

- B. Working paper submitted to the Working Group on International Contract Practices at its third session (New York, 16-26 February 1982): Note by the Secretariat: possible features of a model law on international commercial arbitration: questions for discussion by the Working Group (A/CN.9/WG.II/WP.35)*

A. NEW MANDATE OF THE WORKING GROUP

1. The Working Group on International Contract Practices has been given a new mandate which relates to the field of international commercial arbitration. It is laid down in the following decision adopted by the United Nations Commission on International Trade Law at its fourteenth session:

"The Commission

"1. *Takes note* of the report of the Secretary-General entitled "Possible features of a model law on international commercial arbitration" (A/CN.9/207)**;

"2. *Decides* to proceed with the work towards the preparation of a draft model law on international commercial arbitration;

"3. *Decides* to entrust this work to its Working Group on International Contract Practices with its present composition;

"4. *Requests* the Secretary-General to prepare such background studies and draft articles as may be required by the Working Group."¹

2. The Commission also decided that in preparing a draft model law the conclusions reached by it should be taken into account, in particular, that the scope of application be restricted to international commercial arbitration and that due account be taken of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and of the UNCITRAL Arbitration Rules.*² The Commission was agreed that the above report of the Secretary-General (A/CN.9/207)* setting forth the concerns, purposes and possible contents of a model law would provide a useful basis for the preparation of a model law.

* Yearbook . . . 1976, part one, II, A, para. 57.

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 (Yearbook . . . 1981, part one, A).

² *Ibid.*, para. 65, and Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 81 (Yearbook . . . 1979, part one, II, A).

* 1 December 1981.

** Yearbook . . . 1981, part two, III.

B. SUGGESTED APPROACH AND METHODS OF WORK

3. The Working Group may wish to consider its methods of work and decide on the most appropriate approach for carrying out its task based on these decisions by the Commission. The following remarks are designed to assist the Working Group in this respect and to explain the purpose of the present note.

4. As regards the first step towards the preparation of a draft model law, there are essentially two possible approaches. One would be to select for the present session one of the subject areas covered by a chapter of the above report (A/CN.9/207),* e.g. chapter II Arbitration agreement, and to discuss in detail the various issues relating thereto. The Group might then incorporate into draft provisions the solutions adopted by it or request the Secretariat to prepare draft provisions in accordance with the conclusions reached by the Group. At future sessions, the other subject areas or chapters would be dealt with in the same manner and, after that, a complete set of the first draft provisions may be reviewed as a whole.

5. The other approach would be to have first a preliminary exchange of views on all issues and possible features of a model law and to turn only thereafter to the detailed work outlined in the preceding paragraph. This approach seems preferable for the following reasons. It would enable the Working Group to adopt a common basis as regards the principles, policies and directions of the model law. It would also help to get a better, though necessarily tentative, idea of the scope and contents of the envisaged law as a whole. Above all, many detailed issues are so closely connected with each other that the solution of one issue often depends on the position taken with regard to others. The suggested exchange of views on all points should help to reduce this difficulty since when it comes to deciding a particular question, and to drafting a provision of the model law, the attitude towards other points relevant thereto will have been ascertained at least on a tentative basis.

6. The present note has been prepared primarily as an aid in the suggested exchange of views but might be of some use even if the first approach were adopted. It is a working paper which has to be taken together with the above report by the Secretary-General (A/CN.9/207, hereinafter referred to as "the report").* It follows the order and classification of the issues used in the report (part B). As stated therein,³ this order in no way indicates the eventual structure of the model law but simply adopts the classification scheme used in the national reports as published in the *Yearbook Commercial Arbitration*.⁴

7. The working paper primarily refers to the corresponding discussion of the possible features of a model law set forth in the report. It contains some additional considerations and suggestions supplementing the discussion in the report. Above all, it provides a list of questions which the Working Group may wish to consider. The questions cover the issues identified in the report but should, of course, not be viewed as exhaustive.

8. The Working Group, in its exchange of views on these questions, may in some cases be ready to reach agreement on whether a certain issue should be dealt with in the model law and, if so, in what way. In other cases, any differences of opinion and the reasons therefor may become apparent and, thus, facilitate the search for an acceptable solution. The Group might then request the Secretariat to prepare studies on certain issues or to conduct inquiries, possibly in consultation with interested international organizations and arbitral institutions.

C. ISSUES POSSIBLY TO BE DEALT WITH IN THE MODEL LAW: ANNOTATED LIST OF QUESTIONS

I. Scope of application

1. "Arbitration"

9. According to a decision by the Commission, the model law is to apply to "international commercial arbitration" (see above, paragraph 2). While this would be stated in the law, it is less clear whether the three elements delimiting the scope of application, i.e. "arbitration", "commercial" and "international", should be defined and, if so, in what way.

10. As regards "arbitration" (see report, paragraphs 29-30),* it should be specified that institutional and *ad hoc* arbitration are covered. Whether the term "arbitration" should be further defined seems rather doubtful, not merely because it would involve the difficult task of drawing a clear line against the various types of "free arbitration". It may be noted that national statutes and international conventions usually contain no definition of the term "arbitration".

*Question 1-1:*⁵ Should the model law expressly state that it applies to institutional as well as *ad hoc* arbitration?

Question 1-2: Apart from the clarification referred to in question 1-1, should the model law contain a definition of the term "arbitration"?

2. "Commercial"

11. As suggested in the report (paragraph 31),* There seems to be no particular need for defining the term "com-

* Yearbook . . . 1981, part two, III.

³ A/CN.9/207, para. 8.

⁴ International Council for Commercial Arbitration, *Yearbook Commercial Arbitration*, Pieter Sanders, ed. Deventer, the Netherlands (Kluwer).

* Yearbook . . . 1981, part two, III.

⁵ The questions are numbered according to the chapters they relate to; in the above example, 1-1 stands for chapter I. Scope of application, first question.

mercial", which is the second element delimiting the scope of application of the model law. If, however, such a need were felt, it would be advisable to define the term in the model law but not to follow the approach taken in the 1958 New York Convention which refers to "relationships which are considered as commercial under the national law of the respective State" (article I, paragraph 3).

Question 1-3: Should the term "commercial" be defined in the model law?

3. "International"

12. As indicated in the discussion set forth in the report (paragraphs 32-38),* the third element delimiting the scope of application, i.e. "international", raises a number of difficult and complex questions. Not only is there a great variety of possible criteria for distinguishing between domestic and "international" cases (e.g. subject matter of dispute; nationality or domicile of parties; applicable procedural law; nationality of arbitrators; place of arbitral proceedings and award). There is also the difficulty that the distinction must be made with regard to the various phases covered by the model law (i.e. arbitration agreement, arbitral proceedings, arbitral award) which conceivably may call for different criteria. In addition, this issue may be viewed as being linked with questions of conflicts of laws or international jurisdiction.

13. In view of this, the Working Group may wish, during its first exchange of views, to tentatively agree on a simple formula applicable to all phases. This formula would serve as a working assumption for the discussion on the other issues and would then be reviewed and refined in the light of these discussions.

14. A simple formula is used, for example, in the most recent national arbitration law, establishing special rules for international cases: under article 1492 of the New Code of Civil Procedure of France, an "arbitration is international if it involves international commercial interests."⁶ Reference is, thus, made to the subject matter of the dispute, which has been said to explain best the special nature of, and need for, rules of international commercial arbitration.⁷ This formula, which is based on a notion developed in French case law,⁸ does not include a definition of the term "international".

15. If any definition were desired, a formula, still relatively simple, might be found along the lines of the notion used in the European Convention on International Commercial Arbitration (Geneva, 1961), article I, paragraph 1:

* Yearbook . . . 1981, part two, III.

⁶ Décret no. 81-500 of 12 May 1981, *Journal Officiel* of 14 May 1981, p. 1402; repr. in *Dalloz-Chronique* 1981, p. 217.

⁷ E.g. Fouchard, "Quand un arbitrage est-il international?", *Revue de l'arbitrage* 1970, pp. 59, 75.

⁸ Robert, "L'arbitrage en matière internationale", *Dalloz-Chronique* 1981, p. 209.

"This Convention shall apply:

"(a) To arbitration agreements concluded for the purpose of settling disputes arising from international trade between physical or legal persons having, when concluding the agreement, their habitual place of residence or their seat in different Contracting States;

"(b) To arbitral procedures and awards based on agreements referred to in paragraph 1 (a) above."

Similarly, the model law might state that it applies to arbitration agreements, and to the arbitral proceedings and awards based thereon, between parties whose places of business are in different States.

Question 1-4: Would it be sufficient to refer simply, i.e. without definition, to the international nature of the commercial matter in dispute (or of the arbitration agreement)?

Question 1-5: If a definition is desirable, should one formula (e.g. parties from different States) be adopted for all phases covered by the model law?

II. Arbitration agreement

1. Form, validity and contents

16. The issues and possible features relating to form, validity and contents of the arbitration agreement are discussed in some detail in the report (paragraphs 41-47).^{*} Supplementary information should be given here, in particular to the reference to Latin-American States (paragraphs 41-42).^{*} The Fifth Conference of Ministers of Justice of the Hispanic-Portuguese-American Countries (Lima, 13-17 July 1981) adopted a model law of arbitration and recommended to the Governments of its Member States to take it into consideration when reforming their domestic law.⁹

17. Article 4 of that model law requires for every arbitration a written agreement; and it is this arbitration agreement ("*convenio arbitral*") which precludes resort to courts as laid down in article 6. Article 5, then, speaks of a submission ("*compromiso*") which is to be formalized in writing at the same time as or subsequent to the arbitration agreement; it must set forth certain information on the act of submission and the parties thereto, the matters submitted to arbitration, the appointment of the arbitrators and whether the arbitration is *de jure* or *ex aequo et bono*, and it may contain other points agreed on by the parties.

Question 2-1: Is it sufficient to require (as, e.g., article II of the 1958 New York Convention) only one arbitration agreement irrespective of whether it concerns existing or future disputes or should some additional act be envisaged in certain cases?

* Yearbook . . . 1981, part two, III.

⁹ Resolution No. 5, point 6.c.; Member States are, in addition to the Latin American countries, the Philippines, Portugal and Spain.

(The following questions are based on the assumption that no additional act is envisaged)

Question 2-2: Should the model law specify the required form of the arbitration agreement and, if so, require that it be "in writing"?

Question 2-3: If writing were required, should the term "in writing" be defined, for example, as article II of the 1958 New York Convention ("agreement signed by the parties or contained in an exchange of letters or telegrams") or should a more extensive and refined definition be sought which should reduce the difficulties encountered in practice with the above definition (see report, paragraph 43)?*

Question 2-4: Which points relating to the validity of the arbitration agreement should be included in the model law? For example, should a provision be included guaranteeing equality of the parties as regards the appointment of arbitrators (see report, paragraph 44)?*

(In this connection, it may be suggested that the question as to which law governs the validity of the arbitration agreement be considered, together with other conflicts questions, at a later stage when it will have to be decided whether the model law should include conflicts rules at all.)

Question 2-5: What should be the minimum contents of an arbitration agreement? For example, would a provision like article II, paragraph 1 of the 1958 New York Convention be appropriate and sufficient (see report, paragraphs 46-47)?*

2. Parties to the agreement

18. The question who may be a party to an arbitration agreement is discussed in the report (paragraphs 48-50),* including the difficult issue whether any restrictions should apply, or be recognized, to the capacity to arbitrate in the case of governmental agencies or other public entities. In this connection, the even more difficult question of State immunity is also submitted for consideration (see report, paragraphs 51-54).*

Question 2-6: Should the model law contain a provision on who may be a party to an arbitration agreement?

Question 2-7: If so, should the model law state, for example, that it applies to "arbitration agreements concluded by physical or legal persons of private or public law" or should a provision be added according to which even "legal persons of public law have the right to conclude valid arbitration agreements" (as,

e.g., article II, paragraph 1 of the 1961 Geneva Convention)?

Question 2-8: Should an attempt be made to deal in the model law with certain aspects of State immunity in the area of international commercial arbitration? For example, to mention only one out of many possibilities, should the model law construe the commitment to arbitrate by a Government or a State organ as containing an implied waiver of any right to invoke State immunity in the arbitration proceedings or arbitration-related court proceedings?

3. Domain of arbitration

19. The main question relating to the domain of arbitration is whether a certain subject matter is "arbitrable", i.e. capable of being settled by arbitration. In addition to this question (see report, paragraphs 55-56),* the report submits for consideration the problem often labelled "filling of gaps" which, in fact, comprises two problems (paragraph 57).

20. As regards the true filling of gaps, i.e. where parties, by intention or not, have left certain points open, it is submitted that the arbitral tribunal may not fill those gaps without special authorization by the parties. However, even with such special authorization in the arbitration agreement or a later agreement it is doubtful whether the arbitral tribunal should be empowered to carry out this function and whether its decision, which is more like a quality valuation than a dispute settlement, should be recognized and enforced as an award.

21. As regards the other issue, i.e. adaptation of contracts after unforeseeable change of circumstances, it is suggested that parties may validly authorize the arbitral tribunal to adapt their contract. The main question is whether an arbitral tribunal may do so even without special authorization by the parties, as the courts of most countries may do.

Question 2-9: Should the model law set forth a list of non-arbitrable subject matters, either as an exhaustive list or as an open list to be supplemented by the respective State, or would it be sufficient to express the restrictions merely by reference to "international public policy"?

Question 2-10: Should the model law deal with the "true filling of gaps" and, if so, should a special authorization by the parties be required or should it treat this task as lying outside the arbitrators' competence even where parties have given such special authorization?

Question 2-11: Should the arbitral tribunal be empowered to adapt a contract without special authori-

* Yearbook . . . 1981, part two, III.

* Yearbook . . . 1981, part two, III.

zation by the parties or only if the parties have given such authorization?

4. *Separability of arbitral clause* (report, paragraph 58)*

Question 2-12: Should the model law adopt the principle of separability or autonomy of the arbitral clause?

5. *Effect of the agreement*

22. In addition to the issues discussed in the report (paragraphs 59-61),* two points may be mentioned here. In connection with the situation (referred to in paragraph 60) where more than two parties are involved in a complex case, thought may be given to the topical issue of multi-party arbitration which was the subject of the ICCA-Interim Congress at Warsaw (1980). Questions for the model law could be, for example, whether consolidation clauses in related arbitration agreements should be given effect, and whether consolidation of proceedings may be ordered even without agreement by the various parties.

23. Another point to be considered could be whether the inclusion in an arbitration agreement of a time-period within which parties may resort to arbitration should, under the model law, be effective and valid even if this time-period expires before a prescription period applicable to the underlying transaction which cannot be shortened by the parties (cf., e.g., article 22 of the Convention on the Limitation Period in the International Sale of Goods¹⁰).

Question 2-13: Should the model law contain a provision along the lines of article II, paragraph (3) of the 1958 New York Convention (report, paragraph 59)?* Should it contain supplementary provisions on what points a court should examine and what type of decision it may render?

Question 2-14: Should the model law deal with problems of consolidation in multi-party disputes (e.g. whether consolidation agreements should be given effect, or whether even without such agreements consolidation might be ordered)?

Question 2-15: Should a stipulated time-period for submission of a dispute to arbitration be effective even if it would expire before a prescription period applicable to the underlying transaction which may not be shortened by the parties?

* Yearbook . . . 1981, part two, III.

¹⁰ Art. 22: "1. The limitation cannot be modified or affected by any declaration or agreement between the parties, except in the cases provided for in paragraph (2) of this article (Yearbook . . . 1974, part three, I, B).

"2. The debtor may at any time during the running of the limitation period extend the period by a declaration in writing to the creditor. This declaration may be renewed.

"3. The provisions of this article shall not affect the validity of a clause in the contract of sale which stipulates that arbitral proceedings shall be commenced within a shorter period of limitation than that prescribed by this Convention, provided that such clause is valid under the law applicable to the contract of sale."

Question 2-16: Are pre-arbitration attachments and similar court measures of protection compatible with an arbitration agreement and should the model law state so?

6. *Termination* (report, paragraphs 62-63)*

Question 2-17: Should the model law specify certain circumstances under which an arbitration agreement would be terminated (e.g. settlement on agreed terms; expiry of time-limit for making award) or would not be terminated (e.g. death of one party)?

III. Arbitrators

1. *Qualifications* (report, paragraph 64)*

Question 3-1: Should the model law expressly state that foreign nationals shall not be precluded from acting as arbitrators (cf., e.g., article 2 of the 1966 Strasbourg Convention, report, paragraph 64)?*

Question 3-2: Are the qualifications required of arbitrators an appropriate matter to be dealt with in the model law?

2. *Challenge* (report, paragraphs 65-66)*

Question 3-3: Should the model law deal with the grounds on which an arbitrator may be challenged? If so, should it list these grounds or would a general formula suffice?

Question 3-4: As regards the procedure of challenging an arbitrator, should the model law recognize any agreement of the parties thereon even if it would exclude (last) resort to a court?

Question 3-5: Should supplementary rules be included for those cases where parties have not regulated the challenge procedure?

Question 3-6: Should the model law adopt ancillary rules on disclosure and on restrictions to the right to challenge along the lines of articles 9 and 10 (2) of the UNCITRAL Arbitration Rules** and article 12 (2) of the 1966 Strasbourg Uniform Law (report, paragraph 66)?**

3. *Number of arbitrators* (report, paragraph 67)*

Question 3-7: Should the model law contain any mandatory provision on the number of arbitrators?

Question 3-8: Should supplementary rules be included for those cases where parties have not agreed on the number?

* Yearbook . . . 1981, part two, III.

** Yearbook . . . 1976, part one, II, A, para. 57.

4. Appointment of arbitrators (and replacement)

24. As suggested in the report (paragraphs 68-69),* the model law should guarantee the parties' freedom to agree on the appointment procedure provided that equality is ensured (see report, paragraph 44, and above, question 2-4).* It may also provide supplementary rules for cases where parties have not, or not in all details, determined the appointment procedure.

Question 3-9: Should the parties be free to determine the appointment procedure, provided that equality is ensured?

Question 3-10: Should supplementary rules be adopted for cases where the appointment procedure, or a certain feature thereof, has not been agreed upon by the parties?

5. Liability (report, paragraph 70)*

Question 3-11: Would it be appropriate for the model law to deal with questions relating to the liability of arbitrators?

IV. Arbitral procedure

1. Place of arbitration (report, paragraphs 71-72)*

Question 4-1: Should the model law recognize the parties' freedom to determine the place of arbitration or to empower a third person to make that determination?

Question 4-2: In the absence of any agreement envisaged in question 4-1, should the model law empower the arbitral tribunal to determine the place of arbitration?

(It may be suggested here that any questions concerning the relevance of the place of arbitration to the determination of the applicable procedural law might appropriately be considered at a later stage in connection with other conflicts issues.)

2. Arbitral proceedings in general

25. As suggested in the report (paragraphs 73-74),* the arbitral tribunal may be empowered to conduct the proceedings as it considers appropriate, subject to instructions by the parties (including agreed arbitration rules), to principles of due process and to certain mandatory provisions adopted in the model law. In addition, it will have to be considered, in this and the following sections, to what extent the model law should provide supplementary rules on procedural points which the parties have not regulated.

Question 4-3: Should the model law expressly empower the arbitral tribunal to conduct the proceedings as it deems appropriate and, if so, what restrictions should be laid down?

Question 4-4: As a general question which is also relevant to the following issues, it may be asked to what extent the model law should include supplementary rules on the arbitral procedure as usually contained in arbitration rules?

3. Evidence (report, paragraph 75)*

Question 4-5: Should the arbitral tribunal be empowered to adopt its own rules on evidence, subject to contrary stipulation by the parties?

Question 4-6: What kind of court assistance may be envisaged in enforcing procedural decisions of the arbitral tribunal, e.g. calling of a witness, taking of evidence?

Question 4-7: What supplementary rules would be appropriate?

4. Experts (report, paragraph 76)*

Question 4-8: Should the arbitral tribunal be empowered to appoint experts *ex officio*, unless the parties have agreed otherwise?

Question 4-9: What supplementary rules are appropriate, e.g. on the expert's terms of reference or on the parties' rights and obligations in respect of the expert's performance of his task (cf. e.g., article 27 of the UNCITRAL Arbitration Rules)?**

5. Interim measures of protection

25. As indicated in the report (paragraphs 77-78),* there are two different types of interim measures possibly to be dealt with in the model law. First, there are interim measures of protection which may be taken by the arbitral tribunal (e.g. conservation of goods or sale of perishable goods). Here the main question is whether the arbitral tribunal may so act even without special authorization by the parties. Then, there are interim measures (e.g. attachment and seizure of assets) which a court may take. The question, here, is whether the availability of such relief and the procedure should be dealt with in the model law at all.

Question 4-10: Should the arbitral tribunal be empowered to take interim measures of protection even without special authorization by the parties?

Question 4-11: Should the model law deal with the involvement of courts in this respect?

* Yearbook . . . 1981, part two, III.

* Yearbook . . . 1981, part two, III.

** Yearbook . . . 1976, part one, II, A, para. 57.

6. *Representation and assistance* (report, paragraph 79)*

Question 4-12: Would it be appropriate for the model law to deal with questions relating to representation and assistance?

7. *Default* (report, paragraphs 80-81)*

Question 4-11: If one of the parties fails to participate, should the arbitral tribunal be empowered to go ahead with the proceedings and make a binding award even without special authorization by the parties, including reference to arbitration rules which allow the arbitral tribunal to do so? If such special authorization were to be required, should the model law expressly recognize it as being effective, subject to any restrictions envisaged under question 4-14?

Question 4-14: What conditions must be met, and laid down in the model law, for the arbitral tribunal to go ahead in case of default?

V. *Award*1. *Types of award* (report, paragraph 82)*

Question 5-1: Would it be appropriate for the model law to deal with the different possible types of awards (e.g. final, interim, interlocutory, partial)?

2. *Making of award* (report, paragraphs 83-85)*

Question 5-2: Would it be appropriate for the model law to deal with the question of setting a time-limit for the making of the award?

Question 5-3: Should the model law contain any mandatory provisions on the decision-making process in proceedings with more than one arbitrator? For example, should it require that an award be made by a majority of the arbitrators, provided that all arbitrators had the opportunity to take part in the deliberations leading to that award?

3. *Form of award* (report, paragraphs 86-87)*

Question 5-4: Should the model law require that the award, which must be in writing, be signed by all arbitrators or should it allow any exception, e.g., require that at least a majority of the arbitrators has signed and that the fact of a missing signature of a named arbitrator and the reasons therefor be stated (above the signatures of the other arbitrators)?

Question 5-5: Should the model law require that the date and place of the award be stated therein?

Question 5-6: Should the model law require that the award state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given?

4. *Pleas as to arbitrator's jurisdiction* (report, paragraphs 88-89)*

Question 5-7: Should the arbitral tribunal be empowered to decide on any pleas as to its jurisdiction including those based on non-existence or invalidity of an arbitration agreement?

Question 5-8: Should a ruling by the arbitral tribunal on its jurisdiction be final and binding or should it be subject to any review by a court?

5. *Law applicable to substance of dispute* (report, paragraphs 90-91)*

Question 5-9: Should the model law recognize as binding on the arbitral tribunal an agreement by the parties that the case be decided *ex aequo et bono*? If so, should an attempt be made to define such mandate in the model law (e.g. "*amiables compositeurs*" must observe those mandatory provisions of law regarded in the respective country as ensuring its *ordre public international*)?

Question 5-10: Should the model law recognize as binding on the arbitral tribunal an agreement by the parties that a certain law be applicable to the substance of the dispute?

Question 5-11: Failing an agreement envisaged under question 5-10, should the arbitral tribunal apply the law it deems appropriate (as, e.g., under article 1496 of the French New Code of Civil Procedure) or the law determined by the conflict of laws rules which it considers applicable (as, e.g., under article 33 (1) of the UNCITRAL Arbitration Rules)?**

Question 5-12: Should the arbitral tribunal be required to decide in accordance with the terms of the contract and to take into account the usages of the relevant trade? If so, should this also apply to decisions *ex aequo et bono*?

6. *Settlement* (report paragraph 92)*

Question 5-13: Where parties settle their dispute amicably during arbitration proceedings, should the arbitral tribunal be authorized (but not compelled) to record such settlement in an award ("*accord des parties*"), and should this type of award be treated like any other award?

7. *Correction and interpretation of award* (report, paragraph 94)*

* Yearbook . . . 1981, part two, III.

* Yearbook . . . 1981, part two, III.

** Yearbook . . . 1976, part one, II, A, para. 57.

Question 5-14: Should the model law contain a provision according to which a party may request within a specific period of time that the arbitral tribunal give an interpretation of the award or correct technical errors therein?

8. Fees and costs (report, paragraph 94)*

Question 5-15: Should the model law contain any provisions relating to fees and costs, for example, empowering the arbitral tribunal or any administering body to request deposits from each party?

Question 5-16: Would it be appropriate for the model law to envisage any review by a court (or its president) concerning the fees of arbitrators and, for example, allow readjustment in case of utterly unreasonable fees?

9. Delivery and registration of award

26. As indicated in the report (paragraphs 95-96),* it is clear that the award must be communicated or delivered to the parties, while it is less clear whether the model law should also require deposit or registration of the award. Here, a fundamental question arises which is closely connected with the enforcement of an "international" award under the model law.

27. As suggested in the report (paragraphs 96-100),* an attempt might be made to treat all "international" awards alike irrespective of whether recognition and enforcement is sought in the country of origin or abroad. If that approach were accepted, deposit or registration may not be required but merely an enforcement order (*exequatur*) in the country of enforcement, i.e. the system applicable under the 1958 New York Convention would be adopted for all "international" awards. It may be noted that the new French arbitration law has adopted such a unified approach in its articles 1498-1500 which govern the recognition and enforcement of arbitral awards whether rendered abroad or in international arbitration (in France).¹¹

* Yearbook . . . 1981, part two, III.

¹¹ "Chapter I: Recognition and enforcement of arbitral awards rendered abroad or in international arbitration

"Article 1498

"Arbitral awards shall be recognized in France if their existence is proven by the party relying thereon and if this recognition is not manifestly contrary to international public policy.

"Subject to the same conditions, such awards shall be declared enforceable in France by the enforcement judge.

"Article 1499

"The existence of an arbitral award is established by the production of its original text together with the arbitration agreement, or by copies of said documents accompanied by proof of their authenticity.

"If said documents are not in the French language, the party shall supply a translation certified by a translator who is on the list of court-appointed experts.

"Article 1500

"The provisions of Article 1476 through 1479 (d) are applicable."

Question 5-17: Should the model law state that the award shall be delivered to the parties and in what form (e.g. signed copies)?

Question 5-18: Should the model law require that the award be deposited or registered with a specified authority in the country where it was made? Or would it be preferable to adopt the system of the 1958 New York Convention, which allows recognition and enforcement of foreign arbitral awards without such deposit or registration, for all awards covered by the model law, i.e. international commercial arbitration awards?

10. Executory force and enforcement of award (report, paragraphs 87-100)*

Question 5-19: Should the model law adopt a uniform system of enforcement for all "international" awards irrespective of the place where they are rendered?

Question 5-20: Which rules of procedure on recognition and enforcement should the model law lay down? For example, should it adopt a provision along the lines of article IV of the 1958 New York Convention on what an applying party shall supply? Should it specify the formalities of the recognition and enforcement order and name the authority competent to issue such order?

11. Publication of award (report, paragraph 101)*

Question 5-21: Would it be appropriate for the model law to deal with the question whether an award may be published and, if so, should an express consent of the parties be required?

VI. Means of recourse

1. Appeal against arbitral award (report, paragraphs 102-104)*

Question 6-1: Should the model law recognize any agreement by the parties that the arbitration award may be appealed before another arbitral tribunal (of second instance)?

Question 6-2: Should the model law allow any appeal to a court for review of the award on the merits (apart from the setting aside procedure considered in question 6-6)?

2. Remedies against leave for enforcement (*exequatur*)

28. As suggested in the report (paragraphs 105-106),* the uniform approach recommended for the recognition and enforcement of international awards (see above, paragraph 27) may be adopted also in respect of the remedies

* Yearbook . . . 1981, part two, III.

against leave for enforcement and the remedies against refusal of *exequatur*. This approach has been adopted in the new French arbitration law, with one important modification. In its Chapter II, which deals with "recourse against arbitral awards rendered abroad or in international arbitration", an appeal is allowed against a decision refusing recognition or enforcement of an award (article 1501) and against a decision granting recognition or enforcement, based on a restricted number of reasons (article 1502),¹² which are reminiscent of the reasons set forth in article V, paragraphs (1) (a-d) and (2) (b) of the 1958 New York Convention.

29. However, under article 1504, an order to enforce an award rendered in France in international arbitration proceedings may not be appealed. This modification referred to above is, in fact, part of a further streamlining of the appeal system achieved by the following technique. Article 1504 allows against such an award an action to set aside on the same grounds as set forth in article 1502 and regards this action as implying *ipso jure* an appeal against the enforcement order. The result is that the mode of appeal is different depending on whether it is against leave for enforcement of a foreign award or against an international award rendered in France (and against its enforcement there) but that the reasons on which this appeal may be based are identical.

30. The Working Group may wish to consider whether such an approach would be desirable for the model law. If so, it may consider certain modifications. For example, it may require that in enforcement proceedings the party against whom enforcement is sought would have to be given an opportunity to raise objections and, if he does so, to transfer the case to setting aside proceedings. As regards the reasons on which an appeal against an enforcement order or an action to set aside may be based, it would seem desirable to adopt the reasons set forth in article V of the 1958 New York Convention (cf. report, paragraphs 109-111).^{*} Only one exception should be made, in conformity with a trend in recent case law, i.e. reference to "the public policy of the country where enforcement is sought" or, in case of setting aside proceedings, "the public policy of the country where the award was made" may be restricted to the "international public policy" (*ordre public international*) of the respective State (see report, paragraph 21).^{*}

Question 6-3: Should the model law adopt a uniform appeal system concerning decisions refusing recogni-

^{*} Yearbook . . . 1981, part two, III.

¹² "Article 1501: A decision that refuses recognition or enforcement of an award may be appealed.

"Article 1502: An appeal against a decision granting recognition or enforcement may be brought only in the following cases:

"1. If the arbitrator ruled without an arbitration agreement or on the basis of a void or expired agreement;

"2. If the arbitral tribunal was irregularly composed or a sole arbitrator irregularly appointed;

"3. If the arbitrator exceeded the authority conferred upon him;

"4. Whenever due process (literally: the principle of an adversary process) has not been respected;

"5. If the recognition or enforcement is contrary to international public policy."

tion or enforcement irrespective of where the award was made?

Question 6-4: Should the model law adopt a uniform appeal system concerning decisions granting recognition and enforcement irrespective of where the award was made (subject to a possible modification regarding awards against which a setting aside action may be brought, see question 6-8)? In particular, should the grounds on which recognition and enforcement may be refused under article V of the 1958 New York Convention be the same under the model law irrespective of where the award was made?

Question 6-5: Which rules of procedure concerning recourse against an *exequatur*, or against refusal of *exequatur*, should the model law lay down, including specification of the court or authority to which a party may appeal?

3. Setting aside or annulment of award (and similar procedures)

31. As regards the complex question of what remedy the model law should provide against arbitral awards, reference may be made to the discussion in the report (paragraphs 107-111)^{*} and to the above consideration of a possible streamlining of the appeal system concerning international awards made in the country of the model law (above, paragraphs 28-30).

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

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

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

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

^{*} Yearbook . . . 1981, part two, III.