UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/263/Add.3
31 July 1985

ENGLISH
Original: FRENCH

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW
Eighteenth session
Vienna, 3-21 June 1985

INTERNATIONAL COMMERCIAL ARBITRATION

Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration

Report of the Secretary-General

Addendum

This addendum to document A/CN.9/263 contains the comments of Egypt on the draft text of a model law on international commercial arbitration.* Since these comments are of a basic character and often relate to more than one issue or article, they are reproduced here in the order in which they were submitted.

* These comments were received in the Secretariat on 29 May 1985. As it was not possible to translate them into the other five official languages of the United Nations in time for the session, they were distributed to the participants of the eighteenth session in their original French version. They are now published as a post-session document in order to complete the records of documents submitted to the Commission in the course of consideration of the draft model law.

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Comments of Egypt on the draft model law on international commercial arbitration

Introduction

1. Egypt presents its compliments and congratulations to the Chairman of the Working Group on International Contract Practices, to the members of the Group and the Secretariat of the Commission for the thorough and valuable work which they have carried out in preparing the draft model law on international commercial arbitration. Egypt also wishes to express its satisfaction with regard to the draft as a whole and hopes that the present session of the Commission will not end without its adoption.

2. Having set up an arbitration centre in Cairo under the auspices of the Afro-Asian Legal Consultative Committee, Egypt feels it to be an opportune moment to revise its legislation on commercial arbitration, which has proved, particularly at international level, to be inadequate and incomplete. Egypt is therefore particularly interested in the draft law under consideration and we believe that this interest is shared by several other countries which, like Egypt, envisage adopting commercial arbitration laws better adapted to the needs of international practice. Without waiting for the final adoption of the draft, the Cairo Arbitration Centre has already set up a working group to study the draft and to consider its introduction into the planned new Egyptian legislation. When this legislation comes into effect, the Cairo Centre, which has already adopted the UNCITRAL Arbitration Rules, will be an effective arbitral body for the region founded on a complete and universally recognized package of legal rules.

3. While approving the draft model law as a whole, Egypt would like, however, to submit certain comments on the draft to the Commission, some of them being of a general nature and others relating to specific articles.

I. GENERAL COMMENTS

A. The model law and national arbitration

4. In conformity with the objectives of the body initiating it, the draft is only concerned with the interests of international commerce, putting forward a model law on arbitration which is likely to be accepted by a large majority of countries and thus achieving a certain standardization of the law on this subject. It is therefore restricted to international commercial arbitration without concerning itself with the fact that any State adopting it would have two laws in its legislation (both of them national), one governing so-called national arbitration which does not fall within the definition of "international" set out in article 1 paragraph 2, and the other concerning international arbitration as defined in that paragraph. Now it would not be unusual for a State wishing to avoid this duplication to prefer to extend the scope of the model law by incorporating both categories of arbitration within its provisions. A State taking this course would be faced with difficulties which it could only overcome by introducing amendments into the model law which could lead to disparity between legislations and conflicts of laws. We particularly have in mind the provisions of the model law relating to public policy in certain States, such as, for example, the non-statement of reasons for the arbitral judgment, the unlimited right of the parties to authorize the arbitrator to make a judgment ex aequo et bono, the non-requirement for an odd number of arbitrators and the restriction of the jurisdiction of the courts over the arbitral proceedings. These exceptions to the requirements of public policy could, in a spirit of internationalism, be tolerated by the State as regards external relations, but at national level the State is more sensitive with regard to its public policy requirements. There lies the problem for a State wishing to

combine the two categories of arbitration under the umbrella of the model law. The problem has not been studied by the Working Group. At this late stage we will confine ourselves to drawing attention to it without suggesting that the Commission should consider it, since there would be objections that this is a particular problem which each State concerned will resolve in its own fashion. Nevertheless, it also constitutes a breach which could admit disparities in national legislations and thus might threaten the work of standardization.

B. The model law and the 1958 New York Convention

5. The last chapter of the model law which comprises the two articles 35 and 36 deals with recognition and enforcement of arbitral awards. Article 35 paragraph 1 obliges a State adopting the model law to recognize and enforce the arbitral award subject to certain conditions set out in paragraphs 2 and 3 of the same article. Article 36 provides an exhaustive list of grounds for refusing recognition or enforcement.

6. It is well known that there is an international convention on this matter (the 1958 New York Convention) which is universally recognized as effective. States which have already ratified or acceded to this Convention will not need articles 35 and 36 of the model law, for these articles would constitute a pointless duplication within their legislation. Given the success of the New York Convention, it is most likely that articles 35 and 36 will be of value only to a minority of States which will also ultimately adopt the Convention and thus join the system recognized by the majority of the members of the international family. For this reason we believe that little would be lost if the model law stopped at article 34.

7. If it is suggested in support of the retention of articles 35 and 36 that certain provisions of the Convention have defects or ambiguities, the remedy would appear to lie, not in the creation of a duplication which might cause confusion, but in a call by the Commission for a review of the Convention followed by a thorough study of the proposed reform.

C. "Commercial" and "international"

8. With regard to the term "commercial", Egypt, although among those countries which make a distinction between commercial and non-commercial persons and between commercial and civil acts, is in favour of the content of the text of the note relating to article 1 paragraph 1, for it proposes an acceptable compromise on this subject between the different juridical systems. Although Egypt is fundamentally in agreement, it would have difficulty, however, in including such a note in the model law when it adopts it, for it is not customary in Egyptian legislation to include notes on the texts of laws or to cite examples as an aid to their interpretation. Egypt therefore proposes that a definition of the term "commercial" reproducing the content of the note without the examples referred to should be inserted in article 2. Of course, these examples would be useful in clarifying the too general terms of the proposed definition, but such clarification would be better placed in a commentary on the model law or in an accompanying explanatory note.

9. With regard to the term "international", Egypt is in favour of the system suggested in article 1 paragraph 2, which sets out in subparagraph (a) a general criterion and adds in subparagraph (b) other situations which tend to ease the rigidity of the general criterion and thus extend the scope of the concept of "international". In our view this system is a reasonable compromise between those extreme opinions which tend towards an excessive extension or restriction of the scope of the model law.

D. Territorial scope

10. Without prejudging the result of the debate which will take place in the Commission on the problem of territoriality or extra territoriality of the model law which the Working Group left for its consideration, Egypt would like to clarify its position on two questions related to this problem.

11. The first question concerns the freedom of the parties to choose the rules of procedure governing their arbitration. Whatever the result of the debate which takes place in the Commission on this problem, Egypt insists that this freedom should be respected. Apart from rules aimed at protecting justice, Egypt would be opposed to any solution restricting this freedom, whether by obliging parties to apply the rules of procedure of the place of arbitration or by limiting their right to seek rules of procedure in other sources of their choice (for example a foreign law, an arbitration rule or even their own will).

12. The second question relates to article 34 concerning the problem of territorial scope through the two phrases of its first paragraph which are left in brackets. Speaking of the application for setting aside the arbitral award, this text, in order to be acceptable, proposes that the award should be made "in the territory of this State" (territoriality) "under this Law" (extra territoriality) and leaves the Commission to decide whether the two expressions should be retained, deleted or only one of them deleted.

13. In this respect Egypt is in favour of territoriality, that is, the retention of the expression "in the territory of this State" and the deletion of the other expression "under this Law". The latter expression could, indeed, have the effect of giving national courts authority to rule on the validity or nullity of an award given outside their territory. This extraterritorial jurisdiction would not be acceptable to several countries unless there were reciprocity.

14. In this connection Egypt would like to add that it is in favour of the insertion in article 2 of a general definition of the arbitral award. In the event of this definition proving difficult to formulate, the Commission could simply specify in article 34 what kinds of award might be set aside under this article, for it is in this context that the definition seems most useful.

E. Coexistence of articles 34 and 36

15. We have already given the reasons why we prefer to see the model law stopping at article 34 relating to an application for setting aside the arbitral award without becoming concerned, as occurs in articles 35 and 36, with the problem of recognition and enforcement of the award, which is governed by other international texts, particularly the 1958 New York Convention.

16. But this is no more than a simple suggestion which will probably be rejected by the Commission, in which case the two problems of setting aside and recognition will be juxtaposed within the model law. As far as we are aware this would be the first time that an international text contained the two problems side by side: the 1958 New York Convention only covers recognition and enforcement, while the 1961 European Convention - whose aim is broader - ignores this problem and deals only with setting aside.

17. The model law, in wishing to take account of both these problems, naturally seeks to be complete and independent. While this objective is commendable in

itself, the coexistence of two texts establishing two means of attacking the award based on the same grounds may cause confusion. To take two examples:

(a) Where the court defined in article 6 as authorized to hear the application for setting aside decides to set aside the award, there will be no difficulty; the award is annulled. It will not be recognized or enforced in any country which has adopted the model law. But what would the situation be in the contrary hypothesis, where the court refused the application for setting aside? Could the award then be challenged before the competent authority responsible for hearing the application for recognition and enforcement on the same grounds as those of the application for setting aside which was refused?

(b) Article 34 speaks of a time limit for making the application for setting aside (three months). Article 36, on the other hand, imposes no time limit on the submission of an application for enforcement, which enables the party time-barred from the right of making an application for setting aside to stage a last-minute come-back and challenge the award at the stage of the application for enforcement. What therefore is the value of the time limit in article 34 if it cannot protect the award against late challenges?

18. The co-existence of articles 34 and 36 becomes more unfortunate when the matter in question is the validity or nullity of the arbitration agreement, for in that case two other articles (article 8 and article 16) are involved, giving rise to further complications. For example:

19. In a contract of sale concluded between an Egyptian enterprise and a Lebanese merchant there is an arbitration clause providing for arbitration in Egypt. As a result of a dispute between the two parties the Lebanese merchant, claiming that the subject of the litigation does not fall within the provisions of the arbitration clause, initiates an action before the competent court in Lebanon. The Egyptian party, maintaining the contrary view, requests the referral of the matter to arbitration in Egypt. The Lebanese party objects that there is no arbitration agreement covering the subject of the litigation. This brings us to article 8:

(a) The Lebanese court refers the case to arbitration, which implies its recognition of the existence, validity and effectiveness of the arbitration agreement;

(b) Before the arbitral tribunal in Egypt, the Lebanese party raises an objection of lack of competence based on the same reasoning, that is, the lack of an arbitration agreement. This is dealt with by article 16, which does not forbid the repetition of the objection on the same grounds;

(c) The arbitral tribunal rules in favour of the Egyptian party, on the substance and on the objection. By rejecting the objection of lack of competence it at the same time recognizes the existence, validity and effectiveness of the arbitration agreement;

(d) Within the period of three months the Lebanese party submits to the court specified in article 6 in Egypt an application for setting aside of the award based on the same grounds. This is under article 34 where there is nothing to prevent this recourse;

(e) The court specified in article 6 refuses the application for setting aside, which means that it too recognizes, and for the third time, the existence, validity and effectiveness of the arbitration agreement;

(f) The Egyptian party then goes to the Lebanese authority empowered with the granting of the exequatur, but there runs up against an objection by the Lebanese party who for the fourth time invokes the non-existence of the arbitration agreement. We are now at article 36 which, likewise, contains no bar to such an application when the court specified in article 6 rules in favour of the existence or validity of the arbitration agreement.

20. This example demonstrates the extent to which there is a lack of co-ordination between four provisions contained within the model law and dealing with the same problem. Each of them has an independant life of its own without there being any link between them which might combine them in a defined system.

II. COMMENTS ON THE ARTICLES

21. Article 4: We approve this article, substance and form. The text has the merit of correcting the rigour of the presumption which it establishes by giving the judge discretion with respect to the component elements.

22. Article 5: Although it touches on a delicate matter, control of arbitration by the courts, we are in favour of retaining this article for, by limiting this control to instances provided by the model law, it brings order to the disparity of national legislations on this subject and frees the arbitral proceedings from a yoke which, in some legislations, is too burdensome.

23. We also approve the restriction of the scope of article 5 to the matters regulated by the model law, for the exclusion of other questions, particularly those deleted by the Working Group, sets a balance which may help to assuage the sensitivity of some States in this area.

24. Article 6: Comment on the form: instead of referring to the numbers of articles and paragraphs relating to the functions of the court in question, we propose the use of a general formula such as:

"The court competent to undertake the functions set out in this Law is ..." it should be noted that the form "in this Law" has been used on many occasions.

25. Article 8: Paragraph 1 seems acceptable to us. We share the view that its scope should not exceed the two principles which it expresses, namely denying the court the power to refer to arbitration on its own initiative and the inadmissibility of the application for referral beyond the time limit provided in the text.

26. With regard to paragraph 2, we propose the reinsertion at the end of this paragraph of the phrase "unless the court orders a stay of the arbitral proceedings", which was in the original text and was deleted by the Working Group. In our view, it would be useful to give the court a power of ordering the suspension of arbitral proceedings when it believes that the setting aside or annulment of the arbitration agreement is the most likely outcome. Such a measure would save time, effort and expense.

27. Article 13, paragraph 3: This paragraph allows the arbitral tribunal, where the challenged application is before the court specified in article 6, to continue with the arbitral proceedings. We believe it is preferable also to grant the tribunal the power to order the suspension of the proceedings whenever it is aware of the existence of grounds to justify such a step.

28. If this proposal is accepted by the Commission, the last phrase of paragraph 3 should be drafted as follows:

"... while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings, unless the tribunal orders their suspension."

29. Article 22, paragraph 3:* Amend this paragraph as follows:

"The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language, languages or one of the languages agreed upon by the parties or determined by the arbitral tribunal."

30. The proposal adds the term "one of the languages" with a view to saving time and money. The fact that the parties or the tribunal have chosen several languages for use in the arbitral proceedings shows that the use of any one of them would not prejudice the positions of the parties.

31. It should be noted that the proposal retains the word "languages" alongside the proposed term "one of the languages" in order to allow the arbitral tribunal a wider power of discretion. It could thus require translation into all the agreed languages if circumstances made this advisable.

32. Article 27: We hold the view that the scope of this article should be restricted to arbitral proceedings undertaken within the State. It seems to us excessive to oblige a State to grant the benefit of assistance in the event of arbitral proceedings taking place outside its territory.

33. Article 28: Proposal: Amend paragraph 2 as follows:

"Failing any designation by the parties, the arbitral tribunal shall apply the substantive law which it considers applicable."

34. Commentary: Article 28 paragraph 1 gives the parties the unrestricted right to choose the law applicable to the substance of their dispute. It even establishes a presumption that any designation of a law of a given State is considered, unless otherwise expressed, as directly designating the substantive law and not the conflict of laws rules.

35. Failing a designation by the parties, paragraph 2 entrusts the arbitral tribunal with the designation. But instead of giving it the right to designate the substantive law directly, as paragraph 1 does for the parties, it only gives it the choice of law whose conflict of laws rules will be used to designate the applicable substantive law.

36. This distinction between the two situations seems to us to be untenable. It is a relic of a misguided sense of distrust of the institution of arbitration, a distrust which is outdated and which practical experience has already discredited. Our proposal aims at removing this distinction.

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* Note by Translation Section: Sic, in the draft law there is no "paragraph 3" and "paragraph 2" is presumably meant.

37. Article 32, paragraph 2, subparagraph (b): The text states that where the arbitral proceedings become unnecessary or inappropriate, the arbitral tribunal "may" order the termination of the proceedings. The word "may" indicates a right and not an obligation. Consequently, despite a conviction that the proceedings have become unnecessary or inappropriate, the arbitral tribunal may, nevertheless, order their continuation. On what grounds? To what purpose? In whose interest? The text does not state. It is clear that the continuation of such proceedings would be nothing more than a waste of time, effort and money. We therefore propose that paragraph 2 be amended as follows:

> "2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
>
> (a) The claimant withdraws ... (no change).
>
> (b) The arbitral proceedings become, for any other reason, unnecessary or inappropriate."

38. Article 34, paragraph 2, subparagraph (b)(i): We support the view that this text should be deleted. The grounds for this deletion were put forward and discussed in the Working Group and we shall not repeat them. We merely add that the proposed deletion does not imply the exlusion of non-arbitrability as a ground for setting aside, as this setting aside would be covered by other texts; by subparagraph (b)(ii) when the arbitrability is a matter of the public policy of the State, and subparagraph (a)(i) when it is considered by the law of the State as an element of the arbitration agreement.