III. INTERNATIONAL COMMERCIAL ARBITRATION*

Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN.9/207)**

CONTENTS

INTRODUCTION

1. At its twelfth session, the United Nations Commission on International Trade Law considered a report of the Secretary-General entitled "Study on the application and interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)" (A/CN.9/168)*** and a note by the Secretariat on further work in respect of international commercial arbitration (A/CN.9/ 169).****[1] The note suggested that the Commission commence work on a model law on arbitral procedure which could help to overcome most of the problems identified in the above study and to reduce the legal obstacles to arbitration.

2. The Commission decided, at that session, to request the Secretary-General

"(*a*) To prepare an analytical compilation of provisions of national laws pertaining to arbitration procedure, including a comparison of such laws with the UNCITRAL Arbitration Rules* and the 1958 Convention;

"(*b*) To prepare, in consultation with interested international organizations, in particular the Asian-African Legal Consultative Committee and the International Council for Commercial Arbitration, a

* For consideration by the Commission see Report, chapter IV (part one, A, above).

** 14 May 1981. Referred to in Report, paras. 63, 64 (part one, A, above).

*** Yearbook . . . 1979, part two, III, C.

**** Yearbook . . . 1979, part two, III, D.

[1] Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), paras. 78-80 (Yearbook . . . 1979, part one, II, A).

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

preliminary draft of a model law on arbitral procedure, taking into account the conclusions reached by the Commission, and in particular:

"(i) That the scope of application of the draft uniform rules should be restricted to international commercial arbitration;

"(ii) That the draft uniform law should take into account the provisions of the 1958 Convention and of the UNCITRAL Arbitration Rules;

"(*c*) To submit this compilation and the draft to the Commission at a future session."[2]

3. At its thirteenth session, the Commission had before it a note by the Secretariat entitled "Progress report on the preparation of a model law on arbitral procedure" (A/CN.9/190).[3] In this note, the Secretariat set forth its initial work and referred to difficulties in obtaining the materials necessary for the preparatory work on this project. In order to assist the Secretariat in that regard, the Commission decided to invite Governments to provide the Secretariat with relevant materials on national legislation and case law, and pertinent treatises where available.[4] The General Assembly included a similar appeal to Governments in its resolution 35/51* of 4 December 1980 (paragraph 12 (*d*)).

4. The Secretariat is indebted to those Governments which have already provided it with relevant publications. Materials of as many States and legal systems as possible are needed in order to obtain complete and current information on the different laws and legal practice in the field of arbitration. To have accurate and up-to-date information becomes particularly crucial when, at a later stage, specific issues will be discussed in detail in order to find widely acceptable solutions. Accounts of national laws on the various specific issues could then assist the Commission or, if it wishes to entrust a Working Group with that task, the Working Group in its discussions and preparation of draft provisions.

5. Before that, it seems advisable to discuss and decide on more general, preliminary issues concerning the principles, scope, and possible contents of a model law. The present report is designed to assist the Commission in its consideration of such features and the basic directions it may wish to determine.

6. The first part of the report (A) deals with the concerns which should be met by the model law and with the principles which could underlie it. Clarity and agreement on these points should not only help to find the most suitable approach in this project but also help to define the scope of the future model law, in combination with the directions already decided upon by the Commission, i.e. to cover only international commercial arbitration and to take into account the provisions of the 1958 Convention and of the UNCITRAL Arbitration Rules (see decision above, paragraph 2, sub-paragraph (*b*) (i) and (ii)).

7. The second part of the report (B) attempts to identify all those issues possibly to be dealt with in the draft model law. It does not merely list the points commonly regulated in arbitration statutes or the relevant parts of civil procedure codes. Rather, it focuses on those issues inclusion of which would appear desirable in view of the suggested purposes and principles. In particular, it emphasizes matters where difficulties have been encountered in international practice. Thus, reference is made to problems arising out of disparities between national laws or shortcomings of legal rules or divergent attitudes in different jurisdictions, taking into account criticisms and suggestions made by practitioners and scholars. This report is not intended, though, to discuss these issues in detail and to present elaborate proposals since its purpose is merely to identify the issues and to state reasons relevant to the decision about their inclusion into the draft model law. Whether or not all the issues listed will eventually be dealt with in the model law, their discussion should provide a clearer idea about the possible scope of such a law and about the work and expertise required for its preparation.

8. It should also be mentioned here that the order and classification of the issues used in this report does in no way indicate what the eventual structure of the model law could be like. The order used in part B (except I) is simply the classification scheme of the national reports published in the *Yearbook Commercial Arbitration*.[5] This sensible scheme has been adopted here in order to facilitate reference to, and consultation of, these national reports with their wealth of information, on which the Secretariat relied in preparing this report.[6]

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* Yearbook . . . 1980, part one, II, D.

[2] *Ibid.*, para. 81.

[3] Report of the United Nations Commission on International Trade Law on the work of its thirteenth session, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 17* (A/35/17), paras. 114-116 (Yearbook . . . 1980, part one, II, A).

[4] *Ibid.*, para. 117.

[5] Publication of the International Council for Commercial Arbitration; General Editor: Prof. Pieter Sanders; publ. by Kluwer, Postbox 23, 7400 GA Deventer, Netherlands. In the following footnotes the *Yearbook Commercial Arbitration* is referred to as "YCA".

[6] Reports on the laws of the following States have been published in volumes I to VI of the *Yearbook Commercial Arbitration:* Algeria, Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Cuba, Czechoslovakia, Denmark, Ecuador, Egypt, Finland, France, German Democratic Republic, Germany, Federal Republic of, Greece, Hungary, India, Indonesia, Iran, Iraq, Israel, Italy, Japan, Kuwait, Libyan Arab Jamahiriya, Mexico, Mongolia, Netherlands, Nigeria, Norway, Pakistan, Panama, Peru, Poland, Romania, Saudi Arabia, Sweden, Switzerland, South Africa, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United States of America, Venezuela, Yugoslavia.

A. Concerns and principles of a model law on international commercial arbitration

I. *General concerns and problems*

9. The ultimate goal of a model law would be to facilitate international commercial arbitration and to ensure its proper functioning and recognition. Its practical value would, in particular, depend on the extent to which it provides answers to the manifold problems and difficulties encountered in practice. Thus, in preparing the model law an attempt should be made to meet the concerns which have repeatedly been expressed in recent years, sometimes even labelled as "defects" or "pitfalls" in international commercial arbitration.

10. A major complaint in this respect is that the expectations of parties as expressed in their agreements on arbitration procedure are often frustrated by conflicting mandatory provisions of the applicable law. To give only a few examples, such provisions may relate to, and be deemed to unduly restrict, the freedom of the parties to submit future disputes to arbitration, or the selection and appointment of arbitrators, or the competence of the arbitral tribunal to decide on its own competence or to conduct the proceedings as deemed appropriate taking into account the parties' wishes. Other such restrictions may relate to the choice of the applicable law, both the law governing the arbitral procedure and the one applicable to the substance of the dispute. Supervision and control by courts is another important feature not always welcomed by parties especially if exerted on the merits of the case.

11. These and other restrictive factors set forth in detail below (in part B) tend to create the above disappointment with mandatory provisions of law. It is this concern which, for example, prompted the recommendation of the Asian-African Legal Consultative Committee (AALCC) as considered by the Commission at its tenth session: "Where the parties have adopted rules for the conduct of an arbitration between them, whether the rules are for *ad hoc* arbitration or for institutional arbitration, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in municipal laws and the award rendered should be recognized and enforced by all Contracting States to the 1958 New York Convention".[7]

12. However, this suggestion should not be understood as advocating total freedom of the parties and refusal of all mandatory provisions in the field of international commercial arbitration. That is clear from the second recommendation of the AALCC: "Where an arbitral award has been rendered under procedures which operate unfairly against either party, the recognition and enforcement of the award should be refused".[8] A corrective role in this regard may be played by courts in a country where recognition and enforcement of a foreign arbitral award is sought as provided for in the 1958 New York Convention. But it may also be performed by mandatory provisions of the *lex loci arbitri* dealing with defects in the procedure, denial of justice, and lack of due process of law.

13. Another source of concern and of possibly unexpected legal consequences is the non-mandatory part of the applicable law. Although, by definition, such provisions may be derogated from and, thus, the effect of any undesired rule nullified, parties may not have made a contrary stipulation, in particular where they were not aware of such rule. Also, where parties have not agreed on a certain procedural point, yet another concern may arise from the fact that the applicable law does not contain a provision settling this point. The lack of such "supplementary" rule may create uncertainty and controversy detrimental to the smooth functioning of the arbitration proceedings.

14. The above problems and undesired consequences, whether emanating from mandatory or from non-mandatory provisions or from a lack of relevant provisions, may be due to the fact that a given national law deals only with some aspects of arbitration, or that it is out-dated and in need of revision, or that it has been drafted to meet the needs of domestic arbitration, possibly emphasizing local particularities, or that for other reasons it is not adequate for modern international arbitration practice. This situation is aggravated by the fact that the applicable law often bears no substantive connexion with the parties or the dispute at hand. Usually it is the law of the place of arbitration and this, in fact, may be selected simply for reasons of convenience, for example, because it is the residence of the sole arbitrator or the chairman of a tribunal.

15. In such cases of a rather fortuitous determination of the applicable law parties may be confronted with provisions and procedures with which they are not familiar. The possible adverse effect of that is enhanced by the well-known fact that there exist wide disparities among the national laws on arbitration procedure. Even where uniformity has been achieved to a certain extent, for example, by a widely accepted multilateral convention, unexpectedly different results may be reached due to divergent interpretations of its provisions. With regard to the most important convention, this has been shown by the study on the application and interpretation of the 1958 New York Convention submitted to the Commission at its twelfth session.[9] In addition, there remains a

[7] Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 39 and annex II, paras. 27-36 (Yearbook . . . 1977, part one, II, A). The recommendation of the AALCC has been reproduced in document A/CN.9/127 (Yearbook . . . 1977, part two, III), with comments by the Secretariat in A/CN.9/127/Add.1.

[8] *Ibid.*

[9] A/CN.9/168 (Yearbook . . . 1979, part two, III, C).

great number of unsettled issues and unanswered questions (to be discussed below in part B) which might create uncertainty and controversy.

II. *General principles and purposes*

16. From the general concerns expressed above some tentative conclusions may be drawn which could serve as guidelines in the preparation of a model arbitration law. It is submitted that, to minimize the indicated difficulties, the following principles and purposes should underlie the model law to be drafted.

17. Probably the most important principle on which the model law should be based is the freedom of the parties in order to facilitate the proper functioning of international commercial arbitration according to their expectations. This would allow them to freely submit their disputes to arbitration and to tailor the "rules of the game" to their specific needs. It would also enable them to take full advantage of rules and policies geared to modern international arbitration practice as, for example, embodied in the UNCITRAL Arbitration Rules.

18. To give parties the greatest possible freedom does not mean, however, to leave everything to them by not regulating it in the model law. Apart from the desirability of providing "supplementary" rules (see above, paragraph 13), what is needed is a positive confirmation or guarantee of their freedom. Thus, the model law should provide a "constitutional framework" which would recognize the parties' free will and the validity and effect of their agreements based thereon.

19. Yet, as indicated above (paragraph 12), it is not suggested to accord absolute priority to the parties' wishes over any provision of the law. Their freedom should be limited by mandatory provisions designed to prevent or to remedy certain major defects in the procedure, any instance of denial of justice or violation of due process. Such restrictions would not be contrary to the interest of the parties, at least not of the weaker and disadvantaged one in a given case. They would also meet the legitimate interest of the State concerned which could hardly be expected to issue the above guarantee without its fundamental ideas of justice being implemented.

20. Such fundamental principles as usually found in a State's *ordre public* could only be neglected if one were to favour international arbitration proceedings and awards which would be "supra-national" in the sense of a full detachment from any national law. However, the present report is based on the view that it is desirable, if not imperative, to envisage a certain link between the arbitration proceedings, including the award, and a national law which would give recognition and effect to arbitration agreements and awards and would provide for adequate assistance by courts, for example, as regards orders to compel arbitration or to call witnesses or to enforce interim measures of protection or to provide ultimate resort in case of a deadlock. By establishing such a connexion one should also avoid the problem of a "floating" or "stateless" award which could arise where not even the courts of the State where the award was made confirm (or deny) its binding nature for lack of jurisdiction or "nationality" of the award.[10]

21. In view of the above, it will be one of the more delicate and complex problems of the preparation of a model law to strike a balance between the interest of the parties to freely determine the procedure to be followed and the interests of the legal system expected to give recognition and effect thereto. This involves, above all, a precise demarcation of the scope of possible intervention and supervision by courts and, in particular, of the substantive criteria for reviewing and reasons for setting aside an award. It is submitted that the result of this endeavour will have a considerable influence on the success of the whole project. Yet, the task is somewhat eased by the fact that transnational transactions tend to be subject to less strict standards than purely domestic transactions. This recent trend can be discerned, for example, from the increasingly made distinction between international public order and domestic public order of a State where recognition and enforcement of a foreign award is sought.[11]

22. It is, of course, not only in respect of such substantive standards for review and control that the specific characteristics of international commercial arbitration should be focused at. The needs of modern international practice and the principles of fairness and equality should be guiding in the drafting of all the provisions of a model law. Implementation of the decision of the Commission "that the draft uniform law should take into account the provisions of the 1958 Convention and of the UNCITRAL Arbitration Rules" (see above, paragraph 2) would go a long way towards meeting these ends.

23. In order to facilitate the smooth operation of international commercial arbitration, a further drafting principle could be to strive for a set of rules which would be as comprehensive and complete as possible. This would meet the above concern (paragraph 13) that lack of a provision on a certain point may create uncertainty and controversy. Completeness could also extend to matters possibly regulated in other branches of the law since their inclusion into the model law would allow to adopt uniform answers adapted to the international type of arbitration. Thus, one might even consider to include at least some of the issues not included in the otherwise fairly extensive 1966 Strasbourg Uniform Law on Arbitration: capacity to conclude an arbitration agreement,

[10] Cf. e.g. decision of the Cour d'Appel de Paris of 21 February 1980, lère Chambre civile, publ. in *Recueil Dalloz Sirey* 1980, p. 568, with a note by Robert.

[11] See A/CN.9/168, para. 46 (Yearbook . . . 1979, part two, III, C).

the qualifications of an arbitrator, counter-claims, the powers of investigation of an arbitral tribunal, the provisional execution of arbitral awards, arbitration costs and arbitrators' fees, the jurisdiction of judicial authorities called upon to intervene.[12]

24. Other issues usefully to be included are those that have given rise to difficulties due to divergent interpretations, or gaps, of the 1958 New York Convention as identified in the study of the Secretary-General (A/CN.9/168).* Thus, clarification could be sought, for example, of the exact meaning of the requirement that the arbitration be "in writing". One could also attempt to reach agreement on the law applicable to the arbitration agreement. Another question possibly to be answered in the model law is whether pre-arbitration attachments and similar measures are compatible with an arbitration agreement. To mention yet another point of a long list of items that have given rise to difficulties, one could envisage a provision to the effect that where parties have referred to the law of a given State as being applicable to the substance of the dispute then this choice of law is deemed to refer directly to the substantive law of that State and not to the conflicts rules contained in its private international law.

25. The principle of striving for completeness should be seen in connexion with another idea which would strengthen the positive effect of assisting lawyers, arbitrators and businessmen in their difficult task to find out about the legal rules of a foreign system. And that is to envisage that the law on international commercial arbitration be accorded priority (as *lex specialis*) over other laws except as otherwise stated in the (model) arbitration law. For the same purpose, one could, for example, require the listing of certain points which are often, and for reasons of substance, regulated in other laws, e.g. any non-arbitrable subject-matters or any persons or bodies lacking the capacity to conclude arbitration agreements. This would, at least, ensure easy access to the law although it would not necessarily lead to uniformity since States may list different categories of such exclusions.

26. As to the desirable uniformity in general, it may be submitted here that a model law is not necessarily less conducive to reaching uniform standards than a convention. Apart from any considerations concerning the time-consuming and costly procedures of adopting and ratifying a convention, it is ultimately the quality of the contents of the proposed law that determines its acceptability. However, for the sake of uniformity an appeal should be envisaged to adopt the law, though a model, *in toto*. Another measure of harmonization would be to later "monitor" the interpretation and application of the law by publishing relevant court decisions and pointing out any divergencies. That is, of course, in the true sense of the word, a *cura posterior*.

27. What has to be done first is to work towards a clear and complete set of rules establishing fair and modern standards of international arbitration which would be acceptable to the different legal and economic systems of the world. For that purpose, an attempt shall be made now to identify the issues possibly to be dealt with in the model law and to mention relevant problems and reasons.

B. Identification of issues possibly to be dealt with in the model law

I. *Scope of application*

28. As decided by the Commission at its twelfth session, "the scope of application of the draft uniform rules should be restricted to international commercial arbitration" (see above, paragraph 2). It seems clear that this restriction, if finally maintained, will have to be stated in the model law. It is less clear, though, whether the three elements delimiting the scope of application, i.e. "arbitration", "commercial" and "international", should be defined and, if so, in which way.

1. *"Arbitration"*

29. As to the first element, i.e. "arbitration", it would seem desirable to define that term since it expresses the "heart of the subject-matter" or activity governed by the model law. Such definition would have to cover institutional and *ad hoc* arbitration. Also, it would in some way have to indicate that arbitration is a dispute settlement procedure outside the court system. Beyond that, however, a major difficulty will be to distinguish precisely between arbitration as regulated in the model law and those procedures which, sometimes even labelled arbitration, are similar to arbitration such as the Italian *"arbitrato irrituale"*, the Dutch *"bindend advies"* and the German *"Schiedsgutachten"*.

30. While certain common features of these three examples of "free arbitration" can be detected (e.g. determination of questions of fact rather than law and decision merely binding like a contract provision), these procedures are not identical and there are yet other such procedures in other legal systems. Thus, it will not be an easy task to draw the line in a sufficiently clear manner. At the very least, one should envisage an appeal to States adopting the model law to list any procedure akin to arbitration but excluded from its scope of application.

2. *"Commercial"*

31. As to the second element delimiting the scope of application, i.e. "commercial", it is doubtful whether that should be defined in the model law. It may be

* Yearbook . . . 1979, part two, III, C.

[12] See General Considerations, para. 7, of the Explanatory Report on the European Convention Providing a Uniform Law on Arbitration, Council of Europe, 1967.

thought that this term, although not always and in all respects construed in an identical manner, has by now gained a sufficiently clear meaning, at least as a modifier to arbitration, thus excluding arbitrations of a different nature such as those in labour disputes or family law matters. Based on the experience with article I, paragraph 13 of the 1958 New York Convention,[13] it is further suggested not to qualify the term along the following lines: "relationships which are considered as commercial under the national law of the respective State".

3. *"International"*

32. As to the third element, i.e. "international", it would seem necessary, though difficult, to define that term since the model law is designed to provide a special legal regime for those arbitrations where more than purely domestic interests are involved. There are a number of possible criteria to regard an arbitration as "international" in the sense of "not purely domestic". One such instance would be that at least one of the parties has its place of business in, or is a national of, a State other than the one concerned (hereinafter called X). Another factor could be that the place of arbitration lies outside State X. Yet other factors may be that the arbitration agreement (or the contract containing the arbitration clause) is concluded in a State other than X or that the subject-matter of the dispute concerns an area outside State X (e.g. the market regulated in a distribution agreement.).

33. The first two criteria are used, for example, in the United Kingdom Arbitration Act 1979 which defines, in section 3(7),

> "domestic arbitration agreement" as an "arbitration agreement which does not provide, expressly or by implication, for arbitration in a State other than the United Kingdom and to which neither
>
> "(*a*) An individual who is a national of, or habitually resident in, any State other than the United Kingdom, nor
>
> "(*b*) A body corporate which is incorporated in, or whose central management and control is exercised in, any State other than the United Kingdom,
>
> "is a party at the time the arbitration agreement is entered into".

It has been observed that, in this definition, the ambit of a non-domestic arbitration is drawn very widely in order to give essentially international arbitrations the full benefit of the relaxation introduced by the new legislation.[14] In view of this international thrust and of the technique employed (i.e. to define domestic rather than non-domestic), the above definition may seem to commend itself as an interesting model.

34. However, for the purposes of the scope of application of the model law which is to cover various stages of arbitration (e.g. conclusion of arbitration agreement, arbitral proceedings, setting aside of award, recognition and enforcement of award), certain difficulties should not be overlooked which may arise, in particular, when the place of arbitration is used as a distinguishing factor. One difficulty relates to the fact that the question of the applicability of the model law, based on the non-domestic character of the arbitration, may already be relevant before the arbitration has started, e.g. in the context of a referral to arbitration as envisaged under article II, paragraph 3 of the 1958 New York Convention. Uncertainty would then exist if, as is sometimes the case, the arbitration agreement does not specify the place of arbitration but leaves that determination to the arbitrator. Such an arbitration agreement, if concluded between two nationals of State X, would under the above definition conceivably be treated as a domestic one since it "does not provide for arbitration in a State other than X". If a foreign party is involved, then this would be the international connexion bringing it within the scope of the model law. Consequently, one might consider to solely rely on this criterion, i.e. foreign place of business or nationality of at least one of the parties.

35. This suggestion could also meet the following concern: A State (X) may not be willing to apply its "relaxed" international arbitration provisions to the situation where, as would be covered under the above definition, two nationals of that State select a foreign place of arbitration (and could, thus, avoid the more restrictive procedural law for domestic cases). On the other hand, the State where the arbitration takes place may have no objection against the application of its "international" arbitration law even if both parties are from the same foreign country. The same may be true where in this State a stay of proceedings is sought based on such an arbitration agreement.

36. There is yet another concern in respect of those provisions of the model law which would govern the arbitration proceedings and any setting aside procedures. One should expect that these provisions would primarily, though not exclusively, apply to those "international" arbitrations which take place within the boundaries of the State concerned (X). This expectation is based on the existing conflicts rules according to which the applicable procedural law is normally the law of the place of arbitration, except where another law is validly chosen by the parties. Although the above definition could technically work here since it would not prevent the application of the law to arbitrations in State X as long as at least one of the parties is a national of another State, the use of the (foreign) place of arbitration as one

[13] Cf. A/CN.9/168, para. 11 (Yearbook . . . 1979, part two, III, C).

[14] Schmitthoff, *The United Kingdom Arbitration Act 1979*, YCA V-1980, pp. 231, 234.

of two alternative criteria could be regarded as misleading or as a matter of misplaced emphasis. In fact, the place of business (or nationality) of the parties remains as the decisive factor.

37. If, thus, one were to require that the parties are from different States, one would certainly exclude purely domestic arbitrations. This would also include cases where none of the parties is from the State concerned. Yet, it may be doubtful whether the law of State X should apply to such "fully non-domestic" cases since one might assume that a certain connexion with that State should exist. Here, one may well take the position that this is not an issue to be dealt with under "scope of application", the purpose of which is to indicate generally what type of cases the law is designed to regulate.

38. The above examples, to which many could be added, indicate not only the complexity of the issue at hand but also the inter-play or interdependence between the scope of application and the pertinent conflicts rules. Therefore, the Commission may wish to discuss to what extent such considerations should be taken into account when defining the scope of application and it may even wish to decide whether it would not be appropriate to envisage inclusion of some model conflicts rules. Whatever the final answer may be, the relevant provisions of the 1958 New York Convention would have to be taken into account in order to avoid any conflict and, at least with regard to the scope of application, an attempt should be made to use the same criterion or criteria for the various stages of arbitration regulated by the model law.

II. *Arbitration agreement*

39. In contrast to court litigation, arbitration proceedings usually take place only if the parties have so agreed. Therefore, the model law should contain provisions on this basic agreement. It should be mentioned, however, that there are exceptions to this rule where no such agreement is needed since submission to arbitration is by operation of a law. The most prominent example are disputes between enterprises of the member States of the Council for Mutual Economic Assistance which, under the 1972 Moscow Convention or the General Conditions of Delivery of Goods, 1968 (sections 90 and 91), are referred to the arbitration courts attached to the Chambers of Foreign Trade, Commerce or Industry. For the sake of complete information, one might consider to envisage in the model law inclusion of a reference to the respective exceptions in a given legal system.

40. Returning now to the cases where an agreement is needed, the discussion of what constitutes an arbitration agreement, what form and contents should be required, and of other related points to be dealt with in the model law should be based on the pertinent provisions of the 1958 New York Convention:

"Article II

"1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

"2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

"Article V

"1. Recognition and enforcement of the award may 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 agreement referred to in article II were, under the 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; . . ."

For the sake of consistency between major legal texts governing international arbitration practice, it would be desirable not to include provisions in the model law which would be in conflict with any of the above rules.

1. *Form, validity and contents*

41. It may be considered to adopt in the model law the requirement that the arbitration agreement be in writing, as envisaged under article II, paragraph 1 of the 1958 New York Convention. A survey of national laws reveals that this is the form required under most legal systems. Where this is not so, it has been reported that, nevertheless, in practice almost all agreements are concluded in writing or that oral agreements may not easily be relied on due to strict standards of proof. In some other (Latin American) States written form is dispensed with only for an agreement to arbitrate future disputes which, however, is of lesser practical value since at any rate a formal submission is required there once the dispute has arisen.

42. In view of this latter situation, it may be suggested here already that the model law not retain the classic distinction between *"compromis"* and *"clause compromissoire"*. Rather, in conformity with modern arbitration principles, an arbitration agreement could relate to existing or to future disputes, as envisaged under article II, paragraph 1 of the 1958 New York Convention. Such undertaking, whether in an arbitral clause or a separate agreement, constitutes a final and sufficient

commitment by the parties. No additional submission would be necessary and, thus, its often strict formalities (e.g. public deed, recording in court) would no longer have to be observed. In view of the relaxation under the systems affected, the above proposal as to written form could be regarded as an acceptable compromise.

43. If the requirement of written form were to be adopted, it may further be suggested to include in the model law a clear and detailed definition of what "in writing" means. Such definition could help to achieve uniform interpretation which would be highly desirable not only for purposes of the model law itself but also for other legal texts such as the 1958 New York Convention (article II) or the United Nations Convention on the Carriage of Goods by Sea, 1978 (article 22).* One might even consider to state expressly in the model law that the definition given there would be applicable to relevant provisions in other legal texts, too. As to the possible shape of such a definition, it may be based on the definition set forth in the 1958 New York Convention (article II, paragraph 2). However, in view of the difficulties encountered in practice, as reported in the study of the Secretary-General (A/CN.9/168, paragraphs 19-26), the definition in the model law should be more precise and detailed. In particular, it should attempt to tackle these problems which relate, for example, to the involvement of intermediaries, to the commercial practice of sales confirmations, or to the use of standard forms or references to general conditions.

44. Turning to the matter of validity of the arbitration agreement, it seems doubtful whether the model law should attempt to provide an exhaustive list of reasons of invalidity. Probably the best approach would be to include only those reasons which relate directly to arbitration and to leave out the other reasons relevant to any agreement or contract (e.g. mistake). An example of the first type is provided in article 3 of the Strasbourg Uniform Law: "An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of the arbitrator or arbitrators".

45. The less matters of validity are regulated in the model law, the greater would be the need for a provision determining the law applicable to the validity of the arbitration agreement. The rule of the 1958 New York Convention (article V, paragraph 1 (*a*)) cannot simply be adopted. Its first alternative ("the law to which the parties have subjected it") creates difficulties where the parties' freedom of choosing a law is limited and, more importantly, the supplementary alternative ("the law of the country where the award was made") is not sufficient since, as pointed out earlier (paragraph 33), the issue may be relevant already at a time when the place of the arbitration or the award is not yet determined. Thus, additional criteria (e.g. place of conclusion of agreement, law governing substance of dispute) would have to be considered if one were to tackle this controversial issue at all in the model law.

46. A related question is what the arbitration agreement should contain. As pointed out earlier (paragraph 40), the undertaking to submit to arbitration may relate to existing or to future disputes. It will have to be considered whether the type of dispute should be more specifically described and whether any other requirements as to the minimum contents of an arbitration agreement should be included in the model law. For example, article II, paragraph 1 of the 1958 New York Convention refers to differences "in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".

47. Accordingly, one may also in the model law require that the parties specify the relevant contract or other relationship. On the other hand, the restriction as to arbitrability of the subject matter need not be expressed in the arbitration agreement. However, one should state this limitation in the model law, possibly together with a listing of non-arbitrable subject matters, i.e. exclusions from the domain of arbitration dealt with below (paragraphs 55-56). Another requirement found in some national laws would be that the agreement already name the arbitrator(s) or at least set forth the appointment procedure. While parties may be recommended to do so, a strict requirement to that effect does not seem to be warranted. In this context, mention should be made of a later suggestion that the model law provide supplementary rules on the appointment procedure for cases where such procedure has not been agreed upon by the parties or does not operate as expected (below, paragraph 69).

2. *Parties to the agreement*

48. In order to provide wide access to arbitration, in accordance with a clearly discernible trend in modern dispute settlement practice, an attempt should be made to allow all (physical or legal) persons to conclude an arbitration agreement. The idea of envisaging no restrictions in that regard relates, of course, only to the specific capacity to submit to arbitration but not to the general capacity to conclude agreements (as, e.g. restricted for minors). Also, it is not intended to prevent, for example, a trade association from providing access to its arbitration facilities exclusively to its members. What is intended, is merely that no category of persons or corporations or organs would be *per se* excluded by law.

49. The attempt to abolish any existing restrictions in order to grant full access to arbitration may prove to be difficult with regard to governmental agencies or similar entities of public law since important State interests are

* Yearbook . . . 1978, part three, I, B.

at stake here, including the competence of internal organization and division of authority. Nevertheless, the difficulties could possibly be overcome in view of the specific field of application, i.e. international commercial arbitration. As to the commercial aspect of the transactions concerned, a liberal rule on the capacity to arbitrate may be less objectionable since arbitration is a common procedure of dispute settlement in this field and this type of activity is not closely connected with the State's interest in shaping its policy and conducting its public affairs as it wishes. As to the international aspect, a State may adopt a more liberal attitude with regard to international transactions and disputes than to purely domestic affairs; such a distinction is, for example, clearly drawn in France.[15]

50. In view of the above, one might consider adopting a rule along the lines of article II (1) of the 1961 European Convention on International Commercial Arbitration according to which "legal persons considered by the law which is applicable to them as 'legal persons of public law' have the right to conclude valid arbitration agreements". Paragraph 2 of that article permits a Contracting State "to declare that it limits the above faculty to such conditions as may be stated in its declaration". One could envisage to include in the model law a similar "reservation" by requesting States to list any exclusions if such exclusions are deemed necessary.

51. In this context of State participation in arbitration, the Commission may wish to consider whether the model law should deal with pertinent aspects of State immunity. It may be recalled that one of the recommendations of the AALCC, considered by the Commission at its tenth session,[16] was the following point: "Where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement, it should not be able to invoke sovereign immunity in respect of an arbitration pursuant to that agreement".[17] As specified by the Sub-Committee on Trade Law of the AALCC, the intention of that proposal is to prevent a governmental agency which had entered into a valid arbitration agreement in a commercial transaction from invoking sovereign immunity, at all stages of arbitration, including the stage of recognition and enforcement of the arbitral award.[18]

52. It may be thought that the issue of sovereign immunity in the context of arbitration is but a part of a more general and complex problem having an obviously political and public international law character.[19] Nevertheless, it is suggested not to exclude the issue without prior discussion from the preparatory work on the model law. It may even be possible to find an acceptable solution in view of the fact that it would be limited to commercial activities of States and its organs which are widely perceived, as reflected in most laws,[20] not as an exercise of sovereign power warranting special privileges (*"acta jure imperii"*) but as being on equal footing with the activities of private corporations or persons (*"acta jure gestionis"*).

53. Another encouraging consideration could be that, since arbitration depends on a commitment to arbitrate, any restrictions as to sovereign immunity would apply in practice only if a governmental agency concludes an arbitration agreement. If, in fact, a governmental agency or similar body chooses to enter into an arbitration agreement, it would seem to be appropriate that it honour its commitment to the other party reasonably relying thereon.

54. Therefore, thought may be given to including in the model law a provision on some kind of waiver of the plea or defence of sovereign immunity, either an implied waiver or, at least, a recommendation to expressly agree not to invoke sovereign immunity. In either case, one would have to study in detail the feasibility and the legal effects of such approach, both with regard to the arbitration proceedings proper, including jurisdiction of the courts to whose control the arbitration is subject, and to the recognition and enforcement of the award.

3. *Domain of arbitration*

55. Most legal systems exclude from the domain of arbitration one or more subject matters, often by establishing exclusive jurisdiction of certain courts. Commercial subject matters of this kind relate, for example, to bankruptcy, anti-trust, securities, patents, trademarks and copyrights. However, as the survey of court decisions on the 1958 New York Convention revealed,[21] restrictive national laws are increasingly applied in a more lenient way to international transactions than to purely domestic ones or even interpreted as merely governing domestic affairs.

56. It would be in line with this trend and beneficial to the practice of international commercial arbitration if an attempt were made to limit, to the extent possible, the number of non-arbitrable subject matters. As to the subject matters exclusion of which appears necessary, e.g. concerning customs or foreign exchange control

[15] The Supreme Court decided, on 2 May 1966, that Article 2060 Code Civil, according to which neither the State nor public entities may enter into an arbitration agreement, does not apply to international contracts (Cass. Civ. 1, Dalloz 1966, 575).

[16] Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), annex II, paras. 27-37 (Yearbook . . . 1977, part one, II, A).

[17] A/CN.9/127, annex, under 3 (*c*) (Yearbook . . . 1977, part two, III).

[18] A/CN.9/127/Add.1, paras. 11, 12.

[19] Cf. reservations expressed with regard to States and Governments during discussions at the Commission's tenth session, *ibid.* (footnote 16), para. 33.

[20] Cf. e.g. collection of articles on various national systems in 10 *Neth. Yearb. Int. Law* 1979, p. 3 *et seq.*

[21] A/CN.9/168, para. 45 (Yearbook . . . 1979, part two, III, C).

regulations, one could envisage to request their listing by each State adopting the model law. This would provide easy reference and certainty about that point and, thus, be of assistance to foreign lawyers and businessmen.

57. Another question to be considered in the context of arbitrability is whether arbitration of a dispute relating to a contract may extend to what is often called "filling of gaps". When discussing this controversial issue, a distinction should be drawn between the true filling of gaps, i.e. of points that the parties intended to cover in their agreement but did not do so, intentionally or not, and the adaptation of contracts due to changed circumstances, which were unforeseeable and, thus, could not have been contemplated by the parties when concluding the agreement. It will have to be discussed separately for each of these functions whether arbitrators may perform that task without prior authorization by the parties and, if not, whether there should be any limits to the legal effects of a prior authorization.

4. *Separability of arbitral clause*

58. It is suggested that the model law take a clear stand in favour of separability or autonomy of the arbitration clause, as adopted in modern arbitration laws and rules.[22] This means that an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. This independence may become relevant to, and facilitate, a ruling of the arbitral tribunal on objections that it has no jurisdiction, where those objections relate to the existence or validity of the arbitration clause. Another useful import of separability is that a decision by the arbitral tribunal that the contract is null and void would not entail *ipso jure* the invalidity of the arbitration clause.

5. *Effect of the agreement*

59. The purpose of an arbitration agreement is to settle any dispute by arbitration, to the exclusion of normal court jurisdiction. If one of the parties nevertheless submits a claim concerning the matter in dispute to a court, the other party should be able to successfully invoke the arbitration agreement. The question then is whether the court should have any discretion and what points it should examine in deciding whether the parties should be referred to arbitration. Article II (3) of the 1958 New York Convention provides the following answer:

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall,* at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

60. It is submitted that the substance of this provision, for the sake of conformity, should be adopted in the model law. However, some supplementary provisions, not in conflict with it, may help to clarify matters. For example, one could attempt to specify the type of the court decision referring parties to arbitration, e.g. stay or dismissal of court proceedings. In this context, one could also consider providing for an order to compel arbitration. Another issue in need of clarification, as the survey of court decisions revealed,[23] is the complex situation, not uncommon in international commerce, where more than two parties are involved, not all of whom are bound by arbitration agreements. Another issue possibly to be dealt with is up to what stage of the court proceedings a party may successfully invoke the arbitration agreement.

61. Yet another clarification relates to the scope of application dealt with at another place (above, paragraphs 31-38). The value of a clear provision on this point becomes apparent if one considers the difficulties and disparities caused by the lack of such a provision in the 1958 New York Convention.[24] Finally, the model law may provide an answer to the question whether attachments or similar court measures of protection are compatible with an arbitration agreement. Again, the lack of a pertinent provision in the 1958 New York Convention has led to divergent court decisions.[25] A provision, supposedly in favour of compatibility, could be included here since it concerns also the pre-arbitration stage or it may be combined with the provisions governing the arbitration proceedings (below, paragraphs 77 and 78).

6. *Termination*

62. It may be considered to specify in the model law certain circumstances under which an arbitration agreement would be terminated or would not be terminated. Examples, not necessarily to be followed, are provided by the 1966 Strasbourg Uniform Law. According to article 10 (1), the arbitration agreement shall terminate *ipso jure,* if an arbitrator who has been named in the agreement dies, or cannot for a reason of law or of fact perform his office, or refuses to accept it, or does not carry it out, or if his office is terminated by mutual agreement of the parties. Article 19 regulates the period of time within which the award is to be made and then provides, in paragraph 4, that "where arbitrators are named in the arbitration agreement and the award is not made within the relevant period, the arbitration agree-

* It may be noted that the word "shall" was erroneously omitted in the first official publication of the Convention, in United Nations, Treaty Series, vol. 330, No. 4739 (1959), pp. 38, 40, and is, consequently, missing in a number of reproductions based on that text.

[22] Cf. e.g. article 21, UNCITRAL Arbitration Rules (Yearbook . . . 1976, part one, II, A, para. 57).

[23] A/CN.9/168, paras. 27-28 (Yearbook . . . 1979, part two, III, C).

[24] Cf. A/CN.9/168, paras. 16-18 (Yearbook . . . 1979, part two, III, C).

[25] A/CN.9/168, para. 29 (Yearbook . . . 1979, part two, III, C).

ment shall terminate *ipso jure,* unless the parties have agreed otherwise". An example of non-termination is provided by article 11: "Unless the parties have agreed otherwise, neither the arbitration agreement nor the office of arbitrator shall be terminated by the death of one of the parties".

63. Another detailed question possibly to be dealt with is whether an arbitration agreement is terminated by a settlement on agreed terms (*"accord des parties"*), whereby a distinction may be drawn between agreed settlements in the form of an award and those in the form of a normal agreement.

III. *Arbitrators*

1. *Qualifications*

64. It seems doubtful whether the model law should contain any provisions on who may act as an arbitrator. It would be difficult to list certain required qualifications except very general ones which would be of minimal practical value. It would also be difficult to agree on whether any specific category of persons should be ineligible (e.g. judges); one should be able to agree, though, that foreigners should not be excluded.[26] If any rule on eligibility or qualifications were envisaged at all, it should indicate to what extent any restriction expressed therein would prevail over any conflicting provision in the individual arbitration agreement or the applicable standard rules of arbitration institutions or trade associations.

2. *Challenge*

65. As regards challenge of arbitrators, the issues to be considered are on what grounds an arbitrator may be challenged and by what procedure, including any court involvement. National laws often list in detail the grounds for challenge, usually the same as apply to judges. The reasons relate to the dispute at hand such as a financial interest or previous involvement in the subject-matter under dispute or a certain relation to one of the parties. It will have to be seen whether a "uniform" list of reasons could be agreed on or whether one should merely include a general formula such as "circumstances giving rise to justifiable doubts as to the arbitrator's impartiality or independence".

66. As to the procedure of challenging an arbitrator, it is suggested that the model law guarantee the parties' freedom to agree on the procedure to be followed in case of a challenge. In particular, it should recognize any agreement as to the person or body called upon to decide about the challenge (e.g. the arbitral tribunal, the Court of Arbitration, the Secretary or a special committee of an arbitration association, or an appointing authority). However, it will have to be considered, and expressly stated in the model law, whether resort to courts should be allowed only if so stipulated in the arbitration agreement or whether it should be envisaged, irrespective of such stipulation, as a last resort in order to avoid a deadlock. Finally, one may consider providing "supplementary" rules for those cases where parties have not regulated the challenge procedure. One might add ancillary rules on disclosure and restrictions to the right to challenge along the lines of articles 9 and 10 (2) of the UNCITRAL Arbitration Rules[27] and article 12 (2) of the 1966 Strasbourg Uniform Law.[28]

3. *Number of arbitrators*

67. The number of arbitrators may be thought to be one of the issues that should be fully left to the parties' discretion and agreement. However, one might consider requiring an uneven number as, for example, envisaged by article 5 (1) and (2) of the 1966 Strasbourg Uniform Law.[29] Yet, while such requirement could enhance the efficiency of arbitration, it may be deemed as an over-protective legislative measure. As to the special feature, known in some systems, of a third arbitrator acting as an "umpire" or as a "referee", it is suggested that the model law recognize such function if envisaged in an arbitration agreement but not include it in any "supplementary" rules. As a "supplement", one might consider providing for arbitration by three arbitrators if the parties have failed to agree on a number.

4. *Appointment of arbitrators (and replacement)*

68. The model law should guarantee the parties' freedom to agree on the appointment procedure, provided that equality is ensured (cf. above, paragraph 43). This would include the common system of party-arbitration, under which each party is to appoint one arbitrator and these two party-appointees then appoint the third arbitrator.

69. One may also consider establishing in "supplementary rules" a "reserve" mechanism for those cases where parties have not agreed on the appointment pro-

[26] Cf. e.g. article 2 of the 1966 Strasbourg Convention: "Each Contracting Party undertakes not to maintain or introduce into its law provisions excluding aliens from being arbitrators".

[27] Article 9: "A prospective arbitrator shall disclose to those who approach him in connexion with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances."

Article 10 (2): "A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made."

[28] Article 12 (2): "A party may not challenge an arbitrator appointed by him except on a ground of which the party becomes aware after the appointment."

[29] Article 5: "1. The arbitral tribunal shall be composed of an uneven number of arbitrators. There may be a sole arbitrator.

"2. If the arbitration agreement provides for an even number of arbitrators, an additional arbitrator shall be appointed."

cedure, or where a party fails to appoint his arbitrator or where two arbitrators fail to appoint the third if so required under the agreed scheme. Here, one may discuss to what extent and under what conditions resort to courts may be had in such "defective" cases. In addition, some provisions may be in place concerning the reasons and procedures for replacement of an arbitrator.

5. *Liability*

70. The question to what extent an arbitrator may be liable for any misconduct or error is often debated these days. National laws if they deal with this issue at all tend to apply the same (lenient) standards as adopted for judges. In view of the fact that the liability problem is not widely regulated and remains highly controversial, it may seem doubtful whether the model law could provide a satisfactory solution. However, the Commission may wish to consider in this context whether it would not be desirable to initiate the preparation of a code of conduct, or code of ethics which, outside the model law, could provide guidance to arbitrators in performing their important functions.

IV. *Arbitral procedure*

1. *Place of arbitration*

71. The model law should recognize the parties' freedom to determine the place of arbitration except where that freedom is restricted by a mandatory provision such as article 22 of the Hamburg Rules. For those cases where parties have neither determined the place of arbitration nor entrusted a third person or body (e.g. arbitral tribunal, secretariat of arbitral institution) with that decision the model law might empower the arbitral tribunal to determine the place of the arbitration.

72. "Place of arbitration" would not necessarily mean that, in fact, all meetings or hearings are held at that place (cf. e.g. article 16 (2) and (3) of the UNCITRAL Arbitration Rules) but its clear determination is of legal importance in various respects. The award shall be made at that place and, as often required by national laws, filed or registered there within a certain time-period. Above all, the place of arbitration where the award was made is the major criterion to determine the applicability of the 1958 New York Convention as regards recognition and enforcement of awards (article I (1)). Yet another legal consequence arises from the not uncommon fact that the parties' choice of the place of arbitration is interpreted as implying a choice of the applicable procedural law if there is no express stipulation on that point. It may be considered to deal with this interpretation which is controversial and not beyond all doubts, if conflicts aspects were to be addressed at all in the model law (cf. above, paragraph 38).

2. *Arbitral proceedings in general*

73. The model law should empower the arbitral tribunal to conduct the arbitration proceedings in such manner as it considers appropriate, subject to the following restrictions. The arbitral tribunal must treat the parties with equality and give each party at any stage of the proceedings a full opportunity of presenting his case. It should also follow any procedural instructions which the parties may have given specifically or by reference to a set of arbitration rules.

74. Furthermore, the model law may impose certain rules which would be binding on the arbitrators either irrespective of any conflicting agreement by the parties or only if the parties have not agreed otherwise. Examples of the first category, i.e. mandatory rules, include provisions on interim measures of protection by courts (discussed below, paragraph 78), on default of a party (paragraphs 80-81), and on pleas as to the jurisdiction of arbitrators, which are discussed in the section on awards since they are often dealt with in the award (paragraphs 88-89). Examples of the second category, i.e. rules from which the parties may derogate, include provisions on evidence (paragraph 75), on experts (paragraph 76), and on representation and assistance (paragraph 79). One might add provisions on hearings, on amendments to claim or defence, or on the language(s) to be used in the proceedings, whereby the language of the arbitration agreement might be considered as a possible determinant.

3. *Evidence*

75. Subject to any rules agreed upon by the parties, the arbitral tribunal should be free, under the model law, to adopt and follow its own rules on evidence, including the right to determine the admissibility, relevance and weight of any evidence offered. Since the arbitral tribunal lacks the power of enforcing its procedural decisions such as calling a witness or requiring production of a document by a party, the model law may envisage some assistance by courts in that regard. Here, one would have to clearly define the possible court measures and their specific conditions. In addition, the model law could contain "supplementary" rules (e.g. along the lines of articles 24 and 25 of the UNCITRAL Arbitration Rules) for those cases where the parties have not agreed on rules on evidence.

4. *Experts*

76. As regards rules on the use of experts in arbitration proceedings, similar considerations apply as on evidence in general. Thus, subject to any agreement by the parties, the arbitral tribunal would have the power to appoint experts, whereby the model law should specify whether it may do so only upon request by a party or *ex officio*. Supplementary rules could prove to be particu-

larly useful here, since a number of important questions are not normally taken into account by the parties when drawing up the arbitration agreement and are regulated in full detail only in few standard arbitration rules. Therefore, it would seem desirable to include supplementary provisions, modelled after article 27 of the UNCITRAL Arbitration Rules, on such points as the expert's terms of reference and the parties' rights and obligations in respect of the expert's performance of his task.

5. *Interim measures of protection*

77. It is suggested that the model law contain provisions on interim measures such as ordering the deposit of goods with a third person or the sale of perishable goods or attachments or seizures of assets. One issue to be settled is whether the arbitral tribunal may take such measures even without being specifically empowered to do so by the parties. Then it should be determined what types of measures would be included and whether any executory assistance by courts should be provided for.

78. A court may be involved not only by lending its executory force to measures taken by the arbitral tribunal but also by taking itself such decision in the first place if so requested by a party. It may be considered whether such court measures and their conditions could be regulated in the model law or whether these issues should better be left to the general law on procedure. In either case, however, it would seem desirable to answer, probably in the affirmative, the question whether a request for such interim measures is compatible with the arbitration agreement and does not constitute a waiver thereof. As mentioned earlier (above, paragraph 61), this question may become relevant already before the commencement of arbitration proceedings.

6. *Representation and assistance*

79. Questions relating to representation and assistance are, for example, whether and by what persons a party may be represented or assisted, whether the arbitral tribunal may require a party to appear in person, and whether advance notice has to be given about the persons representing or assisting a party. While a number of national laws (and the 1966 Strasbourg Uniform Law, in article 16 (4)) contain provisions on this point, it may be doubted whether there is a real need for dealing with this topic in the model law.

7. *Default*

80. The model law should regulate the consequences of default of a party, at least as regards the respondent/defendant. In order to provide arbitration with its necessary "teeth", the arbitral tribunal may be empowered to continue with the proceedings and make a binding award even if the respondent fails to participate without showing sufficient cause therefor. However, such a potentially harsh measure would seem justified only if certain conditions, based on the principles of due process and justice, are met which the model law should set forth in detail.

81. First, the party in default must have been duly notified in advance. A second requirement is that the arbitration tribunal clearly establish its competence. For that, it has to determine the existence of a valid arbitration agreement which may not be an easy task in case of silence of the respondent. The third restriction relates to the substance of the dispute and the decision about it. The arbitral tribunal may not accept without proper investigation, including the taking of evidence, the reasons and explanations given by the claimant in support of his claim. It will be necessary to exactly define this requirement of investigation which is contrary to most procedural laws on default in court litigation.

V. *Award*

1. *Types of awards*

82. It seems doubtful whether there is a real need for the model law to deal with the different possible types of awards. If it were considered to include this item, the arbitral tribunal should, in addition to making a final award, be entitled to make interim, interlocutory, or partial awards and ought to do so, if jointly requested by the parties.

2. *Making of award*

83. There are essentially two procedural issues to be considered relating to the making of the award. One is the period of time within which the award shall be made, the other one is the process of making the decision to be embodied in the award.

84. The idea of establishing a time-period, as done in some national laws, might be regarded as a good one since it could help to prevent delays but regulating it in an appropriate manner will not be an easy task. One difficulty is that a fixed standard period would not be appropriate in all cases which in turn would necessitate an elaborate mechanism for extensions. Further formalities, not necessarily conducive to speedy proceedings, would be added if one were to envisage fixing of the time-period by a court (thus, e.g. article 19 (2) of the 1966 Strasbourg Uniform Law).[30] Additional problems may arise from the possible sanction for non-compliance which could be termination of the mandate of the arbi-

[30] Article 19 (2): "If the parties have not prescribed a period or a method of prescribing a period, if the arbitral tribunal delays in making the award and if a period of six months has elapsed from the date on which all the arbitrators accepted office in respect of the dispute submitted to arbitration, the judicial authority may, at the request of one of the parties, stipulate a period for the arbitral tribunal."

trator(s).[31] In view of these difficulties, one might well consider to leave this issue fully to the parties who may take care of it by establishing a time-period and a procedure tailored to their needs or by selecting efficient arbitrators in the first place.

85. As to the decision-making process in arbitration proceedings with more than one arbitrator, the basic question will be whether the model law should impose certain standards or whether it should leave that issue to the parties and only establish "supplementary" rules, if deemed desirable. In view of the legal status of an award in terms of its recognition and enforceability, a mandatory rule may seem preferable. It could require that the award be made by a majority of the arbitrators; yet, in the exceptional case that a majority cannot be obtained, the model law may recognize an agreement by the parties to the effect that the chairman shall have a casting vote. For the sake of clarification, one might add that all arbitrators have to take part in the deliberations leading to the award.

3. *Form of award*

86. An obvious requirement as to the form of the award is that it be in writing. Another obvious requirement, equally common in national laws, is that it be signed by the arbitrator(s). However, national laws differ on whether any exceptions should be allowed here in the case of arbitration proceedings with more than one arbitrator. Probably the most acceptable compromise in the context of international commercial arbitration would be not to require without exception that the award be signed by all arbitrators but to prescribe that the fact of a missing signature and the reason therefor be stated in the award and that at least a majority of the arbitrators have signed the award.

87. Another issue to be considered is whether the model law should establish any requirements as to the contents of the award.[32] Some such elements might be viewed as being too obvious to be expressly stated in the law, for example, the operative part (decision), the names and addresses of the parties and of the arbitrators, and the subject-matter of the dispute. However, there are points which may be less obvious but very important, for example the place and the date of the award. Finally, there is a point to be included on which national laws differ and which is controversial, that is whether the award shall state the reasons on which it is based. Probably the most acceptable solution on the international plane would be to require such statement of reasons unless the parties have agreed that no reasons are to be given.

4. *Pleas as to arbitrator's jurisdiction*

88. The arbitral tribunal should be empowered to decide itself about any pleas as to its jurisdiction. In particular, it should have the power to determine the existence and validity of the arbitration agreement. If the agreement is set forth in an arbitral clause, the determination of the arbitral tribunal's "competence-competence" would be facilitated by the separability of that clause as discussed earlier (paragraph 58).

89. A difficult question remains, that is, whether the decision of the arbitral tribunal about its jurisdiction shall be final or whether it shall be subject to review by a court. In support of court control, one may argue that the arbitrators cannot have the final say on their competence since their jurisdiction is to the exclusion of court jurisdiction. If one would follow this line of thinking, although it may be deemed less convincing in the international context, one might consider imposing some restriction on the right to ask for review by a court. For example, article 18 (3) of the Strasbourg Uniform Law provides that "the arbitral tribunal's ruling that it has jurisdiction may not be contested before the judicial authority except at the same time as the award on the main issue and by the same procedure".

5. *Law applicable to substance of dispute*

90. The first question is to what extent arbitrators ought to observe rules of law in deciding the dispute. It is suggested that the model law recognize an agreement by the parties that the arbitrators shall decide as *"amiables compositeurs"* (or *"ex aequo et bono"*). It would be helpful, though difficult, to define such mandate, for example, along the following lines: *Amiables compositeurs* must observe those mandatory provisions of law regarded in the respective country as ensuring its (international) *ordre public.* In view of the commercial context, it may be added that the arbitrators, whether or not acting as *amiables compositeurs,* shall decide in accordance with the terms of the contract, taking into account the pertinent trade usages.

91. The model law may also empower the arbitral tribunal to determine what law is applicable to the dispute unless the parties have designated a certain law to be applied. As to the facility of designating a law, the model law might recognize not only the choice of a specific national law but also allow reference to a uniform law or convention even if not yet in force. It may also be useful, as mentioned earlier (paragraph 24), to include a provision to the effect that any choice of the law of a given

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[31] In addition to this sanction, the 1966 Strasbourg Uniform Law even envisages termination of the arbitration agreement if the arbitrators are named therein (see above, para. 62).

[32] Cf. e.g. article 22 (5) and (6) of the 1966 Strasbourg Uniform Law:

"5. An award shall, in addition to the operative part, contain the following particulars: (*a*) the names and permanent addresses of the arbitrators; (*b*) the names and permanent addresses of the parties; (*c*) the subject-matter of the dispute; (*d*) the date on which the award was made; (*e*) the place of arbitration and the place where the award was made.

"6. The reasons for an award shall be stated."

State means direct reference to the substantive law of that State and not to its conflicts rules.

6. *Settlement*

92. Where parties, as is often the case, during arbitration proceedings reach an amicable settlement of their dispute, questions arise as to the form and legal status of such settlement. While national laws and arbitration rules provide varied answers, an acceptable approach could be that the model authorize, but not compel, the arbitral tribunal to record such a settlement in the form of an award on agreed terms (*"accord des parties"*). Then, it would have to be decided whether such an award should be treated, e.g. as regards registration, enforcement, or any recourse, exactly like a "normal" award or whether any special regulations seem necessary.

7. *Correction and interpretation of award*

93. It might be useful to include a provision according to which a party may request within a certain period of time that the arbitral tribunal give an interpretation of the award or correct certain errors (cf. e.g. articles 35 and 36 of the UNCITRAL Arbitration Rules). Such a provision, though of limited importance, could help to overcome any problems arising from the fact that the mandate of the arbitral tribunal is terminated by making the award.

8. *Fees and costs*

94. Provisions relating to the costs of arbitration, including the arbitrators' fees, are usually contained in the arbitration agreement by way of reference to standard arbitration rules which may set forth fee schedules or the procedures of fixing the respective amounts. There seems to be little that the model law should regulate in that regard. Perhaps it could specifically mention the right to request deposits which is of practical importance in the international context. Also, it might authorize the arbitrators, subject to any rule adopted by the parties, to fix their own fees, possibly with some provision for review by a court.

9. *Delivery and registration of award*

95. It is clear that the award has to be delivered to the parties, whereby copies signed by the arbitrators or duly certified copies could be used. Such delivery or notification should be required under the model law since it is one condition for the final and binding nature of the award which, in turn, is a condition for its enforcement.

96. Another condition is, under a substantial number of national laws, that the award, normally the authenticated original, is registered or deposited with a certain court or office, differently designated in different States. It will have to be considered whether the model law should require such deposit although it is not found in all national laws and, where it is found, its regulation varies widely as regards form, procedure and competent authority. Another possible reason against such a requirement relates to the fact that the deposit, where it is required, is primarily needed for the enforcement of the award. Here, special considerations come into play with regard to the model law to be discussed now.

10. *Executory force and enforcement of award*

97. National laws commonly provide that the award obtains its executory force by an *"exequatur"* (leave for enforcement), whereby the particulars of the procedure and the authority giving the order vary from one State to the other. When drafting corresponding provisions of the model law, the special scope of application must be taken into account and its relationship to the scope of the 1958 New York Convention. If, for example, enforcement of an award made in (and under the law of) State X is sought in State Y, no *"exequatur"* is needed in State X (and, thus, no deposit there for that purpose) under the 1958 New York Convention whose major achievement was to abolish the requirement of a double-*exequatur*. If enforcement of that same award is sought in the country of origin itself (State X), then the 1958 New York Convention is not applicable and the model law would remain as the governing law.

98. Conceivably, the provisions of the different national laws on enforcement of domestic awards could provide the basis for drafting acceptable rules for the model law which, then, would probably include deposit of the award as a requirement for the *exequatur*. However, looking back at the two situations described in the preceding paragraph, a different approach is suggested here: To the extent possible, the two situations should be treated alike and, therefore, the model law should adopt the same conditions and procedures as laid down in the 1958 New York Convention for the enforcement of "foreign" awards. This approach, which should also be followed with regard to any means of recourse (see below, paragraphs 105-111), would enhance unification and, thus, facilitate matters in a field of great practical importance. It would also underline the international character of the arbitrations covered by the model law and clearly separate them from purely domestic cases.

99. If it were decided to follow this approach, the provisions of the 1958 New York Convention, in particular articles III and IV, would determine the direction to be taken in drafting enforcement rules for the model law:

"Article III

"Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the

award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards."

"*Article IV*

"1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

"(*a*) The duly authenticated original award or a duly certified copy thereof;

"(*b*) The original agreement referred to in article II or a duly certified copy thereof.

"2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent."

100. The reference, in article III, to "the rules of procedure of the territory where the award is relied upon" shows that the Convention itself does not fully regulate the procedure. Consequently, some such procedural rules would have to be included in the model law. In order to meet the requirement imposed by article III concerning the "onus" placed on a party seeking recognition and enforcement, these provisions should envisage a procedure as simple and easy as possible. The provisions would have to determine the competent authority and its procedure while the obligations placed on the applying party are to be regulated as in article IV. In view of the requirement under article IV that the applying party supply the duly authenticated original award or a duly certified copy thereof, one may consider not to require deposit of the award after it is made by the arbitral tribunal. This way, full alignment could be achieved with the desirable result that in practice it would not matter whether recognition and enforcement of an "international" award is sought in the country of origin or somewhere else.

11. *Publication of award*

101. It may be doubted whether the model law should deal with the question whether an award may be published. Although it is controversial, since there are good reasons for and against such publication, the decision may be left to the agreement of the parties or the arbitration rules chosen by them. If, nevertheless, a provision were to be included, probably an acceptable compromise could be that the award may be made public only with the express consent of the parties.

VI. *Means of recourse*

1. *Appeal against arbitral award*

102. The question whether an appeal may lie from the arbitral award is relevant to the question at what point of time an arbitral award obtains "the authority of *res judicata*", as it is called in article 24 of the 1966 Strasbourg Uniform Law, or becomes binding on the parties which is one of the conditions for the award to be enforceable (cf. article V (1) (*e*) 1958 New York Convention). As regards appeal to any (second instance) arbitral tribunal, the answer seems simple. The model law should recognize any such appeal if agreed on by the parties, as is not uncommon in commodity arbitrations.

103. The answer is more difficult, however, in respect of any appeal to the courts. Such judicial review on the merits, at least on certain questions of law, is envisaged under some national laws. Yet, as illustrated by the recent change concerning the most prominent example, the "special case procedure" under United Kingdom law,[33] there is a clear trend towards further limiting the control function of the courts in the international context. This development is based on the same considerations as the trend to restrictively apply any public policy ground, and that is the realisation of the specific features of international commercial arbitration, in particular, its limited connexion to any given domestic legal system.

104. It is suggested, therefore, that judicial control on the merits be limited to the utmost. There are, of course, certain minimum standards which any State wants to see observed even in international arbitrations. However, these standards which form part of its international *ordre public,* including any restrictions as to the arbitrability of the subject matter, do not necessitate any appeal procedure. They could, and it is submitted should, be appropriately taken care of in any setting aside procedures or, as envisaged under article V (2) of the 1958 New York Convention, in procedures relating to recognition and enforcement of the award. As to the method of excluding appeals to courts, one might consider envisaging a respective "exclusion agreement" by the parties. Yet, it would be clearer and more effective to exclude any appeal to courts expressly by the model law.

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

105. As regards remedies against leave for enforcement, similar considerations apply as have been set forth above with regard to executory force and enforcement (paragraphs 98-100). In particular, the same approach of

[33] For an account of the changes, see Schmitthoff, *op. cit.* (footnote 14), pp. 233-237.

aligning the requirements and procedures of the model law with the provisions of the 1958 New York Convention may be recommended here. The desirable result would be that in practice recognition and enforcement could be successfully objected to by a party, and would be refused, on essentially identical grounds irrespective of whether enforcement is sought in the country of origin or somewhere else. The only difference, which is justified and already inherent in the 1958 New York Convention, arises from the fact that the reasons set forth in paragraph (2) of article V relate to the law of the State of enforcement and may, thus, lead to divergent results.

106. If this "internationalist" approach, for the sake of uniformity, would be adopted, the reasons on which a remedy against leave for enforcement could be based under the model law would be those laid down in article V of the 1958 New York Convention. In addition to the rules on the reasons, the model law would have to regulate the procedure to be followed by a party objecting to the leave for enforcement. It would probably envisage resort to the same authority as the one granting the *exequatur,* possibly allowing further recourse (appeal) to a higher instance.

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

107. The issues relating to setting aside or annulment of arbitral awards are amongst the most difficult ones to be settled in the model law. It is also submitted that the pertinent provisions to be drafted will have a decisive influence on the value of the model law as a legal regime exclusively geared to international arbitrations. This is particularly true with regard to the grounds on which an application for the setting aside or annulment of an award may be based. To some extent, it is also true with regard to the procedures envisaged under domestic laws.

108. To start with the minor problem, i.e. the procedure, there is a great variety in national laws of different claims for "attacking" an award, not only for setting aside or, sometimes treated separately, annulment of the award but also to other aims, e.g. suspension or reinstitution.[34] The disparities extend to procedural particulars such as form, time-limits, and competent authority. For the sake of uniformity which would facilitate international practice as regards the post-award stage, an attempt should be made to establish commonly acceptable procedures, in particular, to provide for only one type of application and proceedings, probably to be called "setting aside procedures".

109. The most important point, however, would be to determine the grounds on which such application for setting aside may be based. National laws often contain rather extensive and elaborate lists of reasons upon which a dissatisfied party may rely. While some of these reasons may be easily disregarded as being geared to specific domestic situations or of minimal practical relevance, it will not be an easy task to agree on the reasons to be included in the model law. Yet, it is suggested that every effort be made to limit the number of reasons to the extent acceptable.

110. Ideally, one should aim at a list, shorter than the one set forth in the 1966 Strasbourg Uniform Law,[35] that would contain only those reasons on which recognition and enforcement may be refused under the 1958 New York Convention, i.e. article V (1), (*a*)-(*d*) and (2). This restrictive approach, adopted in article IX of the 1961 European Convention for enforcement purposes,[36] would meet the concerns underlying the cor-

[34] The manifold types of remedies are listed in the national reports, published in YCA, under chapter VI, 5.

[35] Article 25:

"1. An arbitral award may be contested before a judicial authority only by way of an application to set aside and may be set aside only in the cases mentioned in this Article.

"2. An arbitral award may be set aside:

"(*a*) If it is contrary to *ordre public;*

"(*b*) If the dispute was not capable of settlement by arbitration;

"(*c*) If there is no valid arbitration agreement;

"(*d*) If the arbitral tribunal has exceeded its jurisdiction or its powers;

"(*e*) If the arbitral tribunal has omitted to make an award in respect of one or more points of the dispute and if the points omitted cannot be separated from the points in respect of which an award has been made;

"(*f*) If the award was made by an arbitral tribunal irregularly constituted;

"(*g*) If the parties have not been given an opportunity of substantiating their claims and presenting their case, or if there has been disregard of any other obligatory rule of the arbitral procedure, in so far as such disregard has had an influence on the arbitral award;

"(*h*) If the formalities prescribed in paragraph 4 of Article 22 have not been fulfilled;

"(*i*) If the reasons for the award have not been stated;

"(*j*) If the award contains conflicting provisions.

"3. An award may also be set aside:

"(*a*) If it was obtained by fraud;

"(*b*) If it is based on evidence that has been declared false by a judicial decision having the force of *res judicata* or on evidence recognised as false;

"(*c*) If, after it was made, there has been discovered a document or other piece of evidence which would have had a decisive influence on the award and which was withheld through the act of the other party.

"4. A case mentioned in sub-paragraph (c), (*d*) or (*f*) of paragraph 2 shall be deemed not to constitute a ground for setting aside an award where the party availing himself of it had knowledge of it during the arbitration proceedings and did not invoke it at the time.

"5. Grounds for the challenge and exclusion of arbitrators provided for under Articles 12 and 14 shall not constitute grounds for setting aside within the meaning of paragraph 2 (*f*) of this Article, even when they become known only after the award is made."

[36] Article IX:

"1. The setting aside in a Contracting State of an arbitral award covered by this Convention shall only constitute a ground for the refusal of recognition or enforcement in another Contracting State where such setting aside took place in a State in which, or under the law of which, the award has been made and for one of the following reasons:

"(*a*) the parties to the arbitration agreement were under the 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,

responding proposal of the International Chamber of Commerce which is contained in the "list of subject-matters for possible inclusion in the future work programme" considered by the Commission at its eleventh session.[37] It would help to prevent that an international award falls victim to local particularities of law although the case at hand bears no substantive connexion with that respective State.

111. If this recommendation were followed, it would result in full alignment of the reasons for setting aside and for refusing recognition and enforcement. Nevertheless, the setting aside procedure would not become superfluous since it would allow a party to raise objections against an international award in the country where, or under the law of which, it was made irrespective of whether enforcement is sought there by the other party. At the same time, the respective State (of origin) would have a chance of "monitoring" observance by arbitrators active within its boundaries of its provisions of law to the extent they are mandatory for international cases.

failing any indication thereon, under the law of the country where the award was made; or

"(*b*) the party requesting the setting aside of the award was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

"(*c*) the award deals with a difference 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 need not be set aside;

"(*d*) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, with the provisions of Article IV of this Convention.

"2. In relations between Contracting States that are also parties to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 10th June 1958, paragraph 1 of this Article limits the application of Article V (1) (*e*) of the New York Convention solely to the cases of setting aside set out under paragraph 1 above."

[37] Report of the United Nations Commission on International Trade Law on the work of its eleventh session, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 17* (A/33/17), para. 41, sub. I (*e*) (iii) (Yearbook . . . 1978, part one, II, A).

Conclusion and suggested course of action

112. This report does not discuss in detail all the issues and considerations relevant in the preparation of a model law. It is hoped, though, that it provides a sufficient basis for the Commission to decide on its future course of action in respect of this project. It may be concluded that the preparation of a model law on international commercial arbitration is desirable in view of the manifold problems encountered in present arbitration practice and the above-stated concerns which could be met by a widely acceptable law. It also seems to be the appropriate time for such an undertaking since international arbitrations are increasing and there are intentions in a number of States to adopt legislation geared thereto.

113. On the basis of this report, the Commission may wish to discuss the general concerns and principles that would underlie the model law. It may also wish to discuss the issues identified in the report and the pertinent recommendations as to the most suitable approaches to be taken. Such an exchange of views which would help to determine the direction, in particular, as regards the scope and probable contents of the law seems necessary before a first draft of the model law can be prepared.

114. In view of the complexity of the issues and the work required for the preparation of a draft model law, the Commission may wish to entrust a Working Group with that task. Because of budgetary restrictions, it may be considered to give that mandate to the Working Group on International Contract Practices which has completed its task. The Working Group might use this report as its agenda, probably starting with the arbitration agreement, and should follow the directions given by the Commission at this session. It would then, assisted by the Secretariat and in consultation with interested organizations, prepare draft provisions to be submitted to the Commission at a later session.