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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES
ON THE WORK OF ITS SIXTH SESSION

(Vienna, 29 August - 9 September 1983)

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INTRODUCTION

1. At its fourteenth session the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration. 1/
2. The Working Group commenced its work at its third session by discussing all but four of a series of questions prepared by the Secretariat designed to establish the basic features of a draft model law. 2/
3. At its fourth session the Working Group completed its discussion on questions prepared by the Secretariat on possible features of a draft model law and some further issues of arbitral procedure possibly to be dealt with in a draft model law. At that session the Working Group also considered draft articles 1 to 36 of a draft model law prepared by the Secretariat. 3/
4. At its fifth session the Working Group considered further features and draft articles of a model law and revised draft articles I to XXVI of a model law on international commercial arbitration. At that session the Working Group also considered draft articles 37 to 41 on recognition and enforcement of awards and on recourse against awards. 4/
5. According to a decision by the Commission to expand the membership of the Working Group to all States members of the Commission 5/, the Working Group consists of the following 36 States:

Algeria, Australia, Austria, Brazil, Central African Republic, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Germany, Federal Republic of, Guatemala, Hungary, India, Iraq, Italy, Japan, Kenya, Mexico, Nigeria, Peru, Philippines, Senegal, Sierra Leone, Singapore, Spain, Sweden, Trinidad and Tobago, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

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.

2/ Report of the Working Group on International Contract Practices on the work of its third session, A/CN.9/216.

3/ Report of the Working Group on International Contract Practices on the work of its fourth session, A/CN.9/232.

4/ Report of the Working Group on International Contract Practices on the work of its fifth session, A/CN.9/233.

5/ Report of the United Nations Commission on International Trade Law on the work of its sixteenth session (1983), Official Records of the General Assembly, Thirty-eighth session, Supplement No.17, para. 143.

6. The Working Group held its sixth session at Vienna from 29 August to 9 September 1983. All the members were represented except Algeria, Central African Republic, Cuba, Egypt, Iraq, Peru, Senegal, Sierra Leone, Singapore, Trinidad and Tobago, Uganda and Yugoslavia.
7. The session was attended by observers from the following States: Argentina, Belgium, Bolivia, Ecuador, Finland, Ghana, Greece, Holy See, Lebanon, Morocco, Norway, Romania, Switzerland and Thailand.
8. The session was attended by observers from the following United Nations Secretariat units: United Nations Industrial Development Organization. The session was also attended by observers from the following intergovernmental organizations: Asian-African Legal Consultative Committee, Commission of the European Communities and Hague Conference on Private International Law, and from the following international non-governmental organizations: International Bar Association, International Chamber of Commerce, International Council for Commercial Arbitration and International Law Association.
9. The Working Group elected the following officers:
Chairman: Mr. I. Szasz (Hungary)
Rapporteur: Mr. M. Mwagiru (Kenya)
10. The following documents were placed before the session:
 - (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN.9/207);
 - (b) Report of the Working Group on International Contract Practices on the work of its third session (New York, 16-26 February 1982) (A/CN.9/716);
 - (c) Report of the Working Group on International Contract Practices on the work of its fourth session (Vienna, 4-15 October 1982) (A/CN.9/732);
 - (d) Report of the Working Group on International Contract Practices on the work of its fifth session (New York, 22 February-4 March 1983) (A/CN.9/733);
 - (e) Provisional agenda for the session (A/CN.9/WG.II/WP.43);
 - (f) Tentative draft articles A to G on adaptation and supplementation of contracts, commencement of arbitral proceedings, minimum contents of statements of claim and defence, language in arbitral proceedings, court assistance in taking evidence, termination of arbitral proceedings, and period for enforcement of arbitral award (A/CN.9/WG.II/WP.44);
 - (g) Revised draft articles XIII to XXIV on competence of arbitral tribunal, place and conduct of arbitration proceedings, rules applicable to substance of dispute, making of award and other decisions, and duration of mandate of arbitral tribunal (A/CN.9/WG.II/WP.40);

- (h) Revised draft articles XXV to XXX on recognition and enforcement of arbitral award, and recourse against award (A/CN.9/WG.II/WP.46);
- (i) Redrafted articles I to XII on scope of application, general provisions, arbitration agreement and the courts, and composition of arbitral tribunal (A/CN.9/WG.II/WP.45).

11. The Working Group adopted the following agenda:

- (a) Election of officers
- (b) Adoption of the agenda
- (c) Consideration of revised draft articles of a model law on international commercial arbitration
- (d) Other business
- (e) Adoption of the report

DELIBERATIONS AND DECISIONS

12. The Working Group considered the following draft provisions of a model law prepared by the Secretariat: tentative draft articles A to G, as contained in document A/CN.9/WG.II/WP.44; revised draft articles XIII to XXIV, as contained in document A/CN.9/WG.II/WP.40; revised draft articles XXV to XXX, as contained in document A/CN.9/WG.II/WP.46; and redrafted articles I to XII, as contained in document A/CN.9/WG.II/WP.45. The Working Group requested the Secretariat to redraft these articles in the light of its discussion and decisions at the present session.

13. The Working Group decided to hold its seventh session from 6 to 17 February 1984 in New York, as authorized by the Commission at its sixteenth session. 6/

14. The Working Group was agreed that it was desirable to establish corresponding language versions of the text of the model law before it was sent to Governments and international organizations for comments. The Working Group therefore requested the Secretariat to make the necessary arrangements for convening a Drafting Group in connexion with the next session of the Working Group.

15. The Working Group was agreed that it would be highly desirable to have summary records of its deliberations in view of the fact that the Working Group was now composed of all members of the Commission and the main legislative work would be undertaken in the Working Group.

6/ Report of the United Nations Commission on International Trade Law on the work of its sixteenth session (1983), Official Records of the General Assembly, Thirty-eighth session, Supplement No.17, para. 141.

16. As regards representation at the Working Group, a concern was expressed that many developing countries found it difficult, for financial reasons, to send delegates to the important meetings of the Group and that measures should be considered for achieving wider participation of delegates from such countries.

I. CONSIDERATION OF REVISED DRAFT ARTICLES A TO G OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (A/CN.9/WG.II/WP.44)

17. The Working Group considered revised draft articles A to G on adaptation and supplementation of contracts, commencement of arbitral proceedings, minimum contents of statements of claim and defence, language in arbitral proceedings, court assistance in taking evidence, termination of arbitral proceedings and period for enforcement of arbitral award, as set forth in document A/CN.9/WG.II/WP.44. These revised draft articles had been prepared by the Secretariat on the basis of the discussion and decisions of the Working Group at its fifth session. ^{1/}

A. Adaptation and supplementation of contracts

18. The text of article A as considered by the Working Group was as follows:

Article A

Alternative A

- (1) The arbitral tribunal has the power to adapt or supplement the contract upon request of a party provided that the parties have expressly authorized the arbitral tribunal in writing to do so; the arbitral tribunal shall decide on the adaptation or supplementation of the contract in accordance with any indication agreed upon by the parties as to the specific conditions under which the contract should be adapted or supplemented/ the changed circumstances to which the contract or certain provisions of the contract should be adapted or any indication as to the issues which should be regulated in the contract/.
- (2) The arbitral tribunal authorized to decide on the adaptation or supplementation of the contract shall apply the provisions of this Law/ the provisions of articles ... of this Law/.
- (3) The decision of the arbitral tribunal adapting or supplementing the contract/ The arbitral award in which the arbitral tribunal adapts or supplements the contract/ shall be binding on the parties and the parties shall give effect to it/ shall be carried out by the parties/ as an integral part of the contract.

^{1/} Report of the Working Group on International Contract Practices on the work of its fifth session, A/CN.9/233, paras. 15-45.

Alternative B

- (1) The person or persons appointed as arbitrators have the power to adapt or supplement the contract upon request of a party provided that the parties /expressly/ authorized him or them /in writing/ to do so; the person or persons shall decide on the adaptation or supplementation of the contract in accordance with any indication agreed upon by the parties as to /the specific conditions under which the contract should be adapted or supplemented/ /the changed circumstances to which the contract or certain provisions of the contract should be adapted or any indication as to the issues which should be regulated in the contract/.
- (2) The person or persons authorized to decide on the adaptation or supplementation of the contract shall apply /the provisions of this Law by analogy/ /the provisions of articles ... of this Law by analogy/.
- (3) The decision adapting or supplementing the contract shall be binding on the parties and /the parties shall give effect to it/ /shall be carried out by the parties/ as an integral part of the contract.

19. The Working Group recognized the usefulness of procedures to which parties, in particular parties to long-term contracts, might resort in order to have their contracts adapted or supplemented and also recognized that procedural safeguards contained in such procedures would enhance legal certainty in international trade. For this reason some support was expressed for a provision in the model law granting the power to the arbitral tribunal to adapt and supplement contracts. Since some legal systems already granted such power to arbitral tribunals, unification of rules on this power was considered desirable. It was also felt that, once rules on the power of arbitral tribunals to adapt and supplement contracts had been internationally agreed in a model law, such rules would be more acceptable to States which had no provisions on or did not allow adaptation and supplementation of contracts in the framework of arbitration.

20. However, after extensive discussion, the view prevailed that adaptation and supplementation of contracts should not be dealt with in the model law. It was pointed out that there was no need for regulating this question in the model law since many legal systems already provided, outside the domain of arbitration, mechanisms for third party assistance in adapting and supplementing contracts. Also, there were great difficulties in unifying arbitral procedures on adaptation and supplementation of contracts.

21. It was further noted that in adaptation and supplementation of contracts it was difficult to separate questions pertaining to procedural law and questions pertaining to substantive law and that, therefore, the model law, as a system of procedural rules, should not contain rules which may touch upon substantive rights of the parties. This difficulty in separating procedural and substantive questions would cause problems in interpretation of such rules. However, while recognizing this difficulty, it was noted by others that it should and could be made clear in the model law that only procedural aspects were regulated without regulating substantive conditions for adapting or supplementing a contract.

22. In regard of the practical effects of a rule on adaptation and supplementation of contracts it was also observed that in international trade suppliers of equipment and large industrial works were often economically stronger than buyers and that procedures for adaptation and supplementation of contracts might be used to the advantage of suppliers.

23. There was general agreement that the discussion in the Working Group was useful because it revealed the complexity of problems relating to adaptation and supplementation of contracts and possible solutions to these problems. This might prompt national legislators to adopt rules on adaptation and supplementation of contracts or improve existing rules taking into account the needs of modern international trade. Once national rules in this field and practice on the basis of such rules would be more developed, a harmonization might be achieved more easily.

B. Commencement of arbitral proceedings

24. The text of article B as considered by the Working Group was as follows:

Article B

Unless otherwise agreed by the parties, the arbitral proceedings shall be deemed to commence on the date at which a request that a dispute be referred to arbitration is received by the respondent provided that such a request /sufficiently/ identifies the claim.

25. The Working Group was of the view that article B defining the moment of the commencement of arbitral proceedings was useful.

26. There was wide support for the deletion of the word "sufficiently" placed between square brackets because it might cause unnecessary disputes in its interpretation.

27. It was observed that a request for arbitration in order to commence arbitral proceedings necessarily had to identify the claim and, since vague requests for arbitration could not commence arbitral proceedings, the requirement that a request for arbitration had to identify the claim should not be cast in the form of a proviso.

28. The prevailing view in the Working Group was that a general rule, modelled on article 2(1) of the UNCITRAL Arbitration Rules, on the date when a notice or other communication is deemed to have been received was useful and should be included in the model law.

C. Minimum contents of statements of claim and defence

29. The text of article C as considered by the Working Group was as follows:

Article C

- (1) The claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought. The respondent shall state his defence in respect of these particulars. /The parties may annex to their statements all documents they deem relevant or may add a reference to the documents or other evidence they will submit./
- /(2) Unless otherwise agreed by the parties, the statements of the claimant and the respondent /, made in accordance with the preceding paragraph, / shall be communicated to the other party and to each of the arbitrators within a period of time to be determined by the arbitral tribunal./
- /(3) During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances./

Paragraph (1)

30. There was wide support in the Working Group for the policy of this paragraph including the provision in square brackets. However, it was noted that it might be too onerous for the claimant to state all points at issue already at this stage of the proceedings since he might become aware of all such points only after he had been fully informed about the defences the other party intended to raise.

Paragraph (2)

31. There was wide support in the Working Group for the policy of this paragraph. It was noted that the wording of this paragraph would have to be aligned with the wording of article XVII(3) in document A/CN.9/WG.II/WP.40. It was also noted that the words between square brackets were not necessary and could be omitted.

32. A suggestion was made that it should be made clear in this paragraph whose duty it was to communicate the statements to the other party.

Paragraph (3)

33. There was general support in the Working Group for this paragraph. It was noted, however, that the question whether this provision was mandatory or not would be discussed in the context of article I ter (as contained in document A/CN.9/WG.II/WP.45) when the question of mandatory and non-mandatory character of individual provisions of the model law would be considered generally.

D. Language in arbitral proceedings

34. The text of article D as considered by the Working Group was as follows:

Article D

- (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any oral hearing, and any award, decision or other communication by the arbitral tribunal.
- (2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

35. There was general support in the Working Group for the policy of this article.

36. A view was expressed that the wording was unnecessarily detailed in listing and distinguishing cases to which the agreement on or the determination of the language or languages of the proceedings applied and cases in which the arbitral tribunal may order a translation and that maximum flexibility should be left to the parties and the arbitral tribunal in agreeing on or determining this issue. However, the view prevailed that the present wording should be retained because, in view of the great practical importance of the language used in arbitral proceedings, it was useful to draw the attention of the parties to different instances in which the agreed or determined language could affect their position in the proceedings.

E. Court assistance in taking evidence

37. The text of article E as considered by the Working Group was as follows:

Article E

- (1) The arbitral tribunal or a party /with the approval of the arbitral tribunal/ may request from /a court/ /the Court specified in article V/ assistance in taking evidence. The court shall execute such a request by either taking the evidence itself or by ordering a party or a third person to give evidence to the arbitral tribunal.
- (2) Where an arbitration takes place outside this State, the arbitral tribunal or a party /with the approval of the arbitral tribunal/ may submit such a request through a court of the State where the arbitration takes place. Such a request shall be treated by the court referred to in paragraph (1) as a request by that foreign court.

Paragraph (1)

38. There were divergent views in the Working Group on the question whether it was useful to have a provision on court assistance in the State where the arbitration took place. Under one view opposing the inclusion of a provision on court assistance in the model law, such a provision would encourage dilatory tactics by making requests for assistance to courts and, also, it would be contrary to the private nature of arbitration to involve courts in taking evidence. However, the prevailing view was that such a provision would be useful because it would enable the parties to obtain relevant evidence when a person would not comply with a request to give such evidence. A suggestion was made to indicate in that paragraph that court assistance included the possibility of a request by a court to a foreign competent body to gather evidence in that foreign State.

39. The proponents of the prevailing view suggested that it was necessary to prevent the possibility of abuse of court assistance. Under one view this could be achieved by adopting the words in the first square brackets according to which the arbitral tribunal had to approve the request for court assistance because an arbitral tribunal would not have an interest in deliberately abusing court assistance. Under another view abuse could only be prevented by more detailed rules specifying the grounds on which a court could refuse to give assistance; such detailed rules could either be made applicable by reference to domestic rules on court assistance or by including appropriate rules in the model law.

40. Some representatives suggested that only parties may request court assistance and the arbitral tribunal should not have a right to refuse to approve a request for court assistance nor should it be engaged in gathering evidence to be used in arbitral proceedings because this would be contrary to the adversary principle according to which the parties have to produce evidence in support of their case.

41. The Working Group requested the Secretariat to prepare alternative wordings in the light of the discussion.

Paragraph (2)

42. Divergent views were expressed in the Working Group on the question whether the model law should have a provision on international court assistance in taking evidence. Under one view it was desirable to include in the model law a unilateral obligation of domestic courts to give assistance to foreign arbitral tribunals because this would facilitate the functioning of international commercial arbitration. However, the view prevailed that it was not feasible for a model law on arbitration to regulate such a complex matter.

43. In support of the prevailing view it was noted that international court assistance in taking evidence was an issue which fell within the domain of international cooperation between States and that such international cooperation could only be achieved in a satisfactory way by international instruments such as conventions or bilateral treaties. An acceptable system of international court assistance could not be established unilaterally through a model law since the principle of reciprocity and bilaterally or multilaterally accepted procedural rules were essential conditions for the functioning of such a system.

44. It was further noted that, even if a unilateral system of international court assistance could be established, it would be necessary to include in the model law more detailed procedural rules and that this would not be in balance with other parts of the model law where procedure was not provided in such detail. It was also observed that conditions for giving court assistance to an arbitral tribunal in a foreign State might have to touch upon issues which were in the domain of the respective foreign procedural law and that such interference with foreign procedural rules was to be avoided.

45. However, the view favouring the inclusion of a provision on international court assistance in the model law suggested that it was feasible for the model law to have a provision in the context of domestic law on the status of requests made from abroad without interfering with procedural rules of foreign States.

46. The Working Group decided to reconsider the matter at its next session and requested the Secretariat to redraft this provision in the light of the discussion.

F. Termination of arbitral proceedings

47. The text of article F as considered by the Working Group was as follows:

Article F

- (1) The arbitral proceedings are terminated:
 - (a) by the making/ delivery of the final award which constitutes or completes the disposition of all claims submitted to arbitration; or
 - (b) by an agreement of the parties that the arbitral proceedings are to be terminated; or
 - (c) by an order of the arbitral tribunal in accordance with paragraph (2) of this article.
- (2) After having given suitable notice to the parties, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim or if for any other reason the continuation of the proceedings becomes unnecessary or inappropriate.
- (3) The mandate of the arbitral tribunal is terminated with the termination of the arbitral proceedings, subject to the provisions of article XXIV.

General considerations

48. Some support was expressed for the deletion of this article because it was not necessary to regulate in such detail the ending of the mandate of the arbitral tribunal. However, the view prevailed that the article should be retained since there may be other cases where the moment of termination of

arbitral proceedings may be important, like, for example, the continuation of the running of a limitation period or the possibility to institute legal proceedings before another forum on the same dispute.

Paragraph (1)

49. The Working Group adopted sub-paragraph (a) with the word "making" instead of the word "delivery".

50. Regarding sub-paragraph (b) it was suggested that the wording should define more clearly the moment of the termination of the arbitral proceedings. It was also suggested that sub-paragraph (b) should make clear whether an agreement of the parties to terminate arbitral proceedings covered only specific agreements to that effect or also cases where the parties had agreed in advance on a deadline for making the award.

51. Regarding sub-paragraph (c) it was suggested that, while the arbitral tribunal should be under an obligation to issue an order for the termination of the proceedings, in the absence of such an order the interested party should have a possibility to establish that the proceedings had terminated.

Paragraph (2)

52. The Working Group was of the view that the withdrawal of a claim should not ipso facto terminate arbitral proceedings since the defendant might have a legitimate interest in a final settlement of the dispute.

Paragraph (3)

53. There was general support for paragraph (3) of this article. It was noted that this paragraph should include a reference to article XXX (3) as suggested in foot-note 16 of document A/CN.9/WG.II/WP.44.

G. Period for enforcement of arbitral awards

54. The text of article G as considered by the Working Group was as follows:

Article G

Enforcement of an arbitral award shall be refused if the request is made after ten years have elapsed from the date at which the award was made/ received by the party requesting the enforcement/ received by the party against whom enforcement is sought/. However, if the award contains an obligation which is to be performed later than two years after the date at which the award was made, the period for enforcement commences to run on the date at which the obligation is to be performed./

55. Some support was expressed for the policy of this article because a time period for enforcement of arbitral awards would contribute to certainty in international trade.

56. However, the view prevailed that the model law should not contain a provision on this point. In support of this view it was noted that many legal systems already had rules on the period for enforcement of arbitral awards, either by assimilating for this purpose arbitral awards to court judgments or by special legislation. Harmonization of these rules would be difficult to achieve since they were based on differing national policies closely linked to procedural law aspects of States.

11. CONSIDERATION OF REVISED DRAFT ARTICLES XIII TO XXIV (A/CN.9/WG.II/WP.40)

57. The Working Group proceeded to a consideration of revised draft articles XIII to XXIV of a model law on international commercial arbitration, as set forth in document A/CN.9/WG.II/WP.40. These revised draft articles had been prepared by the Secretariat on the basis of the discussion and decisions of the Working Group at its fourth session. 8/

Article XIII

58. The text of article XIII as considered by the Working Group was as follows:

Article XIII

(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 agreement. For that purpose, 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.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the /statement of defence or, with respect to a counter-claim, in the reply to the counter-claim/ /reply to the claim or the counter-claim/. A party is not precluded from raising such plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal has exceeded its terms of reference shall be raised promptly after the matter, allegedly outside the mandate, is taken up. The arbitral tribunal may admit a later plea if it deems the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) either as a preliminary question or in the final award. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award. /A ruling by the arbitral tribunal that it has no jurisdiction may be contested by any party within 30 days before the Court specified in article V/.

8/ Report of the Working Group on International Contract Practices on the work of its fourth session, A/CN.9/232.

Paragraph (1)

59. The Working Group adopted this paragraph.

Paragraph (2)

60. The Working Group adopted this paragraph, subject to the following modifications. In the first sentence, the wording between the first square brackets was preferred to the alternative wording between the second square brackets. In the penultimate sentence, the words "taken up" were considered as too vague; accordingly, the Secretariat was requested to propose a clearer wording.

61. In this connexion, a question was raised as to the legal consequences of the failure of a party to invoke lack of jurisdiction in accordance with paragraph (2). If the legal consequence was that such party was precluded from later invoking lack of jurisdiction, it was doubted whether such solution was compatible with paragraph (1) (a) of article XXVII or XXVIII and article XXX (1) under which lack of a valid arbitration agreement could be relied on, although it was recognized that such reliance might be limited by operation of the waiver rule embodied in draft article I quater. It was felt that this question could appropriately be dealt with in an over-all review of the various provisions of the model law relating to jurisdiction and validity of arbitration agreement.

Paragraph (3)

62. The Working Group accepted the policy underlying this paragraph, except for the last sentence which was placed between square brackets.

63. As regards this last sentence, there was some support for allowing a party to contest before a court the ruling of an arbitral tribunal that it has no jurisdiction. It was suggested that the aim of such recourse need not be to have the same arbitrators continue the proceedings but could be limited to a decision on the existence of a valid arbitration agreement.

64. The prevailing view, however, was that the last sentence of paragraph (3) should not be retained. It was stated that the ruling of an arbitral tribunal that it lacked jurisdiction was final and binding as regards these arbitral proceedings but did not finally settle the question whether the substantive claim was to be decided by a court or by an arbitral tribunal. It was also suggested that the substantive claim would consequently be submitted to a court which would then be able to rule on this question. Yet another view was that any formal ruling by the arbitral tribunal was in the form of an award against which a party might bring an action for setting aside, although it was noted by others that the present wording of draft article XXX did not make it sufficiently clear whether such an award would be covered.

65. One delegation proposed to add to article XIII a paragraph along the lines of previous draft paragraph (3) of article 28 (set forth in document A/CN.9/WG.II/WP.38).

Suggested new paragraph (4)

66. The Working Group considered in this context the revised version of paragraph (3) of article IV which the Secretariat had suggested as new paragraph (4) of article XIII (see A/CN.9//WG.II/WP.45, foot-note 17):

(4) Where, after arbitral proceedings have commenced, a party invokes before a court lack of jurisdiction of the arbitral tribunal, whether impliedly by bringing a substantive claim or expressly by requesting a decision on the jurisdiction of the arbitral tribunal directly from the court without first raising this plea before the arbitral tribunal, the arbitral tribunal may continue the proceedings while the issue is pending with the court.

67. The Working Group agreed with the two policies underlying this provision. One policy was that the arbitral tribunal should be empowered to continue the proceedings while the question of its jurisdiction was pending with a court, although it was understood that this provision should not preclude a court from ordering a stay or suspension of the arbitral proceedings. The other policy was that a party had the right, in addition to the plea regulated in paragraphs (2) and (3) of article XIII, to request a ruling on the competence of the arbitral tribunal directly from a court.

68. It was felt, however, that the wording of paragraph (4) was not sufficiently clear, in particular, as regards its relationship to article IV. It was suggested, therefore, to deal separately with the case where lack of jurisdiction was invoked impliedly by bringing a substantive claim before the court, which was dealt with in article IV, and, on the other side, with the case where the question of competence was expressly (and solely) brought before the court. It was suggested that this important right of the party - and the concurrent power of the court - deserved a more direct expression and treatment than at present accorded in draft paragraph (4). Finally, it was noted that this provision would have to be examined in an over-all review of the provisions relating to jurisdiction and validity of arbitration agreement.

69. The Working Group requested the Secretariat to revise this provision in the light of the above discussion.

Article XIV

70. The text of article XIV as considered by the Working Group was as follows:

Article XIV

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order interim measures for conserving, or maintaining the value of, the goods forming the subject-matter in dispute, such as their deposit with a third person or the sale of perishable merchandise. The arbitral tribunal may require /of a party or the parties/ security for the costs of such measures. If enforcement of any such interim measure becomes necessary, the arbitral tribunal may request /a competent court/ /the Court specified in article V/ to render executory assistance.

71. The Working Group adopted the policy underlying article XIV according to which the arbitral tribunal had an implied power to order certain interim measures of protection. While there was some support for the scope of possible measures as laid down in article XIV, the prevailing view was that this scope was too limited and too much geared to only one type of transaction, i.e. sale of goods. It was decided, therefore, to adopt a more general formula (e.g. "interim measures of protection"), with a possible restriction to those measures which the parties themselves could have achieved by agreement, thus excluding any measures affecting the rights of third parties.

72. Divergent views were expressed on the question of enforceability as dealt with in the last sentence of article XIV. Under one view, executory assistance by courts was desirable and should be available not only to the arbitral tribunal but also to a party, in particular the one favoured by the interim measure. Under another view, which the Working Group adopted after deliberation, the last sentence should be deleted since it dealt in an incomplete manner with a question of national procedural law and court competence and was unlikely to be accepted by many States. It was noted that the model law, in its article IV(2), envisaged enforcement of interim measures ordered by a court and that the power of the arbitral tribunal under article XIV was of practical value even without executory assistance by courts. It was understood that the deletion of the last sentence should not be read as a preclusion of such executory assistance in those cases where a State was prepared to render such assistance under its procedural law.

Article XV

73. The text of article XV as considered by the Working Group was as follows:

Article XV

(1) Subject to the provisions of article XVII (1) /((a) (b), (2), (3), (5)/, the parties are free to /agree on/ /determine, either directly or by reference to arbitration rules, / the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement /on the respective point at issue/, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that each party is given a full opportunity of presenting his case. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

Paragraph (1)

74. The Working Group adopted paragraph (1) in the following modified form: Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Paragraph (2)

75. The Working Group adopted paragraph (2) subject to the deletion of the words placed between square brackets. The Working Group reaffirmed its view that the power conferred upon the arbitral tribunal by this paragraph includes the power to adopt its own rules of evidence. While some considered it desirable to express this understanding in the last sentence, the prevailing view was that the present wording of this sentence already covered this point in sufficient clarity.

Article XVI

76. The text of article XVI as considered by the Working Group was as follows:

Article XVI

(1) The parties are free to agree on the place where the arbitration is to be held. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the arbitration.

(2) Notwithstanding the provisions of the preceding paragraph, the arbitral tribunal may meet at any place it deems appropriate for

- (a) hearing witnesses;
- (b) consultations among its members;
- (c) the inspection of goods, other property or documents.

Paragraph (1)

77. The Working Group adopted paragraph (1) subject to the deletion of the words placed between square brackets.

Paragraph (2)

78. The Working Group adopted the policy underlying paragraph (2) which allowed the arbitral tribunal, subject to contrary agreement by the parties, to meet for certain purposes at places other than the place of arbitration. It was felt that the need for meeting at another place may not only arise with regard to the types of meeting listed under (a), (b) and (c) but also, for example, for hearings of experts or normal hearings with the parties. It was suggested, therefore, to adopt a more general formula which would cover such other meetings, too.

79. On the other hand, a concern was expressed that such wide powers of the arbitral tribunal might be in conflict with the expectations of the parties when agreeing on the place of arbitration, taking into account considerations of convenience and costs.

Article XVII

80. The text of article XVII as considered by the Working Group was as follows:

Article XVII

(1) Failing agreement by the parties, the arbitral tribunal shall decide whether to hold hearings or whether the proceedings shall be conducted on the basis of documents and other materials. However, if a party so requests,

(a) the arbitral tribunal shall, at the appropriate stage of the proceedings, hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument on the substance of the dispute/;

(b) any expert, appointed by the arbitral tribunal, after delivery of his written or oral report, shall be heard at a hearing where the parties have the opportunity to be present, to interrogate the expert and to present expert witnesses in order to testify on the points at issue.

(2) In order to enable the parties to be present at any hearing and any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient/ notice thereof at least 40 days in advance/.

(3) All documents or information supplied to the arbitral tribunal by one party shall be communicated/ made available/ to the other party. Also any expert report or other document, on which the arbitral tribunal may rely on in making its decision, shall be made available to the parties.

(4) Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the tribunal.

(5) 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./

Paragraph (1)

81. The Working Group adopted paragraph (1) subject to the following modifications. While some support was expressed for deleting the introductory phrase "Failing agreement by the parties", the prevailing view was to retain such a proviso, however in a different wording: "Subject to any contrary agreement by the parties". As regards sub-paragraph (a), the Working Group decided not to retain the wording placed between square brackets. As regards sub-paragraph (b), the Working Group also decided to delete the words placed between square brackets, although there was some support for retaining them.

Paragraph (2)

82. The Working Group adopted this paragraph with the word "sufficient" placed between the first square brackets and, accordingly, without the alternative wording placed between the second square brackets since a fixed time-period was considered as inappropriate in view of the great variety of cases.

Paragraph (3)

83. The Working Group adopted this paragraph with the word "communicated" placed between the first square brackets in lieu of the alternative wording "made available". The same preference was expressed with regard to the second sentence where, accordingly, the words "made available" are to be replaced by the word "communicated". It was noted that the paragraph laid down the important principle that each party should receive all relevant documents or information without, however, regulating the mechanics of how precisely and by whom the documents would have to be communicated to the party.

Paragraph (4)

84. The Working Group adopted this paragraph with the proviso placed between square brackets. It was suggested, however, that any contrary agreement had to be concluded before the appointment of the arbitrators so that any arbitrator when accepting his mandate would know about the restriction on his power to appoint experts.

Paragraph (5)

85. The Working Group adopted the first sentence of this paragraph. It decided to delete the second sentence placed between square brackets since it dealt in an unsatisfactory manner with a detail question not appropriate for inclusion in a law. A suggestion was made that in this article consideration be given, under appropriate circumstances, to safeguarding trade secrets.

Article XVIII

86. The text of article XVIII as considered by the Working Group was as follows:

Article XVIII

Alternative A:

Unless otherwise agreed by the parties, if, without showing sufficient cause for the failure,

(a) the claimant fails to communicate his statement of claim within the period of time stipulated by the parties or fixed by the arbitral tribunal, the arbitration proceedings shall be terminated and the costs of the arbitration be borne by the claimant/;

(b) the respondent fails to communicate his statement of defence within the period of time of not less than 40 days as/ stipulated by the parties or fixed by the arbitral tribunal, this /may/ /shall/ be treated as a denial of the claim and/ the arbitration proceedings shall continue;

(c) a party, duly notified in accordance with article XVII (2), fails to appear at a hearing, the arbitral tribunal may proceed with the arbitration;

(d) a party fails to produce documentary evidence, after having been invited to do so within a specified period of time of not less than 40 days, the arbitral tribunal may make the award on the evidence before it.

Alternative B:

Even if, without showing sufficient cause for the failure, the respondent fails to communicate his statement of defence, or a party fails to appear at a hearing or to produce documentary evidence, although an invitation to do so had been sent at least 40 days in advance, the arbitral tribunal may continue the proceedings and make the award, unless default proceedings are excluded by agreement of the parties.

87. The Working Group considered whether alternative A of article XVIII or the shorter version presented as alternative B was more appropriate for inclusion in the model law. There was some support for alternative A since it provided more detailed rules on the important subject of default proceedings. The prevailing view, however, was to include a more general provision along the lines of alternative B, with one or two points added from alternative A.

88. A point to be included is the claimant's failure to communicate his statement of claim (or to state his case) as covered by sub-paragraph (a) of alternative A.

89. Another point which was noted as missing in alternative B was the possible assessment by the arbitral tribunal of the respondent's failure to communicate his statement of defence. Divergent views were expressed as to whether and, if so, in which way this point should be regulated in the model law. Under one view, such failure by the respondent may be treated as a denial of the claim. Under another view, it was sufficient and necessary to provide that such failure shall not be treated as an admission of the claimant's allegations. Under yet another view, the arbitral tribunal should be given full discretion by not providing any rule on the legal assessment of such failure. The Working Group was agreed that this question should be decided at its next session in the light of draft provisions prepared by the Secretariat.

90. The Working Group was also agreed that the provision should not contain any fixed time-period. In view of the great variety of cases, it was more appropriate to use a more flexible formula such as "a reasonable time" or "sufficient time" or merely to refer to the "time stipulated by the parties or fixed by the arbitral tribunal". This would also include the possibility, which was generally supported, that any time-period could be extended by the arbitral tribunal in appropriate cases.

91. Finally, the Working Group adopted the view that the provision should not be mandatory.

92. The Working Group requested the Secretariat to prepare a revised draft provision on the basis of the above discussion, taking into account also the drafting suggestions which were made during the deliberations.

Article XIX

93. The text of article XIX as considered by the Working Group was as follows:

Article XIX

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as may be agreed by the parties/ apply the law designated by the parties as applicable to the substance of the dispute/. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the pertinent substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of trade applicable to the transaction.
- (4) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

Paragraph (1)

94. There was some support for the wording placed between the second square brackets which was understood as referring to the law of one given State. The prevailing view, however, was to adopt the wording between the first square brackets, to which the words "as applicable to the substance of the dispute" should be added. The reference to "the rules of law" (instead of "the law") was deemed preferable since it provided the parties with a wider range of options and would, for example, allow them to designate as applicable to their case rules of more than one legal system, including rules of law which had been elaborated on the international level. While some representatives would have preferred an even wider interpretation or an even broader formula, to include, for example, general legal principles or case law developed in arbitration awards, the Working Group, after deliberation, was agreed that this was too far-reaching to be acceptable to many States, at least for the time being.

95. The Working Group noted that the word "pertinent" placed between square brackets was designed to refine the rule of interpretation, contained in the second sentence, with regard to the case where a national legal system had two bodies of law dealing with the same subject-matter (e.g. law on domestic sale of goods and law on international sale of goods). While some support was expressed for retaining the word "pertinent" or similar wording, the prevailing view was that it should be deleted since it was self-evident or incomplete.

Paragraph (2)

96. There was considerable support for aligning this paragraph with the solution adopted in paragraph (1) and not to require the arbitral tribunal to

apply conflict of laws rules. A provision according to which the arbitral tribunal "shall apply the rules of law it considers appropriate" was deemed desirable not only because it would be in harmony with paragraph (1) but also because it would avoid the difficulties of applying rules of private international law and because it would better accord with present practices in international commercial arbitration.

97. However, the prevailing view was to retain paragraph (2) in its present form. It was felt that a more cautious approach in paragraph (2) was advisable in view of the fact that paragraph (1) already presented a rather progressive step. While recognizing the disparity between the two paragraphs, it was deemed to be acceptable in view of the fact that paragraph (1) was addressed to the parties who could take advantage of the wider scope while paragraph (2) was addressed to the arbitral tribunal and applied only in the case where the parties had not made their choice.

Paragraph (3)

98. There was some support for retaining paragraph (3), though possibly with some modifications. For example, it was suggested to align the reference to trade usages with the provision of article 9 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). It was also suggested that the reference to the terms of the contract (to be redrafted as "terms of any agreement") should be incorporated into paragraph (1) since this formed the basis or starting-point of the decision of the dispute.

99. The prevailing view, however, was not to retain this provision in view of the many questions and concerns it raised. For example, the reference to the terms of the contract could be misleading where such terms were in conflict with mandatory provisions of law or did not express the true intent of the parties. Also, this reference did not belong in an article dealing with the law applicable to the substance of the dispute and was not needed in a law on arbitration, though appropriate in arbitration rules. As regards the reference to trade usages, the concerns related to the fact that their legal effect and qualification was not uniform in all legal systems. Also, where they derived from a national law they were covered already by paragraph (1) or (2).

Paragraph (4)

100. The Working Group adopted this paragraph, although it was recognized that this type of arbitration was not known in all legal systems.

Article XX

101. The text of article XX as considered by the Working Group was as follows:

Article XX

(1) When there are three /or another uneven number of/ arbitrators, any award or other decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by /a majority of the arbitrators, i.e./ more than half of all appointed arbitrators /, provided that all arbitrators had the opportunity to take part in the deliberations leading to the award or decision/.

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

Paragraph (1)

102. The Working Group adopted the majority-principle embodied in this paragraph. It was agreed that the wording of this provision could be simplified along the following lines: "In arbitration proceedings with more than one arbitrator, any award or other decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members".

103. In view of the importance of the decisions covered by paragraph (1), the Working Group did not adopt a suggestion according to which paragraph (1) should adopt the approach of paragraph (2) and give the presiding arbitrator the decisive vote if there was no majority for a decision envisaged in that paragraph.

Paragraph (2)

104. The Working Group adopted the principle that questions of procedure, for the sake of expediency and efficiency, may be left to a presiding arbitrator, provided that the arbitral tribunal or the parties had authorized him to do so. It was agreed that, once this authorization had been given, an individual decision on procedure should not be subject to revision by the arbitral tribunal.

Article XXI

105. The text of article XXI as considered by the Working Group was as follows:

Article XXI

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

(2) An award on agreed terms shall be made in accordance with the provisions of article XXII and shall state that it is an award. Such an award has the same status and executory force as any other award on the merits of the case.

Paragraph (1)

106. The Working Group adopted this paragraph, subject to improvement of its wording along the following lines: "If, during arbitration proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms".

Paragraph (2)

107. The Working Group adopted this paragraph. It was noted that the last sentence might later have to be modified in order to qualify this statement as regards reasons for recourse against such an award or its enforcement.

Article XXII

108. The text of article XXII as considered by the Working Group was as follows:

Article XXII

(1) An award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitration proceedings with more than one arbitrator /, if the signature of one or more arbitrators cannot be obtained, / the signatures of more than half of all appointed arbitrators shall suffice, provided that the fact and the reason for the missing signature or signatures are stated.

(2) 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 or the award is an award on agreed terms under article XXI.

(3) An award shall state the place of arbitration /as referred to in article XVI/. The award shall be deemed /irrebuttably/ to have been made at that place and on /the/ /any/ date indicated therein.

(4) After an award is made, a copy thereof signed by the arbitrators in accordance with paragraph (1) of this article shall be communicated to each party.

Paragraph (1)

109. The Working Group adopted this paragraph, subject to improvement of the wording of its second sentence along the following lines: "In arbitration proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any missing signature is stated".

Paragraph (2)

110. The Working Group adopted this provision.

Paragraph (3)

111. The Working Group noted that the date and the place at which an arbitral award was made was of great importance, in particular, with regard to its recognition and enforcement and any possible recourse against such award.

112. As regards the date, the Working Group decided to require in paragraph (3) that "the award shall state its date".

113. As regards the place, the Working Group adopted the principle that the award shall be made at the place of arbitration as determined pursuant to article XVI (1). However, divergent views were expressed as to how one could best link this principle with the requirement of establishing clearly the place at which the award was made.

114. Under one view, the above principle should be embodied in the model law as a rule binding on the arbitral tribunal, followed by a provision according to which the award shall state the place at which it is made. The prevailing view, however, was to adopt the approach taken in paragraph (3), i.e. to require that the award state the place of arbitration as determined pursuant to article XVI (1), followed by a provision according to which the award shall be deemed to have been made at that place. It was noted that the making of the award was a legal act which in practice was not necessarily one factual act but, for example, done in deliberations at various places, by telephone conversation or correspondence.

115. While there was some support for retaining the word "irrebuttably", the prevailing view was in favour of its deletion. It was understood, however, that such deletion should not be construed as making the presumption rebuttable.

Paragraph (4)

116. The Working Group adopted this paragraph.

Article XXIII

117. The text of article XXIII as considered by the Working Group was as follows:

Article XXIII

Alternative A:

The /making/ /delivery/ of the final award, which constitutes or completes the disposition of all claims submitted to arbitration, terminates the mandate of the arbitral tribunal, subject to the provisions of article XXIV.

Alternative B:

Where the arbitral tribunal makes an award which /is not intended to/ /does not/ constitute a final disposition of the substance of the dispute, the making of such an award (for example, an interim, interlocutory, or partial award) does not terminate the mandate of the arbitral tribunal.

118. There was some support for alternative B since it addressed in a more direct manner the question which the article was intended to answer, i.e. to make clear that the making of, for example, interim, interlocutory or partial awards did not terminate the mandate of the arbitral tribunal. The prevailing view, however, was in favour of the approach taken in alternative A. Yet, it was deemed desirable to express in some provision of the model law in positive terms that an arbitral tribunal had the power to render awards or decisions of the kind listed by way of example in alternative B.

119. It was noted that the rule in alternative A did not add anything to what was provided in (the more recently drafted) article F, paragraphs (1)(a) and (3). There was, thus, no need for maintaining article XXIII, unless it was used for incorporating the above idea concerning interim and similar awards or article F itself was later reconsidered and changed.

Article XXIV

120. The text of article XXIV as considered by the Working Group was as follows:

Article XXIV

(1) Within thirty days after the receipt of the award, unless another period of time has been agreed upon by the parties, a party, 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; and

(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/.

(2) Unless otherwise agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal, within thirty days after the receipt of the award, 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.

(3) The provisions of article XXII shall apply to a correction or interpretation of the award or to an additional award.

Paragraph (1)

121. The Working Group adopted this paragraph including the wording between the two square brackets, subject to possible revision of the time-periods fixed therein. It was felt that the different time-periods for the various actions envisaged in this and the following paragraph should be harmonized. It was also noted that these time-periods should be taken into account when considering the length of the time-period during which an action may be brought under article XXX for setting aside or remission.

Paragraph (2)

122. The Working Group adopted this paragraph. It was noted with approval that this paragraph provided for the making of an additional award only if no further hearings or evidence were required.

Paragraph (3)

123. The Working Group adopted this paragraph.

111. CONSIDERATION OF REVISED DRAFT ARTICLES XXV TO XXX (A/CN.9/WG.II/WP.46)

124. The Working Group proceeded to a consideration of revised draft articles XXV to XXX of a model law on international commercial arbitration, as set forth in document A/CN.9/WG.II/WP.46. These revised draft articles had been prepared by the Secretariat on the basis of the discussion and decisions of the Working Group at its fifth session. ^{9/}

General discussion

125. The Working Group was agreed that it was desirable to discuss general matters of policy before embarking upon a detail consideration of the revised draft articles on recognition and enforcement of arbitral awards and on recourse against such awards. The main questions of policy, which were inter-related, were (a) whether the model law should contain provisions on recognition and enforcement of awards made in the territory of the State of the model law and of awards made outside that State, (b) if so, whether and to what extent separate treatment of these two categories was necessary and justified, and (c) how closely any provisions on recognition and enforcement should follow the corresponding articles of the 1958 New York Convention.

126. Divergent views were expressed on whether provisions on recognition and enforcement should be retained in the model law. Under one view, there was no need for such retention. In support of this view, different reasons were advanced in respect of foreign awards and of "domestic" awards.

127. It was pointed out that provisions concerning foreign awards were not necessary in view of the existence of the 1958 New York Convention, which many States adhered to. It was also noted that a substantial number of these States had made use of the reciprocity reservation the effect of which should not be adversely affected by any provision of the model law. Furthermore, States which were not members to that Convention were unlikely to adopt the very similar provisions of the model law (i.e. articles XXVI and XXVIII). Finally, these provisions were thought to give rise to uncertainty and possible conflicts with that Convention.

^{9/} Report of the Working Group on International Contract Practices on the work of its fifth session, A/CN.9/233, paras. 121-195.

128. As regards recognition and enforcement of "domestic" awards, it was stated that this matter was satisfactorily dealt with in the individual national laws which often treated such awards like court decisions rendered in the State. It was also pointed out that the existing national laws often set less onerous conditions than envisaged in the model law and, for example, did not provide for a special procedure for obtaining recognition or enforcement of "domestic" awards. Finally, it was unacceptable to retain the system of double control set forth in articles XXVII and XXX.

129. The prevailing view, however, was to include in the model law provisions on recognition and enforcement of awards made within and outside the territory of the State of the model law. One reason advanced in support of this view was that a model law on international commercial arbitration would be incomplete if it did not regulate this important matter. Another consideration, for which there was considerable and apparently growing support, was that one should strive for uniform treatment of all awards in international commercial arbitration irrespective of their place of origin. Yet, the main reason supporting the prevailing view was the conviction that the above concerns expressed in opposition to any provisions on recognition and enforcement did not necessitate or warrant deletion of those articles.

130. As regards foreign awards, it was thought that provisions in the model law which were not in conflict with the 1958 New York Convention were useful by establishing for those States prepared to adopt them a supplementary network, though on a unilateral basis, of recognition and enforcement of awards not falling under a multilateral or bilateral treaty. In order to avoid any conflict, it was suggested that the model law should not adversely affect the reciprocity reservation adopted by a substantial number of States members to the 1958 New York Convention and that the provisions of the model law should be closely modelled on the corresponding articles of that Convention.

131. As regards awards made in the territory of the State of the model law, provisions on recognition and enforcement were deemed desirable for the sake of unification and certainty, since the present treatment, even if equated to that of court decisions, did not lead to uniform results in all legal systems. It was also pointed out that the "domestic" awards covered by the model law were of a special nature in that they related to international commercial arbitration as defined in article I.

132. The proponents of this view recognized that articles XXV and XXVII envisaged more onerous conditions than presently existing in a number of legal systems and suggested, therefore, that these provisions should be seen as setting maximum standards which would allow States to require less than provided therein. Furthermore, it was proposed to reconsider the contents of these articles (and of those concerning foreign awards) with regard to the issue of recognition standing alone, i.e. where it is not merely relevant as a pre condition of enforcement. Finally, it was recognized that the double control under articles XXVII and XXX was undesirable and should be avoided by an appropriate technique (e.g. by referring a party against whom enforcement is sought within the time-period set in article XXX to the procedure of setting aside for invoking any objections against the award).

133. The Working Group, after deliberation, was agreed not to take a final decision on these policy matters. Recognizing that these matters were of great importance and ultimately related to a question of acceptability by any given State, it was deemed desirable to retain provisions on recognition and enforcement of "domestic" and of foreign awards, closely modelled on the 1958 New York Convention, but taking into account the need for reconsidering the issue of recognition and of the relationship between articles XXVII and XXX. It was suggested that a final decision might not be appropriate before all Governments had been given the opportunity to comment on the draft model law.

Articles XXV and XXVI

134. The Working Group considered articles XXV and XXVI together. The text of these articles was as follows:

Article XXV

An arbitral award made in the territory of this State shall be recognized as binding and enforced in accordance with the following procedure*:

An application shall be made in writing to the competent court, accompanied by the duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement referred to in article II, or a duly certified copy thereof. If the said award or agreement is not made in an official language of this State, the party applying for recognition and enforcement of the award shall supply a /duly certified/ translation of these documents into such language /, certified by an official or sworn translator or by a diplomatic or consular agent/.

* The procedure set forth in this article is intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained an even less onerous procedure.

Article XXVI

An arbitral award made outside the territory of this State shall be recognized as binding and enforced in accordance with the following procedure:

An application shall be made in writing to the Court specified in article V, accompanied by the duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement referred to in article II, or a duly certified copy thereof. If the said award or agreement is not made in an official language of this State, the party applying for recognition and enforcement of the award shall supply a translation of these documents into such language, certified by an official or sworn translator or by a diplomatic or consular agent.

135. The Working Group, after deliberation, was agreed that these draft articles could be consolidated in one article, since there was no convincing reason for laying down different rules for the two categories of awards. It was agreed, however, that the conditions in the consolidated article were maximum standards and that it should be made clear that a State may set less onerous conditions or not even envisage any special procedure. It was further agreed that, subject to reconsideration at the next session, the model law should itself not retain any procedure on recognition standing alone and, for example, merely state that an award should be recognized, subject to possible objections as set forth in articles XXVII and XXVIII. The next phrase would, then, start with the words: "To obtain enforcement ...".

136. As regards the contents of a consolidated article which would apply to "domestic" and foreign awards, it was not yet decided whether it was sufficient to refer merely to "an arbitral award" or whether it was preferable to add the words "made within or outside the territory of this State". The Working Group was agreed that the judicial authority to which an application for enforcement was to be made should be referred to in the article as the "competent court" and not "the Court of article V" since the function envisaged here was one of enforcement for which States had well established systems of competence. Finally, the Working Group was agreed that the consolidated article should require a "duly certified" translation and not retain the detailed and somewhat problematic wording "certified by an official or sworn translator or by a diplomatic or consular agent".

Article XXVII

137. The text of article XXVII as considered by the Working Group was as follows:

Article XXVII

(1) Recognition and enforcement of an arbitral award made in the territory of this State shall 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 some incapacity/ /lacked the capacity to conclude such an agreement/, or the said agreement is not valid; 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 arbitral proceedings or was otherwise unable to present his case; or

(c) The award decides on a dispute or matter /not submitted to arbitration/ /outside the scope of the arbitration agreement or not referred to the arbitral tribunal/; 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 /, unless in conflict with any mandatory provision of this Law / or, failing such agreement, was not in accordance with the provisions of this Law /, whether mandatory or not~~/~~; or

(e) The award has not yet become binding on the parties or has been set aside by a court of this State.

- (2) Recognition and enforcement of an award /may/ /shall/ also be refused if the court finds that the recognition or enforcement would be contrary to the public policy of this State.

* * *

(In view of the suggestion reported in A/CN.9/233, para. 139, the Working Group may wish to consider the following short version of draft article XXVII:

Recognition and enforcement of an arbitral award made in the territory of this State may be refused if:

- (a) The arbitral tribunal was not competent to make that award; or
- (b) The subject-matter of the award was not /arbitrable/ /capable of settlement by arbitration/; or
- (c) The award is not binding; or
- (d) Recognition and enforcement would be contrary to public policy.)

138. The Working Group recalled the conclusions of its general discussion on the policies relevant to the articles on recognition and enforcement (see above, paras. 125-133). It noted, in particular, the need for special consideration of the case where recognition alone was at stake and not as a pre-condition or interim step to enforcement. It also noted the need for avoiding the double control envisaged under articles XXVII and XXX and decided to consider this question in the context of article XXX.

139. Subject to these special considerations, the Working Group, after deliberation, adopted the prevailing view which was to consolidate articles XXVII and XXVIII on the basis of article XXVIII. This would allow harmony with article V of the 1958 New York Convention and, thus, avoid any undesirable disparity. It was felt that there were no cogent reasons for providing different rules for domestic awards and for foreign awards.

140. Nevertheless, in view of the tentative nature of the basic policy decision, observations were made on the wording of article XXVII in case it were retained as a separate regime for domestic awards in international commercial arbitration. There was agreement that the short version of article XXVII (set forth in WP. 46 after the text of the draft article) was too short to deal with sufficient clarity with the important grounds for refusal.

141. As regards draft article XXVII proper, according to the prevailing view, the words "shall be refused" in the opening phrases of paragraphs (1) and (2) should be replaced by the words "may be refused"; as regards paragraph (1), the wording between the second square brackets in sub-paragraph (a) was preferable to the wording between the first square brackets; the wording between the second square brackets in sub-paragraph (c) was preferable to the wording between the first square brackets; the wording between the two square brackets in sub-paragraph (d) should be deleted; paragraph (2) should specifically mention the ground of non-arbitrability, like the corresponding provision in article XXVIII.

Article XXVIII

142. The text of article XXVIII as considered by the Working Group was as follows:

Article XXVIII

(1) Recognition and enforcement of an arbitral award made outside the territory of this State /may/ /shall/ be refused, at the request of the party against whom it is invoked, only if that party furnishes /to the competent authority where the recognition and enforcement is sought/ proof that:

(a) The parties to the arbitration agreement referred to in article II were, under the /applicable law/ /law applicable to them/, 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 the country where the award was made; 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 arbitral proceedings or was otherwise unable to present his case; or

(c) The award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the 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 or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties or has been set aside or suspended by a /court/ /competent authority/ of the country in which, or under the /procedural/ law of which, that award was made.

(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority/ Court 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 public policy of this State.

(3) If an application for the setting aside or suspension of an award has been made to a court/ competent authority referred to in paragraph (1)(e), the authority before which the award is sought to be relied upon/ Court 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.

143. The Working Group recalled the conclusions of its general discussion on the policies relevant to the provisions on recognition and enforcement, in particular, its tentative decision to use article XXVIII as the basis of a consolidated article covering domestic and foreign awards and to model it closely on article V of the 1958 New York Convention. The Working Group reaffirmed its view that the model law should not cast any doubt on the legal effect of a reciprocity reservation made with regard to a multilateral treaty such as the 1958 New York Convention. On the other hand, the Working Group did not adopt a suggestion to include in article XXVIII a provision which would, on a unilateral basis, allow a similar restriction as regards awards not covered by a multilateral or bilateral agreement.

144. The Working Group was agreed to use in the opening phrase of paragraph (1) the words "may be refused" instead of the words "shall be refused". As regards sub-paragraph (a), there was some support for the wording adopted in article XXVII (1) (a); there was also some support for the wording between the first square brackets in paragraph (1) (a) of article XXVIII. The prevailing view, however, was to retain the wording between the second square brackets since this was the wording used in the 1958 New York Convention.

145. As regards sub-paragraph (e), the word "procedural" was not retained. Also, the term "court" was preferred to the term "competent authority" in view of the fact that the model law, in general, did not use the term "competent authority" and that the term "court", as defined in draft article I bis (d), included any judicial authority even if not called "court" in a given legal system. The same preference for the term "court" (or "Court") prevailed with regard to paragraphs (2) and (3) of article XXVIII.

Article XXIX

146. The text of article XXIX as considered by the Working Group was as follows:

Article XXIX

No recourse against an arbitral award made under this Law may be made to a court except as provided in article XXX.

147. The Working Group noted that article XXIX was closely linked with article XXX in that it expressed the exclusive nature of the recourse available under article XXX. It was, therefore, suggested to incorporate the provision of article XXIX into article XXX.

148. The Working Group noted that both articles applied to arbitral awards "made under this Law" and that this scope of application was different from the one used in articles XXV and XXVII where the territorial approach had been adopted ("awards made in the territory of this State"). It was thought that this disparity could lead to conflicts and undesirable results.

149. The Working Group was agreed to reconsider the matter at its next session in the light of a general study by the Secretariat on the scope of application of the various provisions of the model law, including the question of the choice of a procedural law of a country other than the place of arbitration and some suggestions as to possible rules on conflict of laws.

Article XXX

150. The text of article XXX as considered by the Working Group was as follows:

Article XXX

(1) An award made under this Law may be set aside, whether in whole or in part, only on grounds on which recognition and enforcement may be refused under article XXVII (1)(a), (b), (c), (d) or (2) /or on which an arbitrator may be challenged under article IX (2)/.

(2) An /application/ /action/ for setting aside may not be /made/ /brought/ after four months have elapsed from the date on which the party /making that application/ /bringing that action/ had received the award /in accordance with article XXII (4)/. /However, where the arbitration agreement provides for appeal to another arbitral tribunal, this period commences on the date of the receipt of the decision of that arbitral tribunal./

(3) The Court, when asked to set aside an award, may also order, where appropriate /and if so requested by a party/, that the arbitral proceedings be continued. Depending upon the /reason for setting aside/ /procedural defect found by the Court/, this order may specify the matters to be considered by the arbitral tribunal and may contain other instructions concerning the composition of the arbitral tribunal or the conduct of the proceedings.

Paragraph (1)

151. A suggestion was made to widen the supervisory power of the court under article XXX by adding to the list of grounds "manifest injustice". However, this suggestion was not adopted since it was considered as too vague and too broad and since most cases of such injustice would fall under the grounds listed in paragraphs (1) (b) and (2) of article XXVII referred to in article XXX.

152. The Working Group adopted the grounds as listed in paragraph (1) of article XXX which corresponded to the reasons for refusal of recognition and enforcement under the 1958 New York Convention. It was noted that the ground placed between square brackets was not needed if the Working Group would adopt the second alternative in article X (3).

Paragraph (2)

153. The Working Group was agreed that the time-period within which an application for setting aside may be made should be three months. The Working Group was also agreed that the wording between square brackets at the end of the first sentence was not needed and that the second sentence could be deleted, too.

Paragraph (3)

154. Divergent views were expressed as to whether paragraph (3) should be retained. Under one view, the draft provision was useful in that it provided some guidance on procedural questions which were relevant in the case of remission. Under another view, the provision should be deleted since remission was not known in all legal systems and, in particular, the idea of orders or instructions to an arbitral tribunal was not acceptable. Under yet another view, the option of remission should be retained, without the giving of orders or instructions as envisaged in the second sentence; it was stated in support that this device would allow to cure a procedural defect without having to vacate the award.

155. The Working Group, after deliberation, adopted this latter view and requested the Secretariat to revise the provision accordingly.

Relationship between article XXVII and XXX

156. The Working Group recalled the concern expressed in the context of article XXVII that this article, even if consolidated with article XXVIII, would for domestic awards establish a procedure which would duplicate the examination of the very reasons set forth in article XXX for the setting aside of awards made under the law of this State. While some support was expressed for maintaining this double procedure in view of the different purposes of article XXVII and article XXX, the prevailing view was that it should be avoided, not only for the sake of economy and efficiency but also in order to prevent conflicting decisions.

157. In this respect, a suggestion was made to delete the provisions of article XXVII, with the result that the only control of domestic awards (if made under this Law) was exercised upon an application for setting aside if made within the time-period provided therefor in article XXX. However, this suggestion was not adopted since it was not justified to deprive a party from raising objections if "domestic" enforcement was sought after expiration of this time-limit while the same objections could still be raised against enforcement in any other State.

158. The Working Group was, thus, agreed that the double procedure should be avoided during the time-period for setting aside and requested the Secretariat to prepare a draft provision to that effect. One possible technique was to refer a party against whom enforcement was sought within three months after receipt of the award to the procedure of setting aside. It was further suggested that the decision in that procedure would be binding on the enforcement judge or court and that a provision along the lines of paragraph (3) of article XXVIII might be appropriate also in this "domestic" context.

IV. CONSIDERATION OF REDRAFTED ARTICLES I TO XII (A/CN.9/WG.II/WP.45)

159. The Working Group proceeded to a consideration of redrafted articles I to XII of a model law on international commercial arbitration, as set forth in document A/CN.9/WG.II/WP.45. These redrafted articles had been prepared by the Secretariat on the basis of the discussion and decisions of the Working Group at its fifth session. 10/

Article I

160. The text of article I as considered by the Working Group was as follows:

Article I

(1) This Law applies to international commercial* arbitration /, subject to any multilateral or bilateral agreement entered into by this State/.

* The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial /or economic/ nature, irrespective of whether the parties are "commercial persons" (merchants) under any given national law. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

10/ Report of the Working Group on International Contract Practices on the work of its fifth session, A/CN.9/233, paras. 47-120.

(2) An arbitration is international if the parties to an arbitration agreement have /, at the time of the conclusion of that agreement, / their places of business in different States. If a party has more than one place of business, the relevant place of business is that which has the closest relationship to the arbitration agreement.

/(3) An arbitration shall also be regarded as international for the purpose of paragraph (1) where the parties to an arbitration agreement have stipulated that this Law shall apply in lieu of a national law on domestic arbitration, provided that / their relationship involves international trade interests. A relationship is deemed to involve international trade interests if/ not all of the following places are situated in the same State: the place where the offer for the contract containing the arbitration clause or for the separate arbitration agreement was made; the place where the corresponding acceptance was made; the place of performance of any contractual obligation or of the location of the subject-matter; the place where each party is registered or incorporated or where its central management and control is exercised; the place of arbitration if determined in the arbitration agreement. /

Paragraph (1)

161. The Working Group adopted this paragraph, including the words placed between square brackets, although there was some support for expressing the proviso in a separate provision.

162. As regards the foot-note annexed to the term "commercial", there was some support for incorporating the illustrative list set forth therein into the body of the text of paragraph (1) since the legal effect of a foot-note to a law was not clear. There was also some support for not retaining any such illustrative list at all. The prevailing view, however, was to retain the foot-note since it provided some useful guidance for the interpretation of the term "commercial".

163. As regards the text of the foot-note, there was some support for retaining the words "or economic" and for deleting the phrase "irrespective of whether the parties are "commercial persons" (merchants) under any given national law". The prevailing view, however, was to retain this latter phrase and to delete the words "or economic".

Paragraphs (2) and (3)

164. The Working Group was agreed that the definition of "international" was of utmost importance for the practical effects of a model law on international commercial arbitration and crucial for its acceptability. It was recognized that to find a satisfactory solution was one of the most difficult tasks in the preparation of the model law.

165. Divergent views were expressed as to which would be the most appropriate test of internationality for the model law. Under one view, it was sufficient to use the standard set forth in paragraph (2) which was the test adopted in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). It was stated in support that this test provided a workable

and precise formula which would allow easy determination of whether in a given case the (model) law on international arbitration or the national law on domestic arbitration would apply.

166. Under another view, the standard of paragraph (2) was too narrow and should be supplemented by further criteria which would avoid the vagueness of a general formula but cover the variety of cases for which the model law should establish a special regime. Objective criteria to be used for that purpose were the ones listed in paragraph (3), to which could be added, as suggested by one representative, the substantial ownership of a party. In support of this view to add objective criteria for the purpose of establishing the international character of an arbitration, it was stated that the opting-in mechanism provided under paragraph (3) was not appropriate for the many cases where the parties assumed that, because of some foreign element, their relationship was an international one and, thus, did not see any reason for a special act (of opting-in) on their part.

167. Under yet another view, it was impossible to cover all deserving cases by individual criteria. It was, therefore, necessary to adopt a general formula such as "involving international commercial interests", despite its possible shortcomings in view of the possibility that divergent interpretations would be given to it by the different courts of different States.

168. The Working Group, after deliberation, decided not to adopt the latter approach of a general formula but to widen the standard used in paragraph (2) by adding other objective criteria, in particular, the place of performance of contractual obligations and the location of the subject-matter of the transaction, as well as the place of arbitration if determined in the arbitration agreement. The Working Group requested the Secretariat to prepare a draft provision embodying this compromise solution which should meet with the approval of the greatest number of States.

New Article I bis

169. The text of new article I bis as considered by the Working Group was as follows:

New Article I bis

For the purposes of this Law:

(a) where a provision of this Law grants the parties freedom to determine a certain issue, such freedom includes the right of the parties to authorize a third person or institution to make that determination;

(b) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(c) "arbitral tribunal" /refers to/ /means/ a sole arbitrator or a /panel/ /plurality/ of arbitrators /, as the case may be/;

- (d) "court" means a body or organ of the judicial system of a country;
- (e) if a party does not have a place of business, reference is to be made to his habitual residence./

170. The Working Group adopted sub-paragraphs (a) and (b) of new article I bis.

171. As regards sub-paragraph (c), there was some support for deleting this provision since it stated the obvious. The prevailing view, however, was to retain this provision since it underlined the difference between arbitral tribunal and court, as defined in sub-paragraph (d). Accordingly, sub-paragraph (c) was adopted as follows: (c) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

172. As regards sub-paragraph (d), there was some support for deleting this provision since it was regarded as self-evident or as undesirable interference with national systems. There was also some support for defining the term "court" as "judicial body established by the law of a country, not including an arbitral tribunal". However, the wording of sub-paragraph (d) as drafted by the Secretariat received the widest support.

173. The Working Group adopted sub-paragraph (e) and decided to incorporate it into article I (2), unless it was found to be relevant to another provision of the model law, too.

New Article I ter

174. The text of new article I ter as considered by the Working Group was as follows:

/ New Article I ter

The parties may not derogate from the following provisions of this Law: articles.... (to be listed here: all mandatory provisions./

175. The Working Group adopted this new article and decided to consider at its next session which provisions of the model law should be listed as mandatory in this article.

New Article I quater

176. The text of new article I quater as considered by the Working Group was as follows:

New Article I quater

A party who knows that any provision of, or requirement under, this Law has not been complied with and yet proceeds with the arbitration without stating

his objection to such non-compliance promptly or, if a time-limit is provided therefor in this Law, within such period of time shall be deemed to have waived his right to object.

177. There was some support for deleting this draft article since such a provision was not appropriate for a law, though suitable for arbitration rules, and because it made a drastic legal consequence dependent on the knowledge of a party. The prevailing view, however, was to retain a waiver rule but in a less rigid form in order to exclude its operation in cases of fundamental violations of procedural provisions.

178. Two suggestions were made for "softening" the provision. One proposal was to replace the word "promptly" by less strict wording such as "without delay". Another suggestion was to limit the waiver rule to non-compliance with non-mandatory provisions. The Working Group adopted this suggestion subject to possible refinement at the next session when deciding in the context of article I ter which provisions of the model law should be mandatory.

Article II

179. The text of article II as considered by the Working Group was as follows:

Article II

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration, whether or not administered by a permanent arbitral institution, all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing /whether/ /. An agreement is in writing if it is/ contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which would /preserve a record of the agreement/ /produce a record on paper automatically or at the option of the recipient/. The reference in a contract to an arbitration clause contained in another legal text constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a term of the contract.

Paragraph (1)

180. The Working Group adopted paragraph (1).

Paragraph (2)

181. The Working Group adopted paragraph (2) subject to the following modifications. The word "whether" was deleted and the wording between the

following square brackets retained. As regards the alternatives qualifying other means of tele-communication, the Working Group adopted the wording "which provide a record of the agreement". While some concern was expressed about giving the provision contained in the last sentence too wide a scope, the Working Group adopted this rule with the following wording: "The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a term of the contract".

182. One representative expressed the concern that paragraph (2), if understood as a mandatory provision, was too strict in requiring written form for the arbitration agreement and any later modification of that agreement, for example in the not uncommon case where the parties during arbitration proceedings agreed orally to submit a further issue, not included in the original agreement, to the arbitral tribunal for decision.

Article III

183. The text of article III as considered by the Working Group was as follows:

/ Article III

In matters governed by this Law, no court shall intervene except where so provided in this Law./

184. The Working Group decided to postpone its final decision on this article to a later stage when it was clear which instances of court intervention or assistance would be dealt with in the model law.

Article IV

185. The text of article IV as considered by the Working Group was as follows:

Article IV

(1) A court, before which an action is brought in a matter which is the subject of an arbitration agreement, shall, at the request of a party, /decline jurisdiction and/ refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. /A plea that the court has no jurisdiction because of/ /Such a request based on/ the existence of an arbitration agreement may be made by a party not later than when submitting his first statement on the substance of the dispute.

(2) It shall not be deemed incompatible with the arbitration agreement that a party, before or during arbitral proceedings, requests from a court interim measures of protection /in respect of the subject-matter of the dispute or in respect of evidence/ and that a court /orders or takes/ /grants/ such measures.

Paragraph (1)

186. The Working Group adopted paragraph (1) subject to the following modifications. While there was some support for retaining the words "decline jurisdiction and ", the prevailing view was to delete these words for the sake of conformity with the 1958 New York Convention (article II (3)). As regards the introductory phrase to the second sentence, the Working Group adopted the words "Such a request based on".

187. In this connexion, a suggestion was made to include in article IV or another appropriate article (e.g. article II) a reference to the arbitrability of the subject-matter, as found in article II (1) of the 1958 New York Convention ("concerning a subject matter capable of settlement by arbitration") and recognized by the model law only in the chapter on enforcement (article XXVIII (2) (a)). However, this suggestion was not adopted since article IV was not regarded as an appropriate place for dealing with this issue and because an arbitration agreement concerning a non-arbitrable subject-matter would, at least in some jurisdictions, be regarded as null and void.

Paragraph (2)

188. The Working Group was agreed that the interim measures of protection envisaged under this provision would include measures of conservation of the subject-matter of the dispute and measures in respect of evidence as well as pre-award attachments. Nevertheless, it was not deemed necessary to specifically list the various possible measures; instead, a general formula such as the one adopted in the European Convention on International Commercial Arbitration (Geneva 1961; art. VI (4)) was considered as more appropriate.

189. As regards the thrust of this provision, there was some support for merely addressing it to the parties and, thus, omit the reference to the action of the court itself. The prevailing view, however, was that the question of compatibility with the arbitration agreement was relevant not only with regard to the attitude of the parties but also to the granting of such measures by the courts.

Article V

190. The text of article V as considered by the Working Group was as follows:

Article V

The Court /with jurisdiction/ /entrusted/ to perform the functions referred to in articles VIII (2), (3), X (3), XI (2), XIII (3), XIV, XXVI and XXX shall be the.... (blanks to be filled by each State when enacting the model law).

191. There was wide support for retaining this article, with the words placed between the first square brackets. It was agreed that the reference to the individual articles entrusting the Court with certain functions would have to

be revised and finalized at a later stage. It was also noted that consideration may be given to the question which Court of article V, i.e. the Court of which State, should render assistance in a given case, for example assist in the appointment of an arbitrator where the place of arbitration had not yet been determined. It was agreed that this and similar questions of scope of application and international competence should be considered at the next session, on the basis of a study by the Secretariat.

Article VI

192. The text of article VI as considered by the Working Group was as follows:

Article VI

No person shall be by reason of his nationality precluded from acting as an arbitrator, unless otherwise agreed by the parties.

193. Some support was expressed for the deletion of this article because it would be difficult to implement this provision in States where nationals of certain States were precluded from serving as arbitrators. However, after noting that the model law, not being a convention, would not exclude the possibility for a State to reflect its particular policies in national legislation, the Working Group agreed to adopt this article, subject to the addition of the words "or citizenship" after the word "nationality."

Article VII

194. The text of article VII as adopted by the Working Group was as follows:

Article VII

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

195. The Working Group adopted this article.

Article VIII

196. The text of article VIII as considered by the Working Group was as follows:

Article VIII

- (1) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators.

(2) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within 30 days after having been requested to do so by the other party/, or if the two arbitrators fail to agree on the third arbitrator within 30 days from their appointment, the appointment shall be made by, upon request of a party by the Court specified in article V;

(b) if, in an arbitration with a sole arbitrator, the parties are unable to agree/ do not within 40 days after the request for arbitration agree/ on the arbitrator, he shall be appointed by the Court specified in article V.

(3) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure; or

(b) the parties, or two arbitrators, are unable to reach an agreement expected from them under such procedure; or

(c) an appointing authority fails to perform any function entrusted to it under such procedure,

any party may request the Court specified in article V to take the necessary measure instead, unless the agreement on the appointment procedure by, in particular by reference to arbitration rules by provides another procedure for meeting such contingency/ other means for securing the appointment/.

(3 bis) Any decision entrusted by paragraphs (2) and (3) to the Court specified in article V shall be final./

(4) This Court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties/ the national of a State where neither of the parties has his relevant place of business as referred to in article I (2)/.

Paragraph (1)

197. The Working Group adopted this paragraph.

Paragraph (2)

198. There was some support for replacing the fixed time-periods by more flexible wording such as "within reasonable time". The prevailing view, however, was to retain the fixed time-periods for the sake of certainty. The

Working Group adopted sub-paragraph (a) including the words placed between the two sets of square brackets. The Working Group was agreed that the words placed between the last square brackets should also be inserted in sub paragraph (b). While some support was expressed for the wording in the second brackets of sub-paragraph (b), though with a time-period of 30 days for the sake of harmony with sub-paragraph (a), the prevailing view was to adopt the wording between the first square brackets ("are unable to agree").

Paragraph (3)

199. The Working Group adopted this paragraph subject to the deletion of the text placed between the first two sets of square brackets.

Paragraph (3 bis)

200. The Working Group adopted this paragraph.

Paragraph (4)

201. The Working Group adopted this paragraph subject to the deletion of the wording between the last square brackets and to adjustment in accordance with its decision on article VI (see above, para. 193). A suggestion was made to replace the words "shall take into account" by the words "may take into account".

Article IX

202. The text of article IX as considered by the Working Group was as follows:

Article IX

(1) When a person is approached in connexion with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator /, from the time of his appointment and thereafter, / shall disclose any such circumstances to the parties unless they have already been informed by him of these circumstances.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

Paragraph (1)

203. The Working Group adopted this paragraph including the words placed between square brackets. It was also agreed to insert in both sentences of this paragraph the words "without delay".

Paragraph (2)

204. The Working Group adopted this paragraph.

Article X

205. The text of article X as considered by the Working Group was as follows:

Article X

(1) The parties are free to agree on the procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party may challenge an arbitrator before the arbitral tribunal within 15 days after knowing any circumstance referred to in article IX (2). The mandate of the arbitrator terminates when he withdraws from his office or the other party agrees to the challenge; in neither case does this imply/ /neither reaction implies/ acceptance of the validity of the grounds for the challenge.

(3) If a challenge is not successful within 30 days under the procedure of paragraph (2) or is not successful under any procedure agreed upon by the parties, the challenging party may pursue his objections before a court only in an action for setting aside the arbitral award/ /request, within 15 days, from the Court specified in article V a decision on the challenge which shall be final; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings/.

Paragraph (1)

206. The Working Group adopted this paragraph.

Paragraph (2)

207. It was noted that under this provision " a party may challenge an arbitrator before the arbitral tribunal" but that the power of the arbitral tribunal to decide on such challenge was not clearly expressed in this provision. The Working Group was agreed that, unless the challenged arbitrator withdrew from his office or the other party agreed to the challenge, the arbitral tribunal should decide on the challenge and that this step in the challenge procedure should be clearly stated in paragraph (2), without laying down the procedural details. It was understood that this step had no practical relevance in the case of a sole arbitrator challenged by a party.

208. As to how the paragraph should be redrafted, various suggestions were made and accepted by the Working Group. One proposal was to transfer to article IX the whole text which followed the first sentence of paragraph (2), including the words between the first square brackets. Paragraph (2) of article X would then merely deal with the decision of the arbitral tribunal on the challenge which would become necessary where neither the challenged arbitrator withdrew from his office nor the other party agreed to the challenge. It was further suggested to require in paragraph (2) that a party who challenged an arbitrator should state the reasons for the challenge.

Paragraph (3)

209. It was noted that the introductory wording of paragraph (3) had to be revised in the light of the decision on paragraph (2). Divergent views were expressed concerning the alternative solutions placed between square brackets. Under one view, resort to a court should not be allowed during the arbitration proceedings but only by way of an application for setting aside the award, as provided in the first square brackets. The main reason advanced in support of this view was that dilatory tactics should be prevented, although it was recognized by some proponents of that view that the revised version of the alternative solution (between the second square brackets) contained some elements to alleviate such fears.

210. Under another view, it was unacceptable to continue the arbitral proceedings without first settling the matter by a final decision on the challenge. For that reason, the second alternative should be adopted but without its last part which allowed the arbitral tribunal to continue the arbitral proceedings while the question of challenge was pending with the Court.

211. Under yet another view, the second alternative should be adopted including its last part which, as was pointed out in support of this view, did not oblige the arbitral tribunal to continue the proceedings but merely entitled it to do so. It was stated that this discretion left to the arbitral tribunal would enable it to limit the adverse effects of an unjustified challenge for dilatory purposes.

212. The Working Group, while recognizing the divergency of views and the validity of the different reasons advanced in support thereof, was agreed that the issue had to be settled and adopted, after deliberation, the latter view (reported in para. 211) as a compromise solution.

Article XI

213. The text of article XI as considered by the Working Group was as follows:

Article XI

(1) In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, his mandate terminates if he withdraws from his office or if the parties agree on the termination; in neither case does this imply acceptance of the validity of any ground referred to in the first sentence.

(2) If /the mandate of the arbitrator does not terminate in accordance with paragraph (1) and if/ a controversy remains concerning any of the events envisaged in paragraph (1), any party /or arbitrator/ may request from the Court specified in article V a decision on the termination of the mandate /which shall be final/.

Paragraph (1)

214. Some support was expressed for aligning this paragraph with the provision of article X (2) and to provide that the arbitral tribunal should decide on the failure or impossibility to act, where neither the respective arbitrator withdrew from his office nor the parties agreed on the termination of the mandate. The prevailing view, however, was that such alignment was not warranted in view of the different events or grounds covered by article XI.

215. It was noted that the last phrase of paragraph (1), as presently drafted, was not easily reconcilable with the first sentence, where the very events were stated as objective and existing, while the last phrase precluded any inference as to their validity. While recognizing the policy underlying this last phrase, the Working Group decided to delete that phrase in paragraph (1) and to express the idea in the context of article IX, in line with its decision concerning paragraph (2) of article X (see above, para. 208). As regards the remaining text of paragraph (1), the Working Group requested the Secretariat to prepare a revised draft, possibly combined with the provision of paragraph (2).

Paragraph (2)

216. The Working Group adopted paragraph (2), subject to the deletion of the text placed between the first two sets of square brackets, although there was some support for retaining the words between the second square brackets ("or arbitrator") and for deleting the words between the last square brackets ("which shall be final").

Article XII

217. The text of article XII as considered by the Working Group was as follows:

Article XII

Where the mandate of an arbitrator terminates under article X or XI, or in the event of his death or resignation, 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 otherwise.

218. The Working Group adopted the policy underlying this article. It was observed that the introductory wording did not specify in a systematical manner the cases where the need for appointing a substitute arbitrator arose.

219. In connexion with this article, a concern was expressed that, in the case of a party-appointed arbitrator, the mechanism of resignation and replacement, in particular by using it repeatedly, could be abused for the purposes of obstructing the proceedings. Without denying the validity of this concern with regard to some cases, the Working Group decided not to deal, at least not at this stage, with this problem for which no easy solution could be found.

Reference to conciliation

220. A suggestion was made to consider including in the part of the model law setting forth general provisions (articles I bis to I quater) a new provision as follows: "Conciliation can be used as an additional method of settling disputes where parties so wish". The Working Group decided to consider this suggestion at its next session when discussing the above general provisions.