid adopting a wording which would be contrary to the one of the 1958 New York Convention, adopting a neutral provision broadly based on the new French Law on arbitration (Decree of 12 May 1981). The wording could be the following: "... or the said agreement is not valid".

C. Comments on additional points

Counter-claim

1. In the opinion of Canada, article 23 or another article of the model law should provide for counter-claims and replies thereto.

Secrecy of deliberations by arbitral tribunal

2. In the view of Canada, consideration should be given to providing in the model law that from the time the inquiry by the arbitral tribunal is complete until the time the arbitration is terminated by a final award or otherwise, the arbitral tribunal should keep its deliberations secret and not discuss the arbitration with either party ex parte.

Liability of arbitrators

3. In the view of Canada, consideration should be given to providing in the model law that a member of an arbitral tribunal should not be subjected to civil liability by reason of any action taken in good faith by him in the exercise of his function.

Costs of arbitral proceedings

4. In the view of Canada, consideration should be given to including in the model law a provision on costs, including the costs of interim proceedings in the arbitration.

5. The Sudan advocates adding the following new paragraph to article 32:

> "(4) The costs of arbitration shall, in general, be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties, and such costs shall form part of the award."

6. AALCC draws the attention of the Commission to the utmost importance of costs in the matter of international commercial arbitration and proposes providing in the official commentary, which AALCC suggests should be prepared (see paragraph 7, below), an explanation for the lack of a provision in the model law on costs.

Commentary on the model law

7. AALCC is of the view that the Commission's Secretariat should be requested to prepare an official commentary on the model law on international commercial arbitration, with a view to assisting the developing countries in the uniform application and interpretation of the different provisions of the model law.