

3. NOTE BY THE SECRETARIAT: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION:
DRAFT ARTICLES 37 TO 41 ON RECOGNITION AND ENFORCEMENT OF AWARD AND RECOURSE
AGAINST AWARD (A/CN.9/WG.II/WP.42)^a

Introductory note

1. This working paper contains draft articles on recognition and enforcement of award and on recourse against arbitral award. Since these draft articles are tentative ones to be considered by the Working Group in first reading, they are numbered and presented here as a continuation of tentative draft articles 1 to 36, as set forth in documents A/CN.9/WG.II/WP.37 and

38^b. After consideration by the Working Group, they will be revised and re-numbered as a continuation of revised draft articles I to XXVI, as set forth in document A/CN.9/WG.II/WP.40^c.

2. The draft articles submitted in this working paper have been prepared in the light of the relevant

^bReproduced in this volume, part two, III, B, 1 and 2 respectively.

^cReproduced in this volume, part two, III, D, 1.

^a25 January 1983. Referred to in Report, para 87 (part one, A).

discussions by the Working Group at its third and fourth sessions.¹

3. As regards the subject of recognition and enforcement of arbitral awards, the draft articles follow the approach adopted by the Working Group with regard to the draft article on executory force and enforcement of award (previous draft article 36, revised draft articles XXV and XXVI), i.e. to treat separately awards rendered in the State where the model law is in force and awards rendered outside that State. Nevertheless, an attempt is made to suggest similar solutions in substance in order to come closer to the ideal of uniform treatment of "international" awards irrespective of their place of origin.

4. The above mentioned "territorial" demarcation line also means that no distinction is made according to which procedural law applies. Thus, for example, the provision on enforcement of foreign awards would apply to an award rendered abroad even if made under the law of the State where enforcement is sought (i.e. under the model law). It may be noted that such cases of awards made under a law of a State other than the country of origin involve questions of policy which come up in a number of contexts (e.g. refusal of recognition because of violation of procedural law, draft article 38 (1) (d); competence of court to set aside an award, draft article 40; and recognition of such setting aside as reason against enforcement, draft article 38 (1) (e)). While the answer to these questions may vary from one context to another, it is submitted that the individual decisions are necessarily of a tentative nature and that at a later stage an overall review of the policy would be desirable, possibly in connection with the consideration of questions of conflicts of procedural laws.

Draft articles 37 to 41 of a model law on international commercial arbitration

RECOGNITION AND ENFORCEMENT OF AWARD (continued)²

Article 37³

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

(a) A party to the arbitration agreement referred to in article II was, under the law applicable to him, under

some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

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

(c) The award [deals with] [decides on] a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement or not referred to the arbitral tribunal];⁴ however, if any decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the mandatory provisions of this Law,⁵ or the agreement by the parties, unless in conflict with any mandatory provision of this Law, or, failing such agreement, the non-mandatory provisions of this Law [, provided that, if the parties have agreed on the application of the law of another State, the provisions of that law are relevant];⁶ or

(e) The award [has not yet become binding on the parties] [is still open to appeal before a higher instance arbitral tribunal]⁷ or has been set aside [or suspended]⁸ by a court of this State [or, if the award was made under the law of another country, by a competent authority of that country]⁹.

⁴While the first alternative may be regarded as sufficient for all practical purposes, the second alternative attempts to indicate more clearly that the question of the arbitrators' exceeding their authority has to be answered by using two standards: the arbitration agreement (in particular an arbitration clause) and the often narrower mandate given to the arbitrators by way of reference, submission of statement of claim.

⁵It may be noted that most commentators interpret article V, paragraph (1) (d) of the 1958 New York Convention as giving absolute priority to the agreement of the parties, i.e. irrespective of whether such agreement is in conflict with a mandatory provision of the "applicable" procedural law (see, e.g., Fouchard, *L'arbitrage commercial international*, vol. II (Paris 1965), p. 332, Sanders, *The New York Convention*, in *International Commercial Arbitration*, vol. II (The Hague, 1960), p. 317; Schlosser, *Das Recht der internationalen privaten Schiedsgerichtsbarkeit*, vol. I (Tübingen 1975), p. 420, van den Berg, *The New York Arbitration Convention* (The Hague/Deventer, 1982), p. 325-330). This view leads to the dilemma that, in the case of such a conflict and if the procedure complied with the agreement, enforcement of the award would not be refused under sub-paragraph (d) but, since the award may be set aside, enforcement may be effectively refused under sub-paragraph (e). However, it is clear that this rule and its reasoning does not apply to the enforcement of non-foreign awards as governed by this draft article (see also footnote 14).

⁶See also introductory note above, para. 4.

⁷The first alternative presents the wording used in article V, paragraph (1) (e) of the 1958 New York Convention which is commonly interpreted as meaning "still open to ordinary means of recourse". Since the model law does not envisage any such ordinary appeal to courts but should not preclude appeal within the arbitration system, as known particularly in commodity arbitrations, the second alternative, which would make that point clearer, is submitted for consideration.

⁸The words "or suspended", as used in the 1958 New York Convention, might be omitted in the model law since this law does not envisage such suspension of an award, i.e. of its enforcement.

⁹See also introductory note above, para. 4.

¹Report of the Working Group on International Contract Practices on the work of its third session (A/CN.9/216) (Yearbook . 1982, part two, III, A), paras. 103-104, 106-109, and of its fourth session (A/CN.9/232) (reproduced in this volume, part two, III, A), paras. 14-22.

²Preceding draft articles under this heading are the revised draft articles XXV and XXVI set forth in WP.40

³This draft article is modelled on article V of the 1958 New York Convention (United Nations, *Treaty Series*, vol. 330, No. 4739 (1959), p. 38), with some suggested modifications for the sake of clarification or to adjust it to non-foreign awards.

(2) Recognition and enforcement of an award may also be refused if the court finds that the recognition or enforcement would be contrary to the [international]¹⁰ public policy of this State [, including any public policy rule on the arbitrability of the subject matter of the dispute].¹¹

Article 38¹²

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

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

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

(c) The award [deals with] [decides on] a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement or not referred to the arbitral tribunal];¹³ however, if any decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties,¹⁴ or, failing such agreement, was not in accordance with the law of the country where the arbitration took place [, provided that, if the

¹⁰The word "international" might be retained, for the sake of uniform treatment of all "international" awards, if (and only if) it were also adopted in the context of foreign awards (see draft article 38 (2)).

¹¹The words in square brackets are based on the common view that article V (2) (a) of the 1958 New York Convention presents, in substance, a sub-category of the general reason set forth in subparagraph (b) of that paragraph.

¹²This draft article is modelled on article V of the 1958 New York Convention.

¹³See note 4.

¹⁴The Working Group may wish to consider the appropriateness of aligning this provision with draft article 37 (1) (d), i.e. to accord priority to the mandatory provisions of the applicable procedural law. Although this would constitute a deviation from the prevailing interpretation of this provision in the 1958 New York Convention, it would help to avoid the dilemma mentioned in footnote 5. It may be added here that the dilemma, while probably not frequent, is a real one for the conscientious arbitrator who wants to render an award that can be enforced if necessary. There is a further consideration which casts some doubt on the above interpretation of this provision: where parties have expressly subjected their agreement to mandatory law provisions, e.g. by using the UNCITRAL Arbitration Rules (Yearbook . 1976, part one, II, A), see article 1 (2), it would be difficult to maintain the view that the agreement on the point at issue has priority; however, if then priority is given to the conflicting mandatory provision, a rule such as article 1 (2) of the UNCITRAL Rules would have legal effect which goes far beyond what the drafters had in mind.

parties have agreed on the application of the law of another State, the provisions of that law are relevant];¹⁵ or

(e) The award [has not yet become binding on the parties] [is still open to appeal or other ordinary recourse]¹⁶ or has been set aside [for one of the reasons set forth in sub-paragraphs (a) to (d) or in paragraph (2) of this article],¹⁷ or suspended, by a competent authority of the country in which [, or under the law of which,]¹⁸ that award was made.

(2) Recognition and enforcement may also be refused if the court [from which recognition and enforcement is sought]¹⁹ finds that:

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

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

Article 39²⁰

If an application for the setting aside or suspension of an award has been made to a competent authority referred to in article 37, paragraph (1) (e) or 38, paragraph (1) (e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.²¹

RECOURSE AGAINST ARBITRAL AWARD

Article 40

No recourse against an arbitral award made under this Law [, whether or not rendered in the territory of

¹⁵See also introductory note above, para. 4.

¹⁶While the first alternative presents the wording used in article V (1) (e) of the 1958 New York Convention, the second alternative, reflecting the common interpretation thereof, is submitted for consideration as a possibly clearer rule.

¹⁷The words in square brackets are intended to serve the same purpose as article IX of the 1961 Geneva Convention (United Nations, *Treaty Series*, vol. 484, No 7041 (1963-1964), p. 364), i.e. to recognize, for purposes of enforcement, as reasons for setting aside only those reasons on which recognition and enforcement may be refused. Such a rule, by disregarding certain unexpected local particularities, would meet the concerns underlying a proposal made by the International Chamber of Commerce some time ago (cf. A/CN.9/169, para.9; A/CN.9/168, para 43).

¹⁸See also introductory note above, para. 4.

¹⁹The words in square brackets might be regarded as self-evident and superfluous.

²⁰This draft article is modelled on article VI of the 1958 New York Convention.

²¹As regards non-foreign awards, this draft article may be redundant or in need of modification, if the Working Group would be in favour of stream-lining the recourse system along the lines suggested in WP.35, paras. 28-30. A provision on adjournment would, for example, not be necessary under a system such as the one adopted in article 1504 of the French law according to which an action for setting aside implies *ipso iure* an appeal against any enforcement order of the enforcement judge or dis seizure of that judge. Another point in need of clarification arises with regard to those States not requiring an *exequatur* for enforcement of awards made in their territory.

this State,]²² may be made to a court except an action for setting aside in accordance with the provisions of article 41.

Article 41

(1) An action for setting aside [an arbitral award referred to in article 40]²³ may be brought [before the Court specified in article V]²⁴ within four months from the date on which the party bringing that action has received the award in accordance with article XXII (4).²⁵

(2) An arbitral award may be set aside only on one of the grounds on which recognition or enforcement may

²²The words in square brackets are added for the mere purpose of clarification, i.e. to prevent, in particular, the otherwise possible mis-interpretation that only awards rendered in the State of the model law are covered. Such interpretation might be based on the principle that usually only the courts of the country of origin are competent to set aside awards. While it is conceivable to adopt such "territorial" approach as a strict and clear-cut rule, the solution suggested in draft article 40 is more in line with article V (1) (e) of the 1958 New York Convention and with the principle that parties, while probably not often doing so, may agree on the application of the procedural law of a State other than the one where the arbitration takes place, in this connection, see also introductory note above, para. 4.

²³The words in square brackets might not be necessary in view of the close proximity with the preceding article. If, however, such a reference seems desirable, one might also consider using here the same words as in article 40, i.e. "an arbitral award made under this Law".

²⁴The reference is to revised draft article V as set forth in WP.40. The final decision on whether this Court or another court should be competent for setting aside would depend on a later review of the exact functions of that special Court specified in article V (see also note 9 in WP.40).

²⁵The reference is to revised draft article XXII as set forth in WP.40. The Working Group may wish to consider whether it is necessary to deal with cases of appeal within the arbitration system and expressly to state that the time-limit would then run from the date on which the award is no longer subject to appeal before arbitrators or, if such appeal was made, from the date of the receipt of the decision on the appeal.

²⁶The reference to subparagraph (d) is of particular relevance since the general reason of non-compliance of the arbitral procedure with the applicable procedural laws or rules comprises many particular grounds often set out in detail in national law provisions on setting aside (e.g. award does not comply with form requirements, including statement of reasons; award rendered *ex aequo et bono* without authorization by parties, party not notified in advance about hearing; award rendered after expiry of time-limit fixed by parties). As the last example indicates, even an issue not dealt with in the procedural law (here: the model law) may become relevant in the context of setting aside if it is regulated in the agreement of the parties (and not complied with).

It should also be noted that the generality of the above ground, if interpreted literally, would lead to setting aside in cases of procedural mistakes or defects where such legal consequence may be regarded as unjustified. The Working Group may, thus, wish to consider the appropriateness of somehow qualifying the reason under subparagraph (d) by one of the various approaches found in national laws. One possible way is to use the idea of estoppel or implied waiver and to preclude reliance on a ground which the party had knowledge of during the arbitration proceedings and did not invoke then; it may be added that the same idea might be incorporated in a provision on the arbitral procedure as such (as, e.g., article 30 of the UNCITRAL Arbitration Rules) and not merely as a restriction of the grounds for setting aside. Another possible way would be to qualify the procedural defect (e.g. "serious" or "gross" violation, non-compliance with mandatory provision). Yet another way, also used in some national laws, could be to qualify the causal connection between the procedural mistake and the award (e.g. non-compliance affected the award or is likely to have influenced the decision).

be refused under article 37, paragraph (1) (a), (b), (c), (d)²⁶ or (2)²⁷ [or on which an arbitrator may be challenged under article IX (2)].²⁸

(3) The court may, where appropriate,²⁹ set aside only a part of the award, provided that this part can be separated from the other parts of the award.

(4) If the court sets aside the award, [it may order that the arbitration proceedings continue for re-trial of the case] [a party may within three months request re-institution of the arbitration proceedings], unless such measure is incompatible with a ground on which the award is set aside.³⁰

(5) Any decision by the court on an action for setting aside is subject to appeal within three months.³¹

²⁷Draft article 41 (2) implements the view prevailing at the fourth session of the Working Group that the grounds for setting aside should be restricted to those listed in article V, paragraphs (1) (a-d) and (2) (b) of the 1958 New York Convention (see A/CN.9/232, para. 15, reproduced in this volume, part two, III, A). However, since some doubt was expressed as to whether the reasons should be thus restricted, the Working Group may wish to consider the appropriateness of adding one or more of the following grounds as found in a number of national laws:

(a) "*Infra petita*" (as, e.g. included in the 1966 Strasbourg Uniform Law, article 25 (2) (e): "if the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made"); in considering the need for such a rule, account should be taken of draft article XXIV (2) on additional award (set forth in WP.40) and of the possibility of widening the scope of that provision (e.g. by including even those cases where further hearings or evidence are necessary);

(b) "Award contains conflicting decisions"; in considering the need for such ground, which probably occurs only rarely, account should be taken of revised draft article XXIV (1) (b) on interpretation of award (set forth in WP.40). At any rate this ground seems to be more acceptable than the sometimes found wider ground "decisions in award are in conflict with reasons stated therefor" since this would open the door to an undesirable review of the merits of the case;

(c) "Relevant facts or evidence discovered or become known only after award", this ground is found in many national laws (though in varied versions and sometimes limited to evidence "withheld by the other party" or "which the claimant was unable to present") and its adoption may be considered as furthering justice. However, for practical purposes, it would be necessary (as done in most national laws) to provide for a much longer time-period than the one envisaged under article 41 (1); yet, if a time-limit of, e.g., five years were adopted (as in article 28 (3) of the 1966 Strasbourg Uniform Law) (*European Treaty Series*, No. 56), recognition of such ground for setting aside would run counter to the idea of a speedy and final settlement of the dispute for the sake of peace;

(d) "Award improperly procured by other party (e.g. by fraud, bribery, forgery or other criminal act)"; to this possible ground for setting aside similar considerations apply as the ones set forth under (c); in addition, it is submitted that most if not all instances of this kind would be covered by the grounds set forth in article 37 (1) (b) or (2), i.e. violation of due process or public policy.

²⁸The decision on whether the words in square brackets are to be retained depends on the final decision of the Working Group on court review of a challenge (see revised draft article X in WP.40).

²⁹The main case envisaged here (and possibly to be expressed in the provision itself) is where the ground for setting aside affected only a part of the decision.

³⁰The main case envisaged here is the ground under article 37 (1) (a), i.e. lack of valid arbitration agreement.

³¹In view of revised draft article V (2) (b), set forth in WP.40, it would seem necessary to state expressly that appeal is allowed (provided this idea is adopted by the Working Group), if the Court specified in article V would be entrusted with the setting aside of awards (see also note 26).