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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS THIRD SESSION (New York, 16-26 February 1982)

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INTRODUCTION

1. At its fourteenth session, the United Nations Commission on International Trade Law entrusted to the Working Group on International Contract Practices a new mandate which relates to the field of international commercial arbitration. This mandate is laid down in the following decision adopted by the Commission at that session:

> The Commission
>
> "1. Takes note of the report of the Secretary-General entitled 'Possible features of a model law on international commercial arbitration' (A/CN.9/207);
>
> "2. Decides to proceed with the work towards the preparation of a draft model law on international commercial arbitration;
>
> "3. Decides to entrust this work to its Working Group on International Contract Practices with its present composition;
>
> "4. Requests the Secretary-General to prepare such background studies and draft articles as may be required by the Working Group." 1/

2. The Commission also decided that in preparing a draft model law the conclusions reached by it should be taken into account, in particular, that the scope of application be restricted to international commercial arbitration and that due account be taken of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958) and of the UNCITRAL Arbitration Rules. 2/ The Commission was agreed that the above report of the Secretary-General (A/CN.9/207) setting forth the concerns, purposes and possible contents of a model law would provide a useful basis for the preparation of a model law.

3. The Working Group consists of the following States members of the Commission: Austria, Czechoslovakia, France, Ghana, Guatemala, Hungary, India, Japan, Kenya, Philippines, Sierra Leone, Trinidad and Tobago, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

1/ Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, Offical Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17), para. 70.

2/ Ibid., para. 65, and 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), para. 81.

4. The Working Group held its third session at United Nations Headquarters from 16 to 26 February 1982. 3/ All the members of the Working Group were represented except Ghana.

5. The session was attended by observers from the following States: Australia, Brazil, Burma, Canada, Chile, China, Colombia, Cuba, Cyprus, Ecuador, Egypt, Finland, German Democratic Republic, Germany, Federal Republic of, Greece, Indonesia, Italy, Ivory Coast, Norway, Republic of Korea, Sweden, Switzerland, Thailand, Turkey, Uganda, Venezuela and Yugoslavia.

6. The session was attended by observers from the following international organizations: United Nations Industrial Development Organization, Asian-African Legal Consultative Committee, Commission of the European Communities, Inter-American Juridical Committee, International Chamber of Commerce and International Council for Commercial Arbitration.

7. The Working Group elected the following officers:

Chairman: Mr. I. Szasz (Hungary)
Rapporteur: Mr. J. Skinner-Klee (Guatemala)

8. The following documents were placed before the session:

(a) Report of the Secretary-General entitled "Possible features of a model law on international commercial arbitration" (A/CN.9/207);

(b) Note by the Secretariat entitled "Possible features of a model law on international commercial arbitration: Questions for discussion by the Working Group" (A/CN.9/WG.II/WP.35); and

(c) Provisional agenda of the session (A/CN.9/WG.II/WP.34).

9. The Working Group adopted the following agenda:

(a) Election of officers

(b) Adoption of the agenda

(c) Consideration of possible features of a draft model law on international commercial arbitration to be prepared by the Working Group

(d) Other business

(e) Adoption of the report

3/ At its first two sessions, the Working Group considered the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts.

DELIBERATIONS AND DECISIONS

10. The Working Group commenced its work of preparing a draft model law on international commercial arbitration by a preliminary exchange of views on the questions contained in the note by the Secretariat (A/CN.9/WG.II/WP.35). The deliberations and decisions on the questions considered (questions 1-1 to 6-5) are set forth below.

11. The Working Group decided to continue, at its next session, its exchange of views on the questions not yet considered (questions 6-6 to 6-9) and then to consider the draft provisions and studies which the Secretariat would prepare in accordance with the conclusions reached by the Group at the present session.

12. The Working Group expressed the view that in order to expedite the work, it was desirable to hold two sessions of the Working Group each year. The Working Group noted that the Commission at its fourteenth session had envisaged such a need, but had postponed to its fifteenth session (New York, 26 July to 6 August 1982) a final decision on whether there should be a further session of the Working Group in 1982. The Working Group decided, subject to the approval of the Commission, to hold its next session from 4 to 15 October at Vienna.

CONSIDERATION OF POSSIBLE FEATURES OF A DRAFT MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

13. The Working Group considered the possible features of a draft model law on international commercial arbitration. The Working Group based its deliberations on a report of the Secretary-General (A/CN.9/207, hereinafter referred to as "the report") and on a note by the Secretariat (A/CN.9/WG.II/WP.35, hereinafter referred to as "the working paper") setting forth questions for discussion by the Working Group.

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

14. The Working Group considered the concerns which should be met by the model law and the principles which should underlie it as set forth in paragraphs 9 to 27 of the report. After hearing general statements from several delegations emphasizing the value of the project, the Group expressed its agreement with the analysis of the concerns and principles set forth in the report.

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

15. The Working Group considered these issues using the list of questions set forth in the working paper.

I. Scope of application

1. "Arbitration"

Question 1-1: Should the model law expressly state that it applies to institutional as well as ad hoc arbitration?

Question 1-2: Apart from the clarification referred to in question 1-1, should the model law contain a definition of the term "arbitration"?

16. There was general agreement that the model law should apply to ad hoc and institutional arbitration. However, it was felt that the terms ad hoc arbitration and institutional arbitration were not easily defined, and that accordingly no attempt should be made to give definitions of those terms in the model law. The Working Group concluded that the model law should have a wide scope of application, and should indicate that it covered all forms of arbitration.

17. It was agreed, however, that certain forms of arbitration should fall outside the scope of the model law. For example, since the model law is designed for consensual arbitration, i.e. arbitration based on voluntary agreement of the parties, it should not cover compulsory arbitration. Furthermore, the various types of free arbitration, noted in paragraph 29 of the report, should not be covered. However, such limitations in scope need not necessarily be expressed in the model law. An appeal could be made to States to incorporate such limitations when adopting the model law. The Group concluded that a definition of the term "arbitration" was unnecessary.

18. In the context of that discussion, it was observed that the answers to the questions considered by the Group might depend on the final form of the draft text to be prepared by the Working Group, e.g., model law or convention. The Working Group noted that the task entrusted to it by the Commission was to prepare a draft model law, and decided that, if it wished to make any recommendations as to the final form of the text prepared by it, it would do so after having completed its consideration of the possible features of the model law.

2. "Commercial"

Question 1-3: Should the term "commercial" be defined in the model law?

19. There was general agreement that the term "commercial" should be given a wide meaning in order to meet the concern that, in certain legal systems, the term might be construed in an unduly restrictive manner. The Working Group noted the difficulty of devising a clear-cut formula for defining that aspect of the scope of application of the model law. Various suggestions were made for possible elements of an appropriate formula, including (international) "trade", "commerce" and "economic transactions". It was also suggested that for different language versions, different terms might be used to ensure that the term "commercial" would have a wide meaning. It was also suggested that the wide scope to be given to the term "commercial" might be indicated by excluding arbitration of certain disputes (e.g., labour disputes) from the scope of the law.

3. "International"

Questions 1-4: Would it be sufficient to refer simply, i.e. without definition, to the international nature of the commercial matter in dispute (or of the arbitration agreement)?

Question 1-5: If a definition is desirable, should one formula (e.g., parties from different States) be adopted for all phases covered by the model law?

20. There was general agreement that it would not suffice for the model law to refer simply, without definition, to the international nature of the commercial matter in dispute. The criterion of the international nature of the matter in dispute would determine whether in a given case the special régime embodied in the model law would govern, or whether the rules for strictly domestic arbitrations would apply. As to how the definition should be formulated, there was general agreement that the definition contained in the European Convention (Geneva 1961) formed a good starting point. The details of the definition might be aligned to the corresponding definition used in the Vienna Sales Convention of 1980.

21. It was agreed that further consideration should be given to the possibility of expanding the scope of application of the model law, by adding to the situations covered by the definition of the international nature of a dispute (parties from different States) other cases (e.g. where a contract is to be performed outside the country in which both parties are resident, or where property in dispute is situated outside such country). Such expansion might either be reflected in the definition contained in the model law, or it could be left to the decision of States when adopting the model law to expand the scope of the definition.

II. Arbitration agreement

1. Form, validity and contents

Question 2-1: Is it sufficient to require (as, e.g., article II of the 1958 New York Convention) only one arbitration agreement irrespective of whether it concerns existing or future disputes or should some additional act be envisaged in certain cases?

22. There was general agreement that the model law should require only one arbitration agreement irrespective of whether it concerned existing or future disputes. This solution is in conformity with that adopted in article II, paragraph 1, of the 1958 New York Convention.

Question 2-2: Should the model law specify the required form of the arbitration agreement and, if so, require that it be "in writing"?

Question 2-3: If writing were required, should the term "in writing" be defined, for example, as in article II of the 1958 New York Convention ("agreement signed by the parties or contained in an exchange of letters or telegrams") or should a more extensive and refined definition be sought which should reduce the difficulties encountered in practice with the above definition (see report, para. 43)?

23. The Working Group was agreed that the model law should require the arbitration agreement to be in writing, and that this formal requirement should be defined along the lines of article II, paragraph 2 of the 1958 New York Convention. It was suggested that the model law give a more detailed definition than the one in article II, paragraph 2 of the 1958 New York Convention, so as to make clear that it encompasses, for example, modern means of communication and frequently used contract practices, e.g., use of standard form contracts or reference to general conditions. In the preparation of such a detailed definition, it was suggested that article I, paragraph 2 (a) of the European Convention (Geneva 1961) might be taken into account.

24. In this connexion, the question was raised whether a party which had appeared before an arbitral tribunal without contesting its jurisdiction, may later invoke the lack of a written arbitration agreement. The prevailing view was that such a party could not in those circumstances invoke the lack of a written agreement. However, it was agreed that the question should not be dealt with in the model law, as it was a question which could be adequately dealt with by domestic law.

Question 2-4: Which points relating to the validity of the arbitration agreement should be included in the model law? For example, should a provision be included guaranteeing equality of the parties as regards the appointment of arbitrators (see report, para. 44)?

25. There was general agreement that the model law should not set forth grounds for the invalidity of an arbitration agreement, including grounds specially directed to arbitration agreements. It was noted that the formulation of an exhaustive list of clearly defined grounds was extremely difficult. Consequently, the question of validity should be left to the applicable law. The Group noted that, in view of this decision, the question whether the model law should include rules to determine which law was applicable assumed greater importance. The Group decided to consider this question, together with other questions as to the conflict of laws, at a later stage.

Question 2-5: What should be the minimum contents of an arbitration agreement? For example, would a provision like article II, paragraph 1 of the 1958 New York Convention be appropriate and sufficient (see report, paras. 46-47)?

26. The Working Group was agreed that the model law should state the minimum contents of an arbitration agreement along the lines of article II, paragraph 1 of the 1958 New York Convention, since that provision was appropriate and sufficient. However, doubts were expressed as to the appropriateness of adopting the last part of that provision (i.e. "concerning a subject matter capable of settlement by arbitration"). It was noted that this requirement related to the domain of arbitration, which was dealt with separately (question 2-9). The Group decided to defer its decision on whether to retain that phrase until after it had considered and decided the issue of the domain of arbitration.

2. Parties to the agreement

Question 2-6: Should the model law contain a provision on who may be a party to an arbitration agreement?

Question 2-7: If so, should the model law state, for example, that it applies to "arbitration agreements concluded by physical or legal persons of private or public law" or should a provision be added according to which even "legal persons of public law have the right to conclude valid arbitration agreements" (as, e.g., article II, paragraph 1 of the 1961 Geneva Convention)?

27. There was general agreement that access to arbitration should be unrestricted. However, divergent views were expressed as to how to achieve this end. Under one view, this purpose would best be served by not incorporating in the model law any provision on who might be party to an arbitration agreement. Under another view, it was preferable to state expressly in the model law that it applied to arbitration agreements concluded by physical persons or legal persons of private or public law. The Working Group decided to reconsider the matter in the light of a draft provision to be prepared by the Secretariat.

28. The Working Group noted that this question was to be clearly distinguished from the question whether a given person had the legal capacity to conclude an arbitration agreement. The Group decided that the question of capacity fell outside the scope of the model law, and that therefore no provision as, for example, article II, paragraph 1 of the 1961 Geneva Convention should be included.

Question 2-8: Should an attempt be made to deal in the model law with certain aspects of State immunity in the area of international commercial arbitration? For example, to mention only one out of many possibilities, should the model law construe the commitment to arbitrate by a Government or a State organ as containing an implied waiver of any right to invoke State immunity in the arbitration proceedings or arbitration-related court proceedings?

29. There was general agreement that the model law should not deal with questions of State immunity. The reason for this decision was that the issue of State immunity in the context of arbitration was regarded as but a part of a more general and complex problem having an obviously political and public international law character.

3. Domain of arbitration

Question 2-9: Should the model law set forth a list of non-arbitrable subject matters, either as an exhaustive list or as an open list to be supplemented by the respective State, or would it be sufficient to express the restrictions merely by reference to "international public policy"?

30. There was general agreement that the model law should not set forth a list of non-arbitrable subject matters, either as an exhaustive list, or an open list to be supplemented by the State concerned. It was felt that it would be impracticable to compile an exhaustive list, and that provision for an open list would not further the cause of harmonization. It was also agreed that it would not be appropriate and sufficient to merely refer to "international public policy", as that term was not sufficiently precise.

31. The prevailing view was that the model law should not contain a provision delimiting non-arbitrable issues. However, it was noted that further thought could be given to the possibility of devising a general formula to determine non-arbitrability along the following lines - a subject matter is arbitrable if the issues in dispute can be settled by agreement of the parties.

Question 2-10: Should the model law deal with the "true filling of gaps" and, if so, should a special authorization by the parties be required or should it treat this task as lying outside the arbitrator's competence even where parties have given such special authorization?

Question 2-11: Should the arbitral tribunal be empowered to adapt a contract without special authorization by the parties or only if the parties have given such authorization?

32. The Working Group noted that the issues noted in questions 2-10 and 2-11 were of a complex nature. During the deliberations, the following matters were referred to. There was some uncertainty as to the scope of the function of filling of gaps, and in what way it differed from the function of adaptation of contracts (question 2-11). For example, it was not immediately clear what constituted a gap, and it was noted that the function of filling of gaps encompassed a variety of fact situations which should be distinguished. In each of those situations, different solutions might be envisaged as to the competence of the arbitral tribunal, and as to the legal status and enforceability of its decisions. In this regard, disparities existed between different legal systems.

33. Accordingly, the Working Group requested the Secretariat to prepare a study analysing the issues considered.

4. Separability of arbitral clause

Question 2-12: Should the model law adopt the principle of separability or autonomy of the arbitral clause?

34. There was general agreement that the model law should adopt the principle of separability or autonomy of the arbitral clause, as embodied in article 21 of the UNCITRAL Arbitration Rules.

5. Effect of the agreement

Question 2-13: Should the model law contain a provision along the lines of article II, paragraph 3 of the 1958 New York Convention (report, para. 59)? Should it contain supplementary provisions on what points a court should examine and what type of decision it may render?

35. There was general agreement that the model law should contain a provision similar to article II, paragraph 3 of the 1958 New York Convention. It was noted that this provision was based on the assumption that an arbitration agreement was to exclude the jurisdiction of courts (whether or not it so stated).

36. As regards the question whether the model law should contain a provision concerning the type of decision the court should render when the arbitration agreement was invoked, a view was expressed that the model law might determine whether the court action should be stayed or dismissed. However, the Working Group agreed that the matter should be left to be determined by the court according to its procedural law.

Question 2-14: Should the model law deal with problems of consolidation in multi-party disputes (e.g. whether consolidation agreements should be given effect, or whether even without such agreements consolidation might be ordered)?

37. There was general agreement that the model law should not deal with problems of consolidation in multi-party disputes. While it was agreed that parties had the freedom to conclude consolidation agreements if they so wished, the Working Group was of the view that there was no real need to include a provision on consolidation in the model law.

> Question 2-15: Should a stipulated time-period for submission of a dispute to arbitration be effective even if it would expire before a prescription period applicable to the underlying transaction which may not be shortened by the parties?

38. The Working Group was agreed that the effectiveness of a stipulated time period for submission of a dispute to arbitration was independent of any prescription period concerning the underlying transaction. Accordingly, even a mandatory prescription period would not affect the stipulation of a shorter time-period for arbitration. The Group was of the view that the model law should not include a provision on this point, nor on related issues (such as the right of a party to resort to a court after expiry of that time-limit, or any effect on the prescription period). The solution to these issues would vary according to the specific circumstances of the case.

> Question 2-16: Are pre-arbitration attachments and similar court measures of protection compatible with an arbitration agreement and should the model law state so?

39. There was general agreement that the resort by a party to a court in order to obtain interim measures of protection was not incompatible with an arbitration agreement, and that the model law should contain a statement to that effect. Such relief was normally sought before the arbitration had started, but it was agreed that the principle of compatibility should also prevail during arbitration proceedings. The Working Group noted that this latter issue was linked to the issues set forth in questions 4-10 and 4-11 (interim measures by arbitral tribunals or by courts). It was suggested that in drafting an appropriate provision, account should be taken of article 26, paragraph 3 of the UNCITRAL Arbitration Rules; article VI, paragraph 4 of the 1961 Geneva Convention; and article 4 (2) of the 1966 Strasbourg Uniform Law.

6. Termination

> Question 2-17: Should the model law specify certain circumstances under which an arbitration agreement would be terminated (e.g. settlement on agreed terms; expiry of time-limit for making award) or would not be terminated (e.g. death of one party)?

40. The Working Group was of the view that instances which could conceivably terminate the arbitration agreement were often also relevant in the context of the procedure of arbitration, and that these instances could only be fully considered in the light of its later discussion on arbitral procedure. The Working Group requested the Secretariat to prepare a study on the issues relevant to termination, but only on those which were peculiar to arbitration.

III. Arbitrators

1. Qualifications

Question 3-1: Should the model law expressly state that foreign nationals shall not be precluded from acting as arbitrators (cf., e.g., art. 2 of the 1966 Strasbourg Convention, report, para. 64)?

41. There was general agreement that parties should be free to choose arbitrators of any nationality. Different views were expressed as to how best to achieve the goal that foreign nationals are not precluded from acting as arbitrators. Under one view, the model law should state the above fundamental principle in a positive form. Under another view, silence could achieve the same result. It was agreed that the issue should be decided at a later stage after the Secretariat had prepared a draft text.

Question 3-2: Are the qualifications required of arbitrators an appropriate matter to be dealt with in the model law?

42. The Working Group was agreed that it was extremely difficult to deal in the model law with the varied qualifications required of arbitrators. Accordingly, the prevailing view was that the model law should not deal at all with the question of qualifications. However, under another view it was desirable to incorporate a general formula, as, for example, contained in article 9 of the UNCITRAL Arbitration Rule (impartiality and independence). It was observed in this connexion that this question was linked to the grounds on which an arbitrator may be challenged. The Working Group requested the Secretariat to prepare a study on these questions, and deferred a decision pending the submission of this study.

2. Challenge

Question 3-3: Should the model law deal with the grounds on which an arbitrator may be challenged? If so, should it list these grounds or would a general formula suffice?

Question 3-4: As regards the procedure of challenging an arbitrator, should the model law recognize any agreement of the parties thereon even if it would exclude (last) resort to a court?

Question 3-5: Should supplementary rules be included for those cases where parties have not regulated the challenge procedure?

Question 3-6: Should the model law adopt ancillary rules on disclosure and on restrictions to the right to challenge along the lines of articles 9 and 10 (2) of the UNCITRAL Arbitration Rules and article 12 (2) of the 1966 Strasbourg Uniform Law (report, para. 66)?

43. The Working Group was agreed that the model law should deal with the grounds on which an arbitrator may be challenged only in the same general manner as it dealt with the qualifications of an arbitrator. It was suggested that a draft provision be prepared using the same formula (impartiality and independence). It was agreed that such general provision should form the sole basis for challenging an arbitrator. The Working Group was also agreed that the model law should contain a provision requiring a prospective arbitrator to disclose circumstances which could create doubts as to his impartiality or independence. The Working Group was agreed that this provision should be modelled on article 9 of the UNCITRAL Arbitration Rules.

44. It was generally agreed that, as regards the procedure for challenging an arbitrator, stipulations of the parties regulating the procedure should be recognized by the model law. However, there was no agreement on whether a last resort to courts could be excluded by such stipulations. Under one view, the final decision on a challenge should always lie with a court. Under another view, the freedom of parties to agree on the procedure of challenge was to be recognized, but resort to courts should be provided in cases where the stipulated procedure led to a deadlock. It was noted that such resort could also be provided for during the arbitration proceedings (in order to avoid delays in these proceedings through a speedy court decision on the challenge), or incorporated in those procedures which provided to a party recourse against an award (where an alleged ground for challenge would constitute a reason for attacking the award). The Working Group agreed that this question needed further consideration. The Working Group requested the Secretariat to prepare a study on these issues.

45. Divergent views were expressed as to whether the model law should set forth supplementary rules for those cases where parties had not themselves regulated the challenge procedure. Under one view, it was not in accordance with the purpose of a model law to incorporate detailed rules on such a procedural issue. Under another view, it would be useful if the model law would set forth a mechanism for challenge in order to avoid protracted controversy and delay in the arbitration proceedings. The Secretariat was requested to include in its study on the issue of challenge the question of what supplementary rules might be appropriate.

3. Number of arbitrators

Question 3-7: Should the model law contain any mandatory provision on the number of arbitrators?

Question 3-8: Should supplementary rules be included for those cases where parties have not agreed on the number?

46. There was general agreement that the model law should not contain any mandatory provision specifying the number of arbitrators. It was suggested that thought might be given to expressly stating in the model law the principle of the freedom of the parties to determine the number of the arbitrators.

47. There was also general agreement that the model law should contain a supplementary rule for those cases where the parties had not agreed on the number, or on a mechanism for determining that number. Several views were expressed as to which number the model law should specify. The prevailing view was that the model law provide for three arbitrators, which would accord with article 5 of the UNCITRAL Arbitration Rules. Another view was that in view of the frequency of multi-party arbitrations, it would be appropriate to allow each party to appoint one arbitrator, and for those cases where the result was an even number of arbitrators, to provide for one additional arbitrator. Yet another view was that the model law envisage arbitration by a sole arbitrator. In this context, a further supplementary rule was suggested for those cases where parties had agreed on arbitration by two arbitrators but where these two could not reach a decision. In order to avoid such a deadlock, the model law might envisage appointment of a third arbitrator (or an umpire).

48. The Working Group noted that the question of the number of arbitrators was linked with the question of the appointment procedure (questions 3-9 and 3-10) and decided to defer its decision on which number to include in the model law.

4. Appointment of arbitrators (and replacement)

Question 3-9: Should the parties be free to determine the appointment procedure, provided that equality is ensured?

Question 3-10: Should supplementary rules be adopted for cases where the appointment procedure, or a certain feature thereof, has not been agreed upon by the parties?

49. There was general agreement that the parties should be free to determine the procedure for appointing the arbitrator(s). Different views were expressed as to whether a provision in the model law recognizing such freedom of the parties should contain a restriction such as "provided that equality is ensured". The prevailing view was that the principle of equality of the parties need not be stated in such a provision. This was in accordance with the position which the Working Group had taken when discussing possible grounds for invalidity of an arbitration agreement, in particular the question whether an arbitration agreement which gave one party a privileged position with regard to the appointment of the arbitrators would be invalid (question 2-4). Under another view, it was desirable to express the principle of equality of the parties, despite its generality, in the model law in order to prevent a stronger party from abusing his position.

50. The Working Group was agreed that the model law should set forth supplementary rules for those cases where the parties had not agreed upon the appointment procedure. However, different views were expressed as to how detailed such supplementary provisions should be. Under one view, it sufficed to include a provision which merely stated that the appointment was to be made by an appointing authority (which would be designated by each State when adopting the model law). Under another view, it was desirable to incorporate a more elaborate system, for example, as embodied in articles 6 to 8 of the UNCITRAL Arbitration Rules. An additional proposal was to include a rule on the replacement of an arbitrator (as for example, article 13 of the UNCITRAL Arbitration Rules).

5. Liability

Question 3-11: Would it be appropriate for the model law to deal with questions relating to the liability of arbitrators?

51. There was general agreement that the question of the liability of an arbitrator could not appropriately be dealt with in a model law on international commercial arbitration. It was also agreed not to attempt the preparation of a code of ethics for arbitrators.

52. In connexion with this issue, the Working Group considered whether the model law should contain any rule on the basic duties of arbitrators and of possible effects of the breach of such duties on the course of the arbitral proceedings. The prevailing view was to envisage the replacement of an arbitrator "if he failed to act" (art. 13, para. 2 of the UNCITRAL Arbitration Rules). Under another view, the reasons for replacement should be more widely stated so as to include, for example, any conduct which was not in accordance with the instructions of the parties, or was not of an impartial, proper and speedy character.

IV. Arbitral procedure

1. Place of arbitration

Question 4-1: Should the model law recognize the parties' freedom to determine the place of arbitration or to empower a third person to make that determination?

Question 4-2: In the absence of any agreement envisaged in question 4-1, should the model law empower the arbitral tribunal to determine the place of arbitration?

53. There was general agreement that the model law should recognize the parties' freedom to determine the place of arbitration. It was agreed that this included the freedom to authorize a third person or body (for example, the arbitral tribunal or a permanent arbitral institution) to determine the place of arbitration.

54. There was general agreement that the model law should contain a supplementary rule empowering the arbitral tribunal to determine the place of arbitration where the parties had not agreed upon that place. It was suggested that such a provision should be modelled on article 16, paragraph 1 of the UNCITRAL Arbitration Rules, with a possible modification of the last part of that provision ("having regard to the circumstances of the arbitration").

55. In this connexion, the view was expressed that supplementary rules along the lines of article 16, paragraph 2 second sentence, paragraphs 3 and 4, might be appropriate, but that these provisions related to issues (arbitral procedure and award) to be discussed later.

2. Arbitral proceedings in general

Question 4-3: Should the model law expressly empower the arbitral tribunal to conduct the proceedings as it deems appropriate and, if so, what restrictions should be laid down?

56. There was general agreement that the arbitral tribunal should be empowered to conduct the arbitration as it considered appropriate, subject to the instructions of the parties, provided that the parties were treated with equality and that at every stage of the proceedings each party was given a full opportunity of presenting his case. It was agreed that such a provision, modelled after article 15, paragraph 1 of the UNCITRAL Arbitration Rules, should be mandatory.

57. The Working Group was agreed that the model law should contain procedural provisions along the lines of article 15, paragraphs 2 and 3 of the UNCITRAL Arbitration Rules, subject to the later decision of the Working Group on the general question as to what extent the model law should include supplementary procedural rules for those cases where parties had not agreed on the procedure. Divergent views were expressed as to whether the above provisions, if they were to be included, should be mandatory or not. The Working Group deferred its decision on that point and requested the Secretariat to draft a provision for consideration by it.

Question 4-4: As a general question which is also relevant to the following issues, it may be asked to what extent the model law should include supplementary rules on the arbitral procedure as usually contained in arbitration rules?

58. The Working Group discussed the general question as to what extent the model law should contain supplementary rules on arbitral procedure. It was noted that the purpose of such rules was to assist in those cases where parties had not agreed on the procedure, whether by reference to arbitration rules or in their arbitration agreement itself. It was also noted that not only those States whose arbitration law was less developed, but also all other States could benefit from the preparation of a model law since this law would lay down widely acceptable rules specifically adapted to international commercial arbitration. Therefore, an attempt should be made to devise a set of rules which would allow the commencement and functioning of arbitration proceedings even where parties had not made the necessary provision in their agreement. However, it was agreed that, for reasons of practicability, a decision on whether supplementary rules were appropriate could only be made with regard to each individual subject matter.

3. Evidence

Question 4-5: Should the arbitral tribunal be empowered to adopt its own rules on evidence, subject to contrary stipulation by the parties?

Question 4-7: What supplementary rules would be appropriate?

59. There was general agreement that the model law should empower the arbitral tribunal to adopt its own rules on evidence subject to contrary stipulation by the parties. It was noted that this view was in accordance with the decision concerning question 4-3, and that the question of evidence was an inherent and important part of the conduct of proceedings.

60. The Working Group was agreed that the model law should not contain any supplementary rule which would restrict the arbitral tribunal's power to adopt its own rules on evidence. Not only was such a restriction undesirable, but it was also extremely difficult to envisage detailed rules on evidence in view of the great disparity between legal systems. Accordingly, if a rule were to be adopted, it should be one supporting the power of the arbitrator, such as article 25, paragraph 6 of the UNCITRAL Arbitration Rules ("The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered").

Question 4-6: What kind of court assistance may be envisaged in enforcing procedural decisions of the arbitral tribunal, e.g. calling of a witness, taking of evidence?

61. There was general agreement that assistance by courts in enforcing procedural decisions of the arbitral tribunal could contribute to the proper and efficient functioning of international commercial arbitration. However, divergent views were expressed as to whether this issue of court assistance should be dealt with in the model law. Under one view, it should be possible to draft an appropriate provision which would envisage such court assistance, either in a general form or in a detailed manner. Under another view, such an approach was not feasible in view of the following difficulties and concerns:

(a) The procedures of such court assistance formed an integral part of the procedural law of the legal system concerned, and the relevant procedural laws varied considerably from one legal system to another;

(b) Where such court assistance was required in a country other than the one where the arbitration took place, the model law might not be able to secure such assistance. It was noted in this context that such assistance by foreign courts was normally governed by bilateral or multilateral treaties which, however, primarily covered matters which were the subject of court litigation;

(c) Assistance by courts would require a certain supervision by the courts over the arbitral tribunal as regards the justification for the tribunal's decision, since automatic court assistance would open the possibility of abuse of court process.

62. The Working Group concluded that the issue required further study, and requested the Secretariat to prepare a note taking into account the views expressed and suggestions made during the deliberations.

4. Experts

Question 4-8: Should the arbitral tribunal be empowered to appoint experts ex officio, unless the parties have agreed otherwise?

Question 4-9: What supplementary rules are appropriate, e.g. on the expert's terms of reference or on the parties' rights and obligations in respect of the expert's performance of his task (cf., e.g. art. 27 of the UNCITRAL Arbitration Rules)?

63. There was general agreement that the arbitral tribunal should be empowered to appoint experts ex officio even if the parties had not expressly authorized it to do so. However, divergent views were expressed as to whether this power could be excluded by a stipulation of the parties. Under one view, parties who had submitted a dispute to arbitration should not have the power to preclude the arbitral tribunal from ex officio calling an expert if that was needed for deciding the dispute. The prevailing view, however, was that the parties could at any stage of the proceedings preclude the arbitral tribunal from calling an expert without their agreement. It was noted that this issue was to be distinguished from the question whether a party could present the evidence of an expert witness. The Working Group was agreed that the arbitral tribunal should hear such expert witnesses as provided for in article 15, paragraph 2 of the UNCITRAL Arbitration Rules.

64. The Working Group was also agreed that it was worthwhile to consider the feasibility of including in the model law some supplementary provisions of the type embodied in article 27 of the UNCITRAL Arbitration Rules. It requested the Secretariat to prepare draft provisions for its consideration.

5. Interim measures of protection

Question 4-10: Should the arbitral tribunal be empowered to take interim measures of protection even without special authorization by the parties?

65. The Working Group was of the view that the arbitral tribunal should have the power to take certain interim measures of protection. However, divergent views were expressed as to the scope of, and conditions to be attached to, such power.

66. As regards the scope, under one view the rule of the model law should be in accordance with article 26, paragraph 1 of the UNCITRAL Arbitration Rules. The prevailing view, however, was that the scope should be more restrictively defined, either by limiting the power of the arbitral tribunal to those measures which the parties should or could themselves take, or by listing the specific permissible measures (e.g. conservation of goods, sale of perishable merchandise). In this connexion, it was also noted that provisions concerning the duties of parties to preserve merchandise which are contained in the law applicable to the substance of the dispute may have some influence on the measures which the arbitral tribunal might take. A further possible restriction was to empower the arbitral tribunal only to order such conservation measures, but not to take them itself.

67. The Working Group was divided on whether the arbitral tribunal should be empowered to take interim measures of protection only upon authorization by both parties (including reference by the parties to arbitration rules setting forth such authorization, as e.g. art. 26, para. 1 of the UNCITRAL Arbitration Rules) or whether, failing such agreement, a request by one party sufficed. The Working Group deferred its decision on this question.

> Question 4-11: Should the model law deal with the involvement of courts in this respect?

68. The Working Group reaffirmed the decision which it had taken in relation to question 2-16 (see above, para. 39). Under that decision, the model law should contain a provision along the lines of article 26, paragraph 3 of the UNCITRAL Arbitration Rules. The principle of compatibility embodied therein would apply to resort to courts for interim measures before and during arbitration proceedings.

69. The Working Group was agreed that, apart from such provision on compatibility, the model law should not contain any rule dealing with the involvement of courts in taking any interim measure of protection. As regards interim measures which only a court could take (e.g. attachment or seizure of assets or those measures affecting third parties), it was thought that these were an integral part of the general procedural law applied by the court. As regards interim measures which an arbitral tribunal might take (cf. para. 66 above), it should be left to the domestic procedural law to determine whether such measures could be enforced. It was suggested that parties who wanted enforceable measures of protection should directly resort to the courts. It was further noted that the legal justification and consequences of an interim measure taken by the arbitral tribunal were linked to issues to be discussed later, such as recourse against arbitral decisions and the effect of an (interim) award.

6. Representation and assistance

> Question 4-12: Would it be appropriate for the model law to deal with questions relating to representation and assistance?

70. There was general agreement that parties may be represented or assisted by persons of their choice. Divergent views were expressed as to whether the model law should contain a provision to that effect. The prevailing view was that there was no real need to express such a principle, which seemed to be widely recognized. Under another view, it was desirable for the model law to reaffirm this principle, which included a party's right to be represented by counsel. There was support for the suggestion to include a provision according to which a party, if it intended to be represented by counsel, had to notify the other party thereof in advance.

7. Default

Question 4-13: If one of the parties fails to participate, would the arbitral tribunal be empowered to go ahead with the proceedings and make a binding award even without special authorization by the parties, including reference to arbitration rules which allow the arbitral tribunal to do so? If such special authorization were to be required, should the model law expressly recognize it as being effective, subject to any restrictions envisaged under question 4-14?

71. There was general agreement that, in principle, the arbitral tribunal should be empowered to continue the proceedings even if one of the parties fails to communicate his statement or to appear at a hearing. However, divergent views were expressed as to whether the model law should contain a provision to that effect which would set forth the conditions for such continuation. Under one view, an attempt should be made to formulate the conditions for such continuation. Minimum requirements for continuing the proceedings and rendering an award in case of such failure would be that the party had been given due advance notice (possibly also requiring a statement of the legal consequences of default) and that the party had not shown sufficient cause for his failure. Under another view, it was not practical to regulate this issue in the model law, since such regulation might not be readily acceptable in some countries in view of their general position on ex parte judgements. If, however, there were to be a provision on this issue, one view was that it could provide that a court would decide, in the circumstances of each case, whether ex parte proceedings by the arbitral tribunal were permissible. Another view expressed concern over the delay and complications which might result from such court involvement. The Working Group decided to attempt to formulate the conditions that must be met for permitting ex parte proceedings, and to request the Secretariat to prepare draft provisions taking into account the suggestions made during the discussion. If such attempt proved to be fruitless, the issue would have to be left for decision to the procedural law of each State.

8. Further issues of arbitral procedure

72. The Working Group was agreed that, in addition to the procedural issues contained in questions 4-1 to 4-14, there were other issues of arbitral procedure possibly to be dealt with in the model law. The issues suggested for consideration were: minimum contents of a statement of claim and statement of defence (cf. arts. 18 and 19 of the UNCITRAL Arbitration Rules); language to be used in arbitration proceedings (cf. art. 17 of the UNCITRAL Arbitration Rules); notice of arbitration (cf. art. 3 of the UNCITRAL Arbitration Rules), and its effects on a prescription period; and termination of arbitral proceedings (cf. art. 34 of the UNCITRAL Arbitration Rules). The Working Group requested the Secretariat to prepare for its consideration draft provisions on these issues, with explanatory notes if appropriate.

V. Award

1. Types of award

Question 5-1: Would it be appropriate for the model law to deal with the different possible types of award (e.g. final, interim, interlocutory, partial)?

73. Divergent views were expressed as to whether the model law should deal with the different possible types of award (e.g. final, interim, interlocutory,

partial). Under one view, it was not appropriate for the model law to deal with the above types of awards which were not clearly defined. Under another view, it served no useful purpose merely to list them as possible types of awards which an arbitral tribunal might render; it was necessary in addition to specify the legal qualifications and consequences of the different types, including possible means of recourse and enforceability. The main point in need of clarification was that the making of an interim award would not terminate the mandate of the arbitral tribunal, since there were national legal systems under which this result could ensue. The Working Group decided to further consider this question on the basis of draft provisions to be prepared by the Secretariat.

2. Making of an award

Question 5-2: Would it be appropriate for the model law to deal with the question of setting a time-limit for the making of the award?

74. There was general agreement that parties were free to stipulate a time-limit for the making of an award, if they so wished. However, it was agreed that the model law should neither set such a time-limit nor deal with the legal consequences of the expiry of a time-limit stipulated by the parties, since in international commercial arbitration the circumstances varied considerably from one case to another.

75. In this context, the Working Group considered whether the model law should deal with the question of undue delay by an arbitrator in conducting the proceedings. It was suggested that a possible legal consequence of such misconduct could be either challenge or replacement of the arbitrator concerned. The Working Group was agreed that it might consider this issue at a later stage.

Question 5-3: Should the model law contain any mandatory provisions on the decision-making process in proceedings with more than one arbitrator? For example, should it require that an award be made by a majority of the arbitrators, provided that all arbitrators had the opportunity to take part in the deliberations leading to that award?

76. The Working Group was agreed that the model law should contain mandatory provisions on the decision-making process in proceedings with more than one arbitrator. In this connexion, it was agreed that a provision should be included that, in proceedings with an uneven number of arbitrators, an award shall be made by a majority of arbitrators, provided that all the arbitrators had taken part in the deliberations leading to that award.

77. It was noted that the content of provisions on the decision-making process would be related to the number of arbitrators forming the arbitral tribunal, and it was recalled that the Working Group had concluded that the model law should not contain any mandatory provision specifying the number of arbitrators (question 3-7, above, para. 46). It was noted that there were proceedings conducted by an even number of arbitrators and that the practice of appointing an arbitral tribunal consisting of one arbitrator appointed by each party, with an umpire to decide if the two arbitrators failed to agree, was well established in the commercial practice of some countries. It was accepted that provisions on decision-making in the model law should not exclude these practices.

3. Form of award

Question 5-4: Should the model law require that the award, which must be in writing, be signed by all arbitrators or should it allow any exception, e.g., require that at least a majority of the arbitrators has signed and the fact of a missing signature of a named arbitrator and the reasons therefor be stated (above the signatures of the other arbitrators)?

Question 5-5: Should the model law require that the date and place of the award be stated therein?

Question 5-6: Should the model law require that the award state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given?

78. There was general agreement that, in the interests of certainty, the model law should require that the award be in writing. As regards the signing of the award by the arbitrators, the model law should include a provision envisaging signature by all the arbitrators. However, provisions should also be included dealing with the cases where, exceptionally, the award was not signed by all the arbitrators (e.g. where one arbitrator was unable or unwilling to sign). Under the prevailing view, in such cases it should be sufficient if a majority of the arbitrators had signed, and that the fact of the missing signature, and the reasons therefor, were stated. Such a solution was found in several national laws, and was in accord with article 32, paragraph 4 of the UNCITRAL Arbitration Rules. In relation to this issue, it was pointed out that an arbitrator who was unable to sign could authorize another person (e.g., the chairman of the tribunal) to sign on his behalf.

79. There was general agreement that the model law require that the date and place of the award be stated therein. It was noted that the identity of the place of the award might be relevant in enforcement proceedings under the 1958 New York Convention (e.g., article V, 1 (e) - award set aside by a competent authority of the country in which the award was made). If the date and place of the award was not stated therein, however, the prevailing view was that the model law should not on that account declare the award invalid. In this connexion, it was noted that this question had also to be considered subsequently in connexion with the setting aside or annulment of awards (questions 6-6 et seq.). A suggestion was made that thought might be given to formulating a rule under which the award was to be deemed made on the date and at the place indicated therein, even though the award may, for convenience, have been signed in different places and at different times by the arbitrators.

80. There was wide support for the view that the model law should require that the award state the reasons upon which it is based. Such a requirement was found in many national arbitration laws, and would also have a beneficial influence on the decisions of the arbitrators. Under another view, however, not requiring reasons to be stated also had advantages: the award could be rendered speedily, could not easily be challenged, and was appropriate for certain types of arbitrations (e.g., quality arbitrations). During the deliberations, it was suggested that an acceptable solution might be to require the statement of reasons, but to permit parties to waive this requirement. Such waiver might take place expressly, or even by usage where the arbitration was conducted under rules which did not contemplate the giving of reasons. It was noted that this solution was in accordance with article 32, paragraph 3 of the UNCITRAL Arbitration Rules, and it received very wide support.

4. Pleas as to arbitrator's jurisdiction

Question 5-7: Should the arbitral tribunal be empowered to decide on any pleas as to its jurisdiction including those based on non-existence or invalidity of an arbitration agreement?

Question 5-8: Should a ruling by the arbitral tribunal on its jurisdiction be final and binding or should it be subject to any review by a court?

81. The Working Group noted that it had decided that the model law should adopt the principle of the separability or autonomy of the arbitral clause (question 2-12, above, para. 34). In accordance with that decision, there was general agreement that the model law should empower the arbitral tribunal to decide on any pleas as to its jurisdiction, including those based on non-existence or invalidity of an arbitration agreement. Such a power was also contemplated in article 21, paragraph 1 of the UNCITRAL Arbitration Rules, and in article V, paragraph 3 of the 1961 Geneva Convention. It was noted that thought might be given to imposing limitations on the stage of the proceedings at which a plea as to jurisdiction might be raised, as provided in article 21, paragraph 3 of the UNCITRAL Arbitration Rules.

82. There was also general agreement that a ruling by the arbitral tribunal on its jurisdiction is subject to review by a court. It was noted in this connexion that both the 1958 New York Convention (article V, para. 1 (e)) and the 1961 Geneva Convention (article V, para. 3) contemplated the existence of such court review. Divergent views were expressed, however, as to whether provisions on such review should be included in the model law. Under one view, it was impossible to formulate provisions covering the variety of circumstances in which review by courts should take place. Accordingly, the model law should not contain any such provision. Under another view, however, the model law might contain some provisions on this issue. Thus, it might be desirable to include a provision as to the stage at which court review should be permissible following article 18 of the uniform law annexed to the 1966 Strasbourg Convention, or article VI, paragraph 3 of the 1961 Geneva Convention. Another suggestion was that provisions might be included empowering the court to compel the continuance of arbitral proceedings, where the arbitral tribunal had ruled that it had no jurisdiction, or to discontinue arbitral proceedings, where the arbitral tribunal had ruled that it had jurisdiction.

83. The Working Group decided that an attempt should be made to formulate provisions on court review, taking into account the discussion which had taken place on the issue, and to reconsider the issue at a later stage.

5. Law applicable to substance of dispute

Question 5-9: Should the model law recognize as binding on the arbitral tribunal an agreement by the parties that the case be decided ex aequo et bono? If so, should an attempt be made to define such mandate in the model law (e.g. "amiables compositeurs" must observe those mandatory provisions of law regarded in the respective country as ensuring its ordre public international)?

84. There was general agreement that the model law should recognize as binding on the arbitral tribunal an agreement by the parties that the case be decided ex aequo et bono. It was noted that the term "ex aequo et bono" and the other term "amiables compositeurs" often used in this connexion (e.g., article 33, para. 2 UNCITRAL Arbitration Rules) were not clearly demarcated and sometimes given varying interpretations in different legal systems. It was also noted that the consideration of this issue could not be completely separated from the discussion on question 5-10 (parties' choice of the law applicable to the substance of the dispute).

85. The Group agreed, therefore, though only on a tentative basis, to follow the approach adopted in article 33, paragraph 2 of the UNCITRAL Arbitration Rules, with two modifications. One was to use only the term "ex aequo et bono" although some support was expressed for also retaining the words "as amiables compositeurs". The other was not to retain the last part of the paragraph which reads "if the law applicable to the arbitral procedure permits such arbitration". It was thought that such a requirement, while meaningful in arbitration rules, was not appropriate in the model law which itself was to be, for most cases, the very law determining the permissibility.

86. The Working Group was agreed that it was extremely difficult to define in a practicable manner the mandate, and its limits, of arbitrators authorized to decide ex aequo et bono (or as amiables compositeurs). However, in view of the desirability of a clarification, it did not wish to exclude the possibility of a later attempt to draft a suitable provision. In this respect, a proposal was made according to which the model law should expressly state that arbitrators, even when deciding ex aequo et bono, should to the largest possible extent ensure the enforceability of the decision within the States with which the dispute has a significant connexion.

> Question 5-10: Should the model law recognize as binding on the arbitral tribunal an agreement by the parties that a certain law be applicable to the substance of the dispute?

87. There was general agreement that the model law should recognize as binding on the arbitral tribunal an agreement by the parties that a certain law be applicable to the substance of the dispute. There was some support for the proposal (set forth in the report, para. 91) that parties may not only be given the facility of designating a specific national law, but also of choosing an international convention or uniform law even if it was not yet in force, or not in force in their countries.

> Question 5-11: Failing an agreement envisaged under question 5-10, should the arbitral tribunal apply the law it deems appropriate (as, e.g., under art. 1496 of the French New Code of Civil Procedure) or the law determined by the conflict of laws rules which it considers applicable (as, e.g., under art. 33 (1) of the UNCITRAL Arbitration Rules)?

88. Divergent views were expressed on the question of how the arbitral tribunal should determine the law applicable to the substance of the dispute, where the parties had not designated such law. Under one view, the model law should follow the rule embodied in article 33, paragraph 1 of the UNCITRAL Arbitration Rules, according to which "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

89. Under another view, the arbitral tribunal would directly determine the applicable substantive law which it considered appropriate (e.g. because it was the law most closely related to the transaction). Such determination would relate to the substantive law of a given State. However, some support was expressed for the idea of allowing the arbitrators to select parts of the substantive law of different countries and to apply rules contained in relevant international conventions, even if not yet in force. A suggestion was made for giving the arbitral tribunal some guidance in determining the applicable legal rules by requiring it to take into account the interests and wishes of the parties and their national laws.

90. The Working Group requested the Secretariat to prepare alternative draft provisions reflecting the above views, and decided to reconsider the issue on the basis of those draft provisions.

> Question 5-12: Should the arbitral tribunal be required to decide in accordance with the terms of the contract and to take into account the usages of the relevant trade? If so, should this also apply to decisions ex aequo et bono?

91. In considering this question, it was noted that different considerations applied depending on whether the arbitral tribunal was to decide the dispute according to law or ex aequo et bono. In respect of the first type of arbitration, it was agreed that an arbitral tribunal should have regard to the terms of the contract and relevant trade usages. However, divergent views were expressed as to whether this should be expressed in the model law, and if so in what manner. Concerning the regard to contract terms, the prevailing view was that no provision should be included in the model law since this requirement was self-evident. Furthermore, such a provision would be possibly misleading or incorrect since a contract provision could be invalid under the applicable substantive law. Under another view, however, it was advisable to require the arbitral tribunal to decide in accordance with the terms of the contract (or, at least, to take those terms into account).

92. Concerning the regard to trade usages, one view was not to include a provision in the model law, since this was a matter of substantive law and a provision in the model law could create a conflict with a national substantive law. The prevailing view was that an attempt be made to draft an appropriate provision. Such a provision might be modelled on article VII, paragraph 1 of the 1961 Geneva Convention ("take account of the ... trade usages") or on article 33, paragraph 3 of the UNCITRAL Arbitration Rules ("take into account the usages of the trade applicable to the transaction"). A further suggestion was to consider inclusion of a provision along the lines of article 9 of the 1980 Vienna Sales Convention.

93. As regards arbitration ex aequo et bono, there was wide support for not including a provision in the model law according to which amiables compositeurs should have regard to the terms of the contract and trade usages. This was considered to be in accordance with the earlier decision concerning a possible definition of the mandate of such arbitrators (see question 5-9, above, para. 86). It was noted that if certain guidelines seemed desirable, regard to trade usages should not be given greater weight than regard to contract terms or observance of the applicable law.

94. The Working Group decided to take a final stand after considering alternative draft provisions to be prepared by the Secretariat which would reflect the above views.

6. Settlement

Question 5-13: Where parties settle their dispute amicably during arbitration proceedings, should the arbitral tribunal be authorized (but not compelled) to record such settlement in an award ("accord des parties"), and should this type of award be treated like any other award?

95. There was general agreement that the arbitral tribunal should be authorized to record a settlement, which parties had reached during arbitration proceedings, in an award. It was thought that arbitrators would normally accede to a request by the parties to enter the settlement in an award. However, they should not be compelled to do so in all circumstances. Divergent views were expressed as to the extent of the discretion to be given to the arbitrators in this respect.

96. A suggestion was made that the arbitral tribunal could be empowered to enter a settlement by the parties in an award upon the request of one party only, unless the parties had stipulated otherwise.

97. The Working Group was agreed that a settlement entered in an award should indicate that it was an award. It was also agreed that such an award should be treated like any other award.

7. Correction and interpretation of award

Question 5-14: Should the model law contain a provision according to which a party may request within a specific period of time that the arbitral tribunal give an interpretation of the award or correct technical errors therein?

98. There was general agreement that the model law should contain provisions concerning the correction and interpretation of an award. Such provisions could be modelled on articles 35 and 36 of the UNCITRAL Arbitration Rules. However, it was agreed that a request for interpretation of the award should be limited to specific points in order to avoid possible abuses and delay.

8. Fees and costs

Question 5-15: Should the model law contain any provisions relating to fees and costs, for example, empowering the arbitral tribunal or any administering body to request deposits from each party?

Question 5-16: Would it be appropriate for the model law to envisage any review by a court (or its president) concerning the fees of arbitrators and, for example, allow readjustment in case of utterly unreasonable fees?

99. There was wide support for the view that questions concerning the fees and costs of arbitration were not an appropriate matter to be dealt with in the model law. This view left open the possibility for a State to provide for court control concerning fees and costs, and, for example, to allow readjustment of utterly unreasonable fees.

9. Delivery and registration of award

Question 5-17: Should the model law state that the award shall be delivered to the parties and in what form (e.g. signed copies)?

100. There was general agreement that the model law should require that the award be delivered to the parties and should specify in what form.

> Question 5-18: Should the model law require that the award be deposited or registered with a specified authority in the country where it was made? Or would it be preferable to adopt the system of the 1958 New York Convention, which allows recognition and enforcement of foreign arbitral awards without such deposit or registration, for all awards covered by the model law, i.e. international commercial arbitration awards?

101. There was wide support for not requiring that the award be deposited or registered in the country where it was made. This was to adopt the system of the 1958 New York Convention, which allows enforcement of foreign arbitral awards without such deposit or registration, for all awards covered by the model law, although in borderline cases it might be difficult to determine whether or not an award was covered by the model law.

102. Some support was expressed for requiring deposit or registration of an award. This requirement would benefit parties, by ensuring the continued availability of the original award or an authenticated copy thereof. A suggestion was made to provide for deposit or registration only if at least one party so requested.

10. Executory force and enforcement of award

> Question 5-19: Should the model law adopt a uniform system of enforcement for all "international" awards irrespective of the place where they are rendered?
>
> Question 5-20: Which rules of procedure on recognition and enforcement should the model law lay down? For example, should it adopt a provision along the lines of article IV of the 1958 New York Convention on what an applying party shall supply? Should it specify the formalities of the recognition and enforcement order and name the authority competent to issue such order?

103. There was wide support for the idea of adopting a uniform system of enforcement for all awards covered by the model law. This would result in all awards rendered in international commercial arbitration being uniformly enforced irrespective of where they were made. However, divergent views were expressed as to whether the model law should contain any procedural rule on recognition and enforcement. Under one view, the model law should not deal with these procedures which were idiosyncratic to the law of civil procedure of each country. Furthermore, the model law was not an appropriate means for furthering the unifying effect already achieved by the 1958 New York Convention. Under another view, it was desirable that the model law should not be silent on that issue. One suggestion was to include in the model law merely a reference to the relevant provisions of the 1958 New York Convention. Another suggestion was to incorporate into the model law procedural provisions taking into account article III, and in particular article IV, of that Convention. Yet another proposal was to call upon States to establish a uniform system.

104. The Working Group was agreed that its exchange of views on the matter was of a tentative nature, and that further careful study was needed on the issues considered. It requested the Secretariat to draft alternative draft provisions which could assist the Working Group in reaching a decision.

11. Publication of award

Question 5-21: Would it be appropriate for the model law to deal with the question whether an award may be published and, if so, should an express consent of the parties be required?

105. There was general agreement that the model law should not deal with the question whether an award may be published.

VI. Means of recourse

1. Appeal against arbitral award

Question 6-1: Should the model law recognize any agreement by the parties that the arbitration award may be appealed before another arbitral tribunal (of second instance)?

106. There was wide support for the view that parties were free to agree that the award may be appealed before another arbitral tribunal (of second instance), and that the model law should not exclude such practice although it was not used in all countries. However, the Working Group was agreed that there was no need to include in the model law a provision recognizing such practice. It was noted, however, that this conclusion might have to be reconsidered in the light of the ultimate contents of the model law, and in particular its chapter on means of recourse against an award.

Question 6-2: Should the model law allow any appeal to a court for review of the award on the merits (apart from the setting aside procedure considered in question 6-6)?

107. There was very wide support for the view that an award rendered in international commercial arbitration should not be subject to court review on its merits. It was noted that this reflected the legal position in most States, and that a trend was discernible to further reduce the remaining instances where court review was still allowed.

108. Divergent views were expressed as to whether this policy should be stated in the model law. The prevailing view was not to incorporate a provision to that effect. While the model law itself would then not contribute to unification, the hope was expressed that the above-mentioned trend would continue. Another view was that the model law should expressly exclude any court review of awards on the merits, in order to further the above policy. A suggestion was made to consider including a provision according to which an award was final (or had the effect of res judicata), subject to certain conditions (e.g. it was not contrary to ordre public).

2. Remedies against leave for enforcement (exequatur)

Question 6-3: Should the model law adopt a uniform appeal system concerning decisions refusing recognition or enforcement irrespective of where the award was made?

Question 6-4: Should the model law adopt a uniform appeal system concerning decisions granting recognition and enforcement irrespective of where the award was made (subject to a possible modification regarding awards against which a setting aside action may be brought, see question 6-8)? In particular, should the grounds on which recognition and enforcement may be refused under article V of the 1958 New York Convention be the same under the model law irrespective of where the award was made?

Question 6-5: Which rules of procedure concerning recourse against an exequatur, or against refusal of exequatur, should the model law lay down, including specification of the court or authority to which a party may appeal?

109. There was wide support for the view that the model law should not set forth rules on remedies against decisions granting or refusing enforcement of awards. It was thought that the procedures for appeal or recourse against the decisions of a court were an integral part of the law of civil procedure of each State. Accordingly, the Working Group did not accept, at least for the time being, the suggestion to adopt in the model law a uniform system of appeal against decisions relating to the enforcement of awards rendered in international commercial arbitration.