B. Working papers submitted to the Working Group on International Contract Practices at its fourth session (Vienna, 4-15 October 1982)

1. NOTE BY THE SECRETARIAT: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION: DRAFT ARTICLES 1 TO 24 ON SCOPE OF APPLICATION, ARBITRATION AGREEMENT, ARBITRATORS, AND ARBITRAL PROCEDURE (A/CN.9/WG.II/WP.37)[a]

Introductory note

1. This working paper contains tentative draft articles on scope of application, arbitration agreement, arbitrators, and arbitral procedure, 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). Separate working papers will deal with the other chapters (i.e. award, means of recourse) and with those issues on which the Working Group 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 (notice of arbitration, statements of claim and 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.[b] 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),[c] 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 1 to 24 of a model law on international commercial arbitration

I. *Scope of application*[1]

Alternative A:[2]

Article 1 (A)

This Law applies:

(a) To arbitration agreements concluded by parties to a commercial [or economic] transaction whose places of business are in different States [or, if their places of business are in the same State, where their contract is to be performed outside that State or where the subject-matter in dispute is property situated outside that State][3]; if a party has more than one place of business the relevant place of business is that which has the closest relationship to [the contract and its performance] [the conclusion of the arbitration agreement];[4]

(b) To the preparation and conduct of arbitration proceedings based on agreements referred to in paragraph *(a)*;

(c) To arbitral awards rendered in proceedings referred to in paragraph *(b)*.

Alternative B:

Article 1 (B)

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

(2) "Arbitration" covers arbitration agreements, the preparation and conduct of arbitration proceedings based on such agreements whether or not administered by a permanent arbitral institution, and the arbitral awards resulting therefrom.

(3) "Commercial" refers to the settlement of a dispute arising in the context of any commercial transaction [or similar economic realtionship] [including supply or exchange of goods, construction of works, financing, joint venture and other forms of business co-operation, provision of services, except labour under a contract of employment].[5]

(4) "International" are those cases where the arbitration agreement is concluded by parties whose places of business are in different States [or, if their places of

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[a] 15 July 1982 Referred to in Report, para 87 (part one, A).

[b] Yearbook 1982, part two, III, A.

[c] Yearbook .. 1981, part two, III

[1] Relevant discussion and conclusions of the Working Group in A/CN.9/216, paras 16-21.

[2] The main difference between alternative A and alternative B is one of structure and drafting style, also, alternative B is more detailed and covers some aspects not dealt with in alternative A (see art. 1 (B) (2), (3))

[3] If the latter situation were to be accepted as an "international" case, this extension would probably have to be expressed in the context of the arbitration proceedings but not the arbitration agreement, since at the time of the conclusion of that agreement it may not be clear whether a dispute will arise relating to property

[4] The first mentioned factor ("the contract and its performance") is the one adopted in article 10 *(a)* of the United Nations Convention on Contracts for the International Sale of Goods (Yearbook .. 1980, part three, I, B). The second alternative ("the conclusion of the arbitral agreement") is submitted for consideration since it would allow a clear decision even in the case where the contract, or a separate arbitration agreement, is negotiated and concluded with one branch of a firm while another branch, in a different State, is in charge of the performance.

[5] This non-exhaustive list, still to be refined, is given here in order to stimulate discussion on whether the general term "commercial" (or "economic") should be explained by way of example or be left undefined

business are in the same State where their contract is to be performed outside that State or where the subject-matter in dispute is property situated outside that State].[6] If a party has more than one place of business, the relevant place of business is that which has the closest relationship to [the contract and its performance] [the conclusion of the arbitration agreement].[7]

II. *Arbitration agreement*

1.-3. *Form, contents, parties, domain*[8]

Article 2[9]

"Arbitration agreement" is an undertaking by [parties] [physical persons or legal persons of private or public law] to submit to arbitration all or certain differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not [, concerning a subject matter which could be disposed of by agreement of the parties under the applicable law].

Article 3

(1) The arbitration agreement, whether an arbitration clause in a contract or a separate agreement, shall be [concluded or evidenced] in writing.

(2) "Agreement in writing" includes an agreement contained in a document signed by the parties or contained in an exchange of letters, telegrammes or communications in another, [visible and] sufficiently permanent form.[10] The reference in a contract to general conditions containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing. [However, an arbitration agreement also exists where one party to a contract refers in its written offer, counter-offer or contract confirmation to general conditions, or uses a contract form or standard contract, containing an arbitration clause and the other party does not object, provided that the applicable law recognizes formation of contracts in such manner].[11]

4. *Separability of arbitration clause*[12]

Article 4[13]

For the purposes of determining whether the arbitral tribunal has jurisdiction, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

5. *Effect of the agreement*[14]

Article 5[15]

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

Article 6[16]

A request for interim measures of protection addressed by any party to a court, whether before or during arbitration proceedings, shall not be deemed incompatible with the agreement to arbitrate or as a waiver of that agreement.

III. *Arbitrators*

1.-2. *Qualifications, challenge (and replacement)*[17]

Article 7

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.[18]

Article 8[19]

(1) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence.

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[6]See note 3.

[7]See note 4.

[8]Discussion and conclusions of the Working Group in A/CN.9/216, paras 22-31.

[9]This draft provision is modelled on article II (1) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (hereinafter referred to as "1958 New York Convention") (United Nations, *Treaty Series*, vol 330, No. 4739 (1959), p. 38), with some alternatives or amendments based on suggestions by the Working Group

[10]The last words of this sentence are submitted to invite discussion by the Working Group on which modern means of communication should be recognized and which elements should be required, in particular in cases of electronic transmission

[11]It may be noted that this latter provision deviates from the requirement of written form by recognizing a writing by only one party, but that it deviates considerably less than, for example, article I (2) *(a)* of the European Convention on International Commercial Arbitration (Geneva, 1961) (United Nations, Treaty Series, vol. 484, No. 7041 (1963-1964), p. 484) which recognizes, "in relations between States whose laws do not require that an arbitration agreement be made in writing, any arbitration agreement concluded in the form authorized by these laws".

[12]Discussion and conclusion of the Working Group in A/CN 9/216, para. 34.

[13]This draft provision is modelled on article 21 (2) of the UNCITRAL Arbitration Rules The related issue "Pleas as to arbitrator's jurisdiction" will be dealt with under V.4, following the classification scheme adopted in the report However, it may well be combined later with the provision on separability

[14]Discussion and conclusions of the Working Group in A.CN.9/216, paras. 35-39.

[15]This draft provision is modelled on article II (3) of the 1958 New York Convention.

[16]This draft provision is modelled on article 26 (3) of the UNCITRAL Arbitration Rules

[17]Discussion and conclusions of the Working Group in A CN.9/216, paras. 42-45, 50, 52, 75. The draft provisions of this section might later be placed after the draft provisions on the appointment of arbitrators.

[18]This draft provision is modelled on article 9 of the UNCITRAL Arbitration Rules.

[19]This draft provision is modelled on article 10 of the UNCITRAL Arbitration Rules.

(2) A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Article 9

(1) Subject to the provisions of article 10, the parties are free to agree on the procedure for challenging an arbitrator.

(2) Failing such agreement, the following procedure shall be used:[20]

(a) A party who intends to challenge an arbitrator shall, within fifteen days after knowing about the appointment of that arbitrator or about the circumstances mentioned in articles 7 and 8, send a written statement of the reasons for the challenge to the other party and to all arbitrators;

(b) When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge;

(c) If within [20] days after the challenge, the other party does not agree to the challenge and the challenged arbitrator does not withdraw, [the decision on the challenge shall be made by the Authority specified in article 17] [the challenging party may pursue his objections before a court only in an action for setting aside the award or any recourse against recognition and enforcement of the award].[21]

Article 10

If, under any procedure for challenge agreed upon by the parties, the challenged arbitrator does not withdraw or the challenge is not sustained by the person or body entrusted with the decision on the challenge, the challenging party may [request the Authority specified in article 17 to make a final decision on the challenge] [pursue his objections before a court only in an action for setting aside the award or any recourse against recognition and enforcement of the award].[22]

[20]The procedure suggested here is essentially the one adopted in articles 11 and 12 of the UNCITRAL Arbitration Rules, except that no provision is included on the involvement of an appointing authority designated by the parties

[21]The first alternative, providing for a final decision on the challenge, may help to avoid delays and controversy during the arbitration proceedings and to reduce the risk of a later setting aside of the award and, thus, of waste of time and resources. However the second alternative might be acceptable in view of the practical experience that an arbitrator challenged on justifiable grounds usually withdraws from his office

[22]This draft provision is designed to regulate the recourse available to a party who has challenged an arbitrator without success under a procedure agreed upon by the parties Such party would, depending on which alternative is selected by the Working Group for articles 9 and 10, have the right to resort to the specified Authority for a final decision or would be precluded from resorting to a court during the arbitration proceedings, even if such court intervention were envisaged in the challenge procedure agreed upon by the parties.

Article 11[23]

Unless the parties have agreed otherwise, the following procedure shall be used in the event that an arbitrator [fails to act] [does not perform his functions in accordance with the instructions of the parties and in an impartial, proper and speedy manner] or in the event of the *de jure* or *de facto* impossibility of his performing his functions:

(a) Any party who wishes that, for any of these reasons, the mandate of an arbitrator be terminated shall send a written statement of the reasons to the other party and to all arbitrators;

(b) If, within [20] days after the notification, the other party does not agree to the termination of the mandate and the arbitrator does not withdraw from his office, the party may request the Authority specified in article 17 to make a final decision thereon.

Article 12

In the event of the termination of the mandate of an arbitrator or in the event of his death or resignation during the course of the arbitration proceedings, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, unless the parties agree on another appointment procedure [or decide to terminate the arbitration proceedings].[24]

3.-4. *Number and appointment of arbitrators*[25]

Article 13

(1) In arbitration governed by this Law, nationals of any State may be appointed as arbitrators.

(2) An arbitration agreement is invalid [if] [to the extent that][26] it accords one of the parties a predominant position with regard to the appointment of arbitrators.

Article 14

(1) Subject to the provisions of article 13 (2), the parties are free to determine the number of arbitrators.

(2) Failing such determination,

Variant A:

three arbitrators shall be appointed.

[23]This draft provision follows in substance article 13 (2) of the UNCITRAL Arbitration Rules but spells out the procedure to be used in such case instead of generally referring to the provisions on challenge

[24]This draft provision follows in substance articles 12 (2) and 13 (1) of the UNCITRAL Arbitration Rules, except for the alternative option of termination of the proceedings which, if adopted, would have to be considered in the context of the general issue "Termination of arbitration proceedings" under IV.11.

[25]Discussion and conclusions of the Working Group in A/CN.9/216, paras. 46-50.

[26]These alternatives are submitted to invite discussion by the Working Group on what should be the effect of a clause which violates the principle of equality of the parties: invalidity of the whole arbitration agreement or of that clause only.

Variant B:

the number of arbitrators shall be equal to the number of parties but increased by one if the number of parties is even.

Variant C:

a sole arbitrator shall be appointed.

Article 15

(1) Subject to the provisions of article 13 (2), the parties are free to agree on the procedure of appointing the arbitrator or arbitrators.

(2) If a party does not fulfill his obligations under an agreed appointment procedure, the other party may request the Authority specified in article 17 to take the required measure instead.[27]

Article 16[28]

(1) If the parties have not agreed on the appointment procedure,

(a) In an arbitration with a sole arbitrator, the arbitrator shall be appointed by the Authority specified in article 17;

(b) In an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators thus appointed shall appoint the third abritrator;

[*(c)* In an arbitration with a number of arbitrators that is equal to the number of the parties or a multiple thereof, each party shall appoint one arbitrator or the respective multiple thereof;]

[*(d)* In a multi-party arbitration with one arbitrator more than there are parties, each party shall appoint one arbitrator and the additonal arbitrator shall be appointed by the Authority specified in article 17.]

(2) If a party, in an arbitration referred to in paragraph (1) *(b)*, [*(c)* or *(d)*], fails to make the required appointment within [30] days after having been so requested by the other party, or if, in an arbitration referred to in paragraph (1) *(b)*, the two arbitrators fail to appoint the third arbitrator within [30] days after their appointment, the appointment shall be made by the Authority specified in article 17.

Article 17

(1) The Authority, referred to in articles 9 (2) *(c)*, 10, 11 *(b)*, 15 (2), 16 (1) *(a)*, *(d)*, (2) and . . ., shall be the . . . (e.g. specific chamber of a given court, president of a specified court, to be determined by each State when enacting the model law).[29]

(2) The Authority shall act upon request by any of the parties or by the arbitral tribunal, unless otherwise provided for in a provision of this Law.

(3) The Authority, in appointing an arbitrator, shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or an additional arbitrator under article 16 (1) *(a)*, *(b)* [or *(d)*], shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.[30]

IV. *Arbitral procedure*

1. *Place of arbitration*[31]

Article 18

(1) The parties to an arbitration agreement are free to determine, or to authorize a third person or institution to determine, the place where the arbitration is to be held.

(2) Failing such stipulation, the arbitral tribunal shall determine the place of arbitration, having regard to the circumstances of the arbitration [, including the convenience of the parties].

2.-4. *Arbitration proceedings in general, evidence, experts*[32]

Article 19

(1) The arbitral tribunal may conduct the arbitration in such manner as it considers appropriate

(a) Subject to the provisions of articles 20 to 24 and any instructions given by the parties in the arbitration agreement;[33]

(b) Provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.[34]

(2) The power conferred upon the arbitral tribunal under paragraph (1) includes the power to adopt its

[27]The main case envisaged here would be where the respondent, though comitted under the arbitration agreement to appoint the second arbitrator, fails to make that appointment within the agreed period of time

[28]This draft article is intended to regulate the appointment procedure not only for the case of article 14 (2), i.e. where parties have not agreed on the number of arbitrators, but also for cases where they have agreed on the number but not on the procedure Yet, it may not be desirable in a model law to list the procedure for any possible number which parties could select due to their unlimited freedom under article 14 (1) Thus, it may be considered to provide procedural rules only for the two probably most common and practical numbers, i e. one and three

[29]The Authority envisaged in this provision would be a judical body specializing in arbitration matters and assisting in a variety of ways specified in the model law

[30]This draft provision is modelled on article 6 (4) of the UNCITRAL Arbitration Rules The Working Group may wish to consider adding a provision along the lines of article 6 (3), suggesting the use of the list-procedure.

[31]Discussions and conclusions of the Working Group in A/CN.9/216, paras. 53-55.

[32]Discussion and conclusions of the Working Group in A/CN.9/216, paras. 56-60, 63, 64

[33]Consideration of this sub-paragraph may be combined with the discussion on the articles referred to therein. When discussing articles 20 to 24, the Working Group may wish to consider to what extent these provisions should be mandatory (as regards art.20, see A/CN 9/216, para. 57).

[34]This draft provision is modelled on article 15 (1) of the UNCITRAL Arbitration Rules.

own rules on evidence and to determine the admissibility, relevance, materiality and weight of the evidence offered. [Notwithstanding the provision of paragraph (1) *(a)*, the parties may not preclude the arbitral tribunal from calling an expert if it deems that necessary for deciding the dispute.]

Article 20[35]

(1) If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

(2) All documents or information supplied to the arbitral tribunal by one party shall [at the same time] be communicated [by that party][36] to the other party.

Article 21[37]

Notwithstanding the provisions of article 18, the arbitral tribunal may

(a) Hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration;

(b) Meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

Article 22[38]

(1) The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal.[39]

(2) Unless otherwise provided in the arbitration agreement,

(a) A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties;

(b) The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision;

(c) Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report;

(d) At the request of either party, the expert, after delivery of the report, [may] [shall] be heard at a hearing where the parties shall have the opportunity to be present, to interrogate the expert, and to present expert witnesses in order to testify on the points at issue.

5. *Interim measures of protection*[40]

Article 23[41]

The arbitral tribunal [, if so authorized by the parties,] may order [or take, at the request of either party, [any interim measures it deems necessary in respect of the subject-matter of the dispute, including] measures for the conservation of the goods forming the subject-matter in dispute, such as their deposit with a third person or the sale of perishable goods. The arbitral tribunal shall be entitled to require security for the costs of such measures.

7. *Default*[42]

Alternative A:

Article 24 (A)[43]

(1) If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his statement of claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitration proceedings.

(2) If, within the period of time fixed by the arbitral tribunal, the respondent fails to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

(3) If one of the parties, invited in writing at least [20] days in advance, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration; if the

[35]This draft article is modelled on article 15 (2) and (3) of the UNCITRAL Arbitration Rules

[36]The words placed between square brackets would probably have to be deleted if the provisions were to be mandatory (cf footnote 33) since under some arbitration rules or administrative procedures copies of the communications of a party are sent to the other party by the arbitral tribunal or an administrative body, thus not "by that party" and not "at the same time".

[37]This draft article is modelled on article 16 (2) and (3) of the UNCITRAL Arbitration Rules

[38]This draft article is modelled on article 27 of the UNCITRAL Arbitration Rules If the Working Group were to adopt paragraph (2), it may wish to consider including suppletive rules also on evidence and hearings, modelled on articles 24 and 25 (1) to (5) of the UNCITRAL Arbitration Rules

[39]As to the question whether the parties may preclude the arbitral tribunal from calling an expert, see draft article 19 (2).

[40]Discussions and conclusions of the Working Group in A/CN 9/216, paras 65-67.

[41]This draft article is modelled on article 26 (1) and (2) of the UNCITRAL Arbitration Rules, with some alternative wording reflecting the views expressed in the Working Group

[42]Discussion and conclusions of the Working Group in A/CN 9/216, para 71

[43]Paragraphs (1) to (4) of this draft article are modelled on article 28 of the UNCITRAL Arbitration Rules Paragraph (5) presents a possible method of judicial control which the Working Group may wish to consider, as an alternative to draft article 24 (B), if some kind of court control over ex parte proceedings would be envisaged at all

tribunal decides to do so, it shall notify the parties in writing.

(4) If one of the parties, invited in writing to produce documentary evidence within a specified period of time not less than [20] days, fails to do so, the arbitral tribunal may make the award on the evidence before it; if the tribunal decides to do so, it shall notify the parties in writing.

[(5) The defaulting party may, within 15 days after issuance of the order referred to in paragraph (1) or (2) or the notification referred to in paragraph (3) or (4), request the Authority specified in article 17 to review the decision of the arbitral tribunal as to whether the conditions laid down in the respective paragraph of this article were fulfilled.]

Alternative B

Article 24 (B)

If, without showing sufficient cause for the failure,

(a) the respondent fails to communicate his statement of defence within the period of time fixed by the arbitral tribunal; or

(b) one of the parties, invited in writing at least [20] days in advance, fails to appear at a hearing; or

(c) one of the parties, invited in writing to produce documentary evidence within a specified period of time of not less than [20] days, fails to do so,

the other party may request the Authority specified in article 17 to [authorize] [instruct] the arbitral tribunal to proceed with the arbitration.