

2. NOTE BY THE SECRETARIAT: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT ARTICLES 25 TO 36 ON AWARD (A/CN.9/WG.II/WP.38)^a

Introductory note

1. This working paper contains tentative draft articles on the arbitral award, prepared by the secretariat in accordance with the conclusions reached by the Working Group on International Contract Practices at its third session (New York, 16-26 February 1982)^b. Draft articles on scope of application, arbitration agreement, arbitrators, and arbitral procedure are contained in the note A/CN.9/WG.II/WP.37 of 15 July 1982. Separate working papers, to be submitted to future sessions of the Working Group, will deal with the final chapter (VI. Means of recourse) and with those issues on which the Working Group has requested further studies (e.g. court assistance in taking evidence; filling of gaps and adaptation of contracts) or which were suggested as additional features to be included in the model law (effect of commencement of arbitration proceedings on prescription period; minimum contents of statements of claim and of defence; language; termination of arbitration proceedings).

2. References accompanying the draft articles are made to the relevant parts of the report of the Working Group on the work of its third session under its symbol A/CN.9/216^c. In order to facilitate reference to the corresponding discussion in that report and in the basic report on possible features of a model law (A/CN.9/207)^d, the structure and classification of the

issues used therein has been maintained in the presentation of the draft articles. Their order in no way indicates the eventual structure of the model law and will be altered once a clearer picture about the contents of the model law has emerged. Also the headings and subheadings used in these reports have been maintained in this working paper for the same purpose. They are not intended to be suggested headings of the eventual chapters or sections of the model law.

Draft articles 25 to 36 of a model law on international commercial arbitration

V. Award

1. Types of award¹

Article 25

Where the arbitral tribunal makes an award which [is apparently] [indicates that it is]² not intended to settle the dispute in full, the making of such an (interim, interlocutory, or partial) award does not terminate the mandate of the arbitral tribunal.³

¹Relevant discussion and conclusions of the Working Group in A/CN.9/216, para 73

²Alternative wording is submitted here to stimulate discussion on whether an indication of the intent should be required (which could be interpreted as requiring a statement to that effect) or whether it would be more appropriate to require merely that the intent is apparent (or evident).

³If this draft article were to be retained, it might later be incorporated into the provisions, if any, on termination of arbitration proceedings (under IV.11).

^a31 August 1982. Referred to in Report, para. 87 (part one, A)

^bReproduced in this volume, part two, III, B, 1.

^cYearbook . . 1982, part two, III, A.

^dYearbook . . 1981, part two, III.

2. Making of an award⁴

Article 26⁵

(1) When there are three or another uneven number of arbitrators,⁶ any award [or other decision of the arbitral tribunal] shall be made by [all or] a majority of the arbitrators, provided that all arbitrators have taken part in the deliberations leading to the award [or decision].

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

3. Form of award⁷

Article 27

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

(2) An award shall be made at the place of arbitration (article 18). It shall state the place where and the date on which it is made. [The award shall be deemed to have been made at the place and on the date indicated therein.]⁸ [Failing such indication, the award shall be deemed to have been made at the place of arbitration and on the date on which it is signed by the arbitral tribunal.]⁹

(3) The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.¹⁰ The arbitral tribunal is not obliged to give reasons for an award on agreed terms.¹¹

⁴Discussion and conclusions of the Working Group in A/CN.9/216, paras 74-77. As to the suggestion in para 75 (on possible legal consequences of undue delay by an arbitrator in conducting the proceedings) see draft article 11 (in A/CN.9/WG.II/WP.37)

⁵This draft provision is modelled on article 31 of the UNCITRAL Arbitration Rules (Yearbook ... 1976, part one, II, A, paras 56-57).

⁶Despite the parties' freedom to agree on any number of arbitrators, no provision on an even number is suggested here, following the approach suggested in draft article 16 and accompanying footnote 28 (A/CN.9/WG.II/WP.37).

⁷Discussion and conclusions of the Working Group in A/CN.9/216, paras 78-80

⁸The sentence in parenthesis reflects the suggestion set forth in para. 79 of A/CN.9/216.

⁹The last sentence is modelled on article 22 of the ICC Rules of Arbitration (1975). It would indirectly express the view prevailing in the Working Group (A/CN.9/216, para 79) that an award was not invalid by the mere reason that the place and time were not stated therein.

¹⁰This sentence is modelled on article 32 (3) of the UNCITRAL Arbitration Rules

¹¹This sentence could also be incorporated into the draft article relating to settlement by the parties (article 33).

4. Pleas as to arbitrator's jurisdiction¹²

Article 28

(1) [Subject to the provisions of paragraph (3) of this article,] a plea that the arbitral tribunal does not have jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement, may be raised only in the arbitration proceedings and not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.¹³ [A plea that the arbitral tribunal has exceeded its terms of reference shall be raised during the arbitration proceedings promptly after the matter is raised on which the tribunal is alleged to have no jurisdiction.] [Where the delay in raising the plea is due to a cause which the arbitral tribunal deems justified, it shall declare the plea admissible.]¹⁴

[(2) The fact that a party has appointed, or participated in the appointment, of an arbitrator does not preclude that party from raising a plea referred to in paragraph (1) of this article.]¹⁵

[(3) Where either party to an arbitration agreement has initiated arbitration proceedings before any resort is had to a court, a court subsequently asked to deal with the same subject-matter between the same parties or with the question whether the arbitration agreement was non-existent or null and void or had lapsed, shall stay its ruling on the jurisdiction of the arbitral tribunal until the arbitral award is made, unless it has good and substantial reasons to the contrary.]¹⁶

Article 29¹⁷

(1) The arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration clause, in accordance with the provisions of article 4,¹⁸ or of the separate arbitration agreement.

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

Article 30

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

¹²Discussion and conclusions of the Working Group in A/CN.9/216, paras 81-83

¹³This sentence is modelled on article 21 (3) of the UNCITRAL Arbitration Rules

¹⁴The two sentences in parenthesis are modelled on article V(1) of the European Convention on International Commercial Arbitration (Geneva, 1961, hereinafter referred to as 1961 Geneva Convention) (United Nations, *Treaty Series*, vol. 484, No. 7041 (1963-1964), p. 364)

¹⁵This draft provision is modelled on article 18 (4) of the Uniform Law annexed to the European Convention (Strasbourg, 1966) (*European Treaty Series*, No. 56).

¹⁶This draft provision is modelled on article VI (3) of the 1961 Geneva Convention

¹⁷This draft article is modelled on article 21 (1) and (4) of the UNCITRAL Arbitration Rules.

¹⁸The reference to article 4 need not be retained if draft article 4 itself is incorporated here (cf. footnote 13 in A/CN.9/WG.II/WP.37).

Alternative A:

whether it was made as a preliminary question or in the final award, only by way of recourse against the award under the procedure laid down in article ...¹⁹

Alternative B:

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

(b) if it was made in the final award, by way of recourse against the award under the procedure laid down in article ...¹⁹.

5. *Law applicable to substance of dispute*²⁰*Article 31*

(1) The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute.²¹ [Parties may so designate any national law or, even if not yet in force, a pertinent international convention or uniform law.]²²

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

Alternative A:

the law determined by the conflict of laws rules which it considers applicable.²³

Alternative B:

the substantive law rules which it considers most appropriate [, taking into account the various factors of the transaction and the interests of the parties]. [Such rules may form part of a given national legal system or of an international convention or uniform law, even if not yet in force].²⁴

(3) The arbitral tribunal [shall decide in accordance with the terms of the contract and] shall take into account the usages of the trade applicable to the transaction.²⁵ [It shall apply any usage to which the parties have agreed; the parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which they

knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.]²⁶

Article 32

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

6. *Settlement*²⁷*Article 33**Alternative A:*

(1) If, during the arbitration proceedings, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitration proceedings, or if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms.²⁸

Alternative B:

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

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

7. *Correction and interpretation of award*²⁹*Article 34*³⁰

(1) [Unless otherwise agreed by the parties,] within thirty days after the receipt of the award, either party,

¹⁹The reference is to a future draft article on the subject "VI Setting aside or annulment of award", still to be considered by the Working Group

²⁰Discussion and conclusions of the Working Group in A/CN.9/216, paras. 84-94

²¹This sentence is modelled on article 33 (1) of the UNCITRAL Arbitration Rules

²²The sentence in parenthesis reflects a suggestion set forth in para. 87 of A/CN.9/216.

²³Alternative A is modelled on article 33 (1) of the UNCITRAL Arbitration Rules

²⁴Alternative B reflects the view reported in para. 89 of A/CN.9/216.

²⁵This sentence is modelled on article 33 (3) of the UNCITRAL Arbitration Rules.

²⁶The sentence in parenthesis reflects a suggestion set forth in para. 92 of A/CN.9/216 and is modelled on article 9 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (Yearbook 1980, part three, I, B)

²⁷Discussion and conclusions of the Working Group in A/CN.9/216, paras. 95-97

²⁸This alternative is modelled on article 34 (1) of the UNCITRAL Arbitration Rules. If this alternative were to be adopted, the part referring to termination might later be incorporated into the provisions, if any, on "Termination of arbitration proceedings" (under IV.11).

²⁹Discussion and conclusions of the Working Group in A/CN.9/216, para. 98.

³⁰This draft article is modelled on articles 35 to 37 of the UNCITRAL Arbitration Rules. The draft provision on making an additional award is included here although the Working Group has not yet considered that issue.

with notice to the other party, may request the arbitral tribunal

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

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

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

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

8. Delivery and registration of award³¹

Article 35³²

(1) After an award is made under article 27, copies thereof signed by the arbitral tribunal shall be communicated to the parties.³³

(2) Upon request by [the parties] [either party], the original award shall be filed with the Authority specified in article 17.³⁴ [This provision shall not be interpreted as making such filing a pre-condition for recognition or enforcement of the award.]

³¹Discussion and conclusions of the Working Group in A/CN.9/216, paras. 100-102

³²This draft article might later be combined with draft article 27.

³³This draft provision is modelled on article 32(6) of the UNCITRAL Arbitration Rules.

³⁴The Working Group may wish to consider the appropriateness of including a similar provision for the filing of all documents and records of the arbitration proceedings, in particular in *ad hoc* arbitration

9. Executory force and enforcement of award.³⁵

Article 36

Alternative A:

Subject to any multilateral or bilateral agreement entered into by the State in which this Law is in force,³⁶ an arbitral award as defined in article 1

Alternative B:

An arbitral award as defined in article 1 and considered as a domestic award in the State in which this Law is in force,³⁶

shall be recognized as binding and enforced in accordance with the following rules of procedure:³⁷

(a) An application for recognition and enforcement of an arbitral award shall be made in writing to [the Authority specified in article 17].³⁸

(b) The party applying for recognition and enforcement shall, at the time of the application, supply the duly authenticated original award or a duly certified copy thereof and the original arbitration agreement referred to in article 3 or a duly certified copy thereof. [If the said award or agreement is not made in an official language of [the Authority] [this State], the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language, certified by an official or sworn translator or by a diplomatic or consular agent.]³⁹

³⁵Discussion and conclusions of the Working Group in A/CN.9/216, paras 103-104

³⁶A State when adopting this model law may replace this reference by the name of that State or other appropriate wording.

³⁷It should be noted that this draft article deals only with procedure but not with substantive aspects (e.g. the question, dealt with under VI 2, of which objections may be raised against recognition and enforcement)

³⁸Designation of the Authority specified in article 17 may be particularly appropriate if alternative B were to be adopted. For alternative A, however, it might be preferable to refer to all courts or other judicial authorities competent to grant recognition and enforcement.

³⁹Subparagraph (b) is modelled on article IV of the 1958 New York Convention (United Nations, *Treaty Series*, vol. 330, No. 4739 (1959), p. 38). The last sentence, placed between square brackets, is unnecessary if alternative B were to be adopted.