UNITED NATIONS

GENERAL ASSEMBLY

Distr.
GENERAL

A/CN.9/264
25 March 1985

ORIGINAL: ENGLISH

28249

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

INTERNATIONAL COMMERCIAL ARBITRATION

ANALYTICAL COMMENTARY ON DRAFT TEXT OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

Report of the Secretary-General

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INTRODUCTION

1. The United Nations Commission on International Trade Law, at its fourteenth session (1981), decided to entrust its Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration. 1/ The Commission, at that session, had before it a report of the Secretary-General entitled "Possible features of a model law on international commercial arbitration" (A/CN.9/207). It was agreed that this report, setting forth the concerns and purposes underlying the project and the possible contents of a model law, would provide a useful basis for the preparation of such a law. 2/

2. The Working Group commenced its work, at its third session, by discussing a series of questions designed to establish the basic features of a draft model law. 3/ At its fourth session, it considered draft articles prepared by the Secretariat 4/ and reviewed, at its fifth and sixth sessions, redrafted and revised articles of a model law. 5/ The Working Group, at its seventh session, considered a composite draft text and, after a drafting group had established corresponding language versions in the six languages of the Commission, adopted the draft text of a model law as annexed to its report. 6/

3. The Commission, at its seventeenth session (1984), requested the Secretary-General to transmit this draft text of a model law on international commercial arbitration to all Governments and interested international organizations for their comments and requested the Secretariat to prepare an analytical compilation of the comments. 7/ It also decided to consider, at its eighteenth session (1985), the draft text in the light of these comments, with a view to finalizing and adopting the text of a model law on international commercial arbitration. 7/

4. At the seventeenth session, a suggestion was made that the Secretariat should prepare a commentary on the draft model law which would assist Governments in preparing their comments on the draft text and later in their consideration as to any legislative action based on the model law. The Commission was of the view that such a commentary, although it could not be prepared in time to be of assistance to Governments in preparing their

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

2/ Ibid., para. 65.

3/ Report of the Working Group on International Contract Practices on the work of its third session (A/CN.9/216).

4/ Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN.9/232).

5/ Reports of the Working Group on International Contract Practices on the work of its fifth session (A/CN.9/233) and of its sixth session (A/CN.9/245).

6/ Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN.9/246).

7/ Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17), para. 101.

comments, would be useful if it were made available at the eighteenth session of the Commission. 8/ Accordingly, the Commission decided to request the Secretariat to submit to the eighteenth session of the Commission a commentary on the draft text of a model law on international commercial arbitration. 9/

5. The present report has been prepared pursuant to that request. It provides a summary of why a certain provision has been adopted and what it is intended to cover, often accompanied by explanations and interpretations of particular words. It does not give a complete account of the travaux préparatoires, including the manifold proposals and draft variants that were not retained. For the benefit of those seeking fuller information on the history of a given provision the commentary lists the references to the relevant portions of the five session reports of the Working Group. 10/

6. In preparing the commentary, the Secretariat has taken into account the fact that it is not a commentary on a final text but that its foremost and immediate purpose is to assist the Commission in reviewing and finalizing the text. The Secretariat has, therefore, taken the liberty of noting possible ambiguities and inconsistencies, occasionally accompanied by suggestions which the Commission may wish to consider. An attempt has been made to distinguish such views of the Secretariat, by using expressions like "it is submitted" or "it is suggested", from those explanations or interpretations which accord with the unanimous or prevailing view of the Working Group.

8/ Ibid., para. 100.

9/ Ibid., para. 101.

10/ In order to avoid confusion, no special reference is made to previous article numbers which, in the course of the preparation, were altered twice. However, any earlier number will be apparent from the relevant discussion in the session report or may be seen from the comparative tables of article numbers set forth in documents A/CN.9/WG.II/WP.40 and 48 which were submitted to the Working Group at its fifth and seventh sessions.

ANALYTICAL COMMENTARY

ON THE DRAFT TEXT

OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION 11/

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application*

(1) This Law applies to international commercial** arbitration, subject to any multilateral or bilateral agreement which has effect in this State.

(2) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the subject-matter of the arbitration agreement is otherwise related to more than one State.

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* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

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

11/ The draft text of a model law reproduced here and commented upon is the one which the Working Group on International Contract Practices adopted at the close of its seventh session (A/CN.9/246, para. 14 and annex).

(3) For the purposes of paragraph (2) of this article, if a party has more than one place of business, the relevant place of business is that which has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference is to be made to his habitual residence.

REFERENCES

A/CN.9/216, paras. 16-21
A/CN.9/232, paras. 26-36
A/CN.9/233, paras. 47-60
A/CN.9/245, paras. 160-168, 173
A/CN.9/246, paras. 156-164

COMMENTARY

1. Article 1 of the draft text of a model law on international commercial arbitration (hereinafter referred to as "the model law") deals with the intended scope of application of the model law. In particular, it lays down the substantive field of application, which is, in accordance with the Commission's mandate to the Working Group, 12/ "international commercial arbitration". Before considering this substantive scope of application, some general comments on the form of the model law and on further aspects of its application are made.

A. "This Law applies ..."

I. The model law as "this Law" of a given State

2. The mode of unification and improvement of national arbitration laws envisaged by the Working Group, subject to final decision by the Commission, is that of a model law. The text, in its final form, would be recommended by the Commission and then by the General Assembly to all States for incorporation into their national legislation.

3. To facilitate such incorporation, the text has been drafted in a form in which it could be enacted in a given State. The commentary follows this direction towards a particular State and refers to "this State", 13/ where "this Law" would apply, as State X.

12/ 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.

13/ A State, when adopting the model law, may wish not to retain the expression "this State" (found in articles 1(1), 27(1), 34(1), (2), 35(2), (3) and 36(1)) but, following its normal legislative technique, either substitute appropriate wording (e.g. name of the State) or regard the reference as unnecessary on the ground that it would be clear from the context of the law and its promulgation.

II. Territorial scope of application (not yet decided)

4. "This Law", in its present form, does not generally state to which individual arbitrations (of international commercial nature) it applies. One possibility would be to use as a determining factor the place of arbitration, that is, to cover all arbitrations taking place in "this State" (X). Another possibility would be to recognize the parties' freedom to select a law other than that of the place of arbitration and to cover all arbitrations taking place in State X, unless the parties have chosen the law of another State, as well as those "foreign" arbitrations for which the parties have selected the law of "this State" (X).

5. The prevailing view in the Working Group was in favour of the first solution (i.e. strict territorial criterion) but the decision was not to deal expressly in article 1 with this issue. 14/ The question was also left undecided in the context of article 34, as indicated by the two variants placed between square brackets: "award made [in the territory of this State] [under this Law]." 15/ Similarly non-committal is the present wording of article 27 ("arbitral proceedings held in this State or under this Law") which would accommodate both of the above possibilities. 16/

6. The question of the territorial scope of application, which remains to be solved by the Commission, needs to be answered in respect of most but not all provisions of the model law. The reason is that certain provisions, dealing with the role of the courts of State X in respect of recognition of arbitration agreements (articles 8 and 9) 17/ and recognition and enforcement of awards (articles 35 and 36), are intended to cover arbitration agreements or awards without regard to the place of arbitration or any choice of procedural law.

III. The model law as "lex specialis"

7. Once the model law is enacted in State X, "this Law applies" as lex specialis, i.e. to the exclusion of all other pertinent provisions of non-treaty law, 18/ whether contained, for example, in a code of civil procedure or in a separate law on arbitration. This priority, while not expressly stated in the model law, follows from the legislative intent to establish a special regime for international commercial arbitration.

14/ A/CN.9/246, paras. 165-168.

15/ A/CN.9/246, paras. 169-171. See also commentary to article 34, para. 4.

16/ A/CN.9/246, paras. 92-97. See also commentary to article 27, para. 3.

17/ As regards article 9, a distinction must be made between the right of a party to request an interim measure of protection and the power of the court to grant such measure; see commentary to article 9, paras. 2-3.

18/ As to "treaty law", which prevails over the model law, see below, paras. 9-11.

8. It should be noted (and possibly should be expressed in article 1) that the model law prevails over other provisions only in respect of those subject-matters and questions covered by the model law. Therefore, other provisions of national law remain applicable if they deal with issues which, though relevant to international commercial arbitration, have been left outside the model law (e.g. capacity of parties to conclude arbitration agreement, impact of State immunity, consolidation of arbitral proceedings, competence of arbitral tribunal to adapt contracts, contractual relations between arbitrators and parties or arbitration bodies, fixing of fees and requests for deposits, security for fees or costs, period of time for enforcement of arbitral award).

B. Model law yields to treaty law

9. According to paragraph (1) of article 1, "this Law" applies "subject to any multilateral or bilateral agreement which has effect in this State". This proviso might be regarded as superfluous since the priority of treaty law would follow in most, if not all, legal systems from the internal hierarchy of sources of law. Nevertheless, it has been retained as a useful declaration of the legislative intent not to affect the validity and operation of multilateral and bilateral agreements in force in State X.

10. The proviso would be of primary relevance with regard to treaties devoted to the same subject-matter as that dealt with in the model law. Prominent examples of such multilateral treaties are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958; hereinafter referred to as "1958 New York Convention"), the European Convention on International Commercial Arbitration (Geneva, 1961; hereinafter referred to as "1961 Geneva Convention"), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965; hereinafter referred to as "1965 Washington Convention"), and the Inter-American Convention on International Commercial Arbitration (Panama, 1975). 19/

11. It should be noted, however, that the scope of the proviso is wider in that it also covers treaties which are devoted to other subject-matters but contain provisions on arbitration. An example would be the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), which, by its article 22(3), reduces the effect of an original agreement on the place of

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19/ Another important such treaty is the "Convention on the Decision by way of Arbitration of Civil Litigations Resulting from Relations of Economic and Scientific-technological Co-operation" (Moscow, 1972) which, however, deals primarily with compulsory arbitration, while the model law is designed for consensual arbitration only (see below, para. 15).

arbitration by providing some alternative places at the option of the claimant. 20/ This provision, if in force in State X and applicable to the case at hand, would prevail over article 20 of the model law which recognizes the freedom of the parties to agree on the place of arbitration and gives full effect to such choice, whether made before or after the dispute has arisen.

C. Substantive scope of application: "international commercial arbitration"

12. The substantive scope of application of the model law, as expressed in its title, is "international commercial arbitration". This widely used term consists of three elements which are in the model law defined, illustrated or accompanied by a declaratory remark.

I. "Arbitration"

13. The model law, like most conventions and national laws on arbitration, does not define the term "arbitration". It merely clarifies, in its article 7(1), that it covers any arbitration "whether or not administered by a permanent arbitral institution". Thus, it applies to pure ad hoc arbitration and to any type of administered or institutional arbitration.

20/ A/CONF.89/13, Annex I. See Official Records of the United Nations Conference on the Carriage of Goods by Sea, United Nations Publication, Sales No. E.80.VIII.1.

Article 22(3), (5), (6) of the "Hamburg Rules" reads as follows:

> "3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:
>
> (a) a place in a State within whose territory is situated:
>
> (i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or
>
> (ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or
>
> (iii) the port of loading or port of discharge; or
>
> (b) any place designated for that purpose in the arbitration clause or agreement.
>
> . . . .
>
> 5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.
>
> 6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen."

14. Of course, the term "arbitration" is not to be construed as referring only to on-going arbitrations, i.e. arbitral proceedings. It relates also to the time before and after such proceedings, as is clear, for example, from the provisions on recognition of arbitration agreements and, later, of arbitral awards.

15. While the model law is generally intended to cover all kinds of arbitration, two qualifications should be mentioned here which are not immediately apparent from the text but may be expressed by any State adopting the model law. 21/ The model law is designed for consensual arbitration, i.e. arbitration based on voluntary agreement of the parties (as regulated in article 7(1)); thus, it does not cover compulsory arbitration. Also not covered are the various types of so-called "free arbitration" such as the Dutch bindend advies, the German Schiedsgutachten or the Italian arbitrato irrituale.

II. "Commercial"

16. The term "commercial" has been left undefined in the model law, as in conventions on international commercial arbitration. Although a clear-cut definition would be desirable, no such definition, which would draw a precise line between commercial and non-commercial relationships, could be found. Yet, it was deemed undesirable to leave the matter to the individual States or to provide some guidance for uniform interpretation merely in the session reports of the Working Group or any commentary on the model law. As an intermediate solution, a footnote is annexed to article 1 as an aid in the interpretation of the term "commercial".

17. As regards the form, there may be some uncertainty as to the addressee and the legal effect of this footnote, since such legislative technique is not used in all systems. At the least, the footnote could provide some guidance to the legislator of a State even where it would not be reproduced in the national enactment of the model law. A more far reaching use, which the Commission may wish to recommend, would be to retain the footnote in the national enactment and, thus, to provide some guidance in the application and interpretation of "this Law".

18. The content of the footnote reflects the legislative intent to construe the term commercial in a wide manner. This call for a wide interpretation is supported by an illustrative list of commercial relationships. Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquified gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business. Of course, the fact that a transaction is covered by the model law by virtue of its commercial nature does not necessarily mean that all disputes arising from the transaction are capable of settlement by arbitration (as to the requirement of arbitrability, see commentary to article 7, para. 5).

21/ A/CN.9/216, para. 17.

19. The footnote, while not giving a clear-cut definition, provides guidance for an autonomous interpretation of the term "commercial"; it does not refer, as does the 1958 New York Convention (article I(3)), to what the existing national law regards as commercial. Therefore, it would be wrong to apply national concepts which define as commercial, for example, only those types of relationship dealt with in the commercial code or only those transactions the parties to which are commercial persons.

20. This latter idea of preclusion had been expressed in a previous draft of the footnote by the words (following the first sentence): "irrespective of whether the parties are 'commercial persons' (merchants) under any given national law". This wording, which was exclusively intended to clarify that the commercial nature of the relationship is not dependent on the qualification of the parties as merchants (as used in some national laws for distinguishing between commercial and civil relationships), was nevertheless deleted lest it might be construed as dealing with the issue of State immunity. 22/

21. In this connection, it may be noted that the model law does not touch upon the sensitive and complex issue of State immunity. For example, it does not say whether the signing of an arbitration agreement by a State organ or governmental agency constitutes a waiver of any such immunity. On the other hand, it seems equally noteworthy that the model law covers those relationships to which a State organ or governmental entity is a party, provided, of course, the relationship is of a commercial nature.

III. "International", paragraph (2)

22. In accordance with the mandate of the Commission, the model law is designed to establish a special regime for international cases. It is in these cases that the present disparity between national laws creates difficulties and adversely affects the functioning of the arbitral process. Furthermore, in these cases more flexible and liberal rules are needed in order to overcome local constraints and peculiarities. Finally, in these cases the interest of a State in maintaining its traditional concepts and familiar rules is less strong than in a strictly domestic setting. However, despite this design and legislative self-restraint, any State is free to take the model law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law.

23. Unless a State opts for such unitary treatment, the test of "internationality" set forth in article 1(2) is of utmost importance and crucial for the applicability of "this Law". Since it determines whether a given case would be governed by the special regime embodied in the model law or by the law on domestic arbitration, the definition should be as precise as possible so as to provide certainty to all those concerned. Unfortunately, the search for an appropriate test reveals a dilemma: A precise formula tends to be too narrow to cover all cases encountered in the practice of international commercial arbitration; and the wider the scope of the test the more it is likely to lack precision. The solution presented in paragraph (2) starts with a rather precise criterion in sub-paragraph (a), which covers the great bulk of worthy cases, and then widens its scope in sub-paragraphs (b) and (c) with an increasing reduction in precision.

22/ A/CN.9/246, para. 158.

Parties' places of business in different States, sub-paragraph (a)

24. The basic criterion, laid down in sub-paragraph (a), is modelled on the test of internationality adopted in article 1(1) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; 23/ hereinafter referred to as "1980 Vienna Sales Convention"). It uses as determining factor the location of the places of business of the parties to the arbitration agreement. Accordingly, other characteristics of a party such as its nationality or place of incorporation or registration are not determinative.

25. Since a given case is international if the parties have their places of business "in different States", it is irrelevant whether any of these States is State X (i.e. the one enacting "this Law"). Included are, thus, any arbitration between "foreigners" (e.g. parties with place of business in State Y and State Z) and any arbitration between a party in State X and a party in a foreign State (Y). However, whether and to what extent this Law would apply in any such international case is a different question, to be answered according to other rules on the scope of application (discussed above, paras. 4-6). While articles 8, 9, 35 and 36, dealing with recognition of arbitration agreements and awards by the courts of State X, apply without regard to the place of arbitration or any choice of procedural law, the remaining bulk of provisions, dealing in particular with arbitration procedure, would apply only if the case falls within the territorial scope of application.

Other relevant places, sub-paragraph (b)

26. Either of the places listed in sub-paragraph (b) establishes an international link if situated in a State other than the one where the parties have their places of business. Again, it is without relevance to the test of internationality whether any of these States is State X. Thus, an arbitration would be international under sub-paragraph (b) in any of the following situations: Parties' places of business in State X and other relevant place in State Y; parties' places of business in State Y and other relevant place in State X; parties' places of business in State Y and other relevant place in State Z. However, whether in fact "this Law" would apply in full depends, again, on whether the case falls within the territorial scope of application. 24/

23/ A/CONF.97/18, Annex I. See Official Records of the United Nations Conference on Contracts for the International Sale of Goods, United Nations Publication, Sales No. E.81.IV.3.

24/ In particular with regard to sub-paragraph (i), it is noteworthy that "this Law" would apply in full only if the place of arbitration is in State X, assuming that the strict territorial criterion is adopted. The thrust of sub-paragraph (i) is thus to cover cases where the parties have their places of business not in State X but in another State (provided that the latter State does not prohibit these "domestic" parties to select a foreign place of arbitration).

27. The places listed in sub-paragraph (b) relate either to the arbitration (sub-paragraph (i)) or to the subject-matter of the relationship or the dispute (sub-paragraph (ii)). The first relevant place is the place of arbitration, as the only arbitration-related criterion. Thus, the international link would not be established by any other arbitration-related element such as appointment of foreign arbitrator or choice of foreign procedural law (if permissible).

28. The place of arbitration is relevant if determined in, or pursuant to, the arbitration agreement. Where the place of arbitration is specified in the arbitration agreement, the parties know from the start whether their case is international under sub-paragraph (i). Where the place of arbitration is determined pursuant to the agreement, there may be a long period of uncertainty about this point. It is submitted that this requirement would not be met by a stipulation authorizing the arbitral tribunal to determine the place of arbitration.

29. Under sub-paragraph (ii), internationality is established if a substantial part of the obligations of the commercial relationship is to be performed in a State other than the one where the parties have their places of business. This would be the case, for example, where a producer and a trader conclude a sole distributorship agreement concerning a foreign market or where a general contractor employs an independent sub-contractor for certain parts of a foreign construction project. While the arbitration agreement must cover any dispute or certain disputes arising out of this relationship, it is not necessary that the dispute itself relates to the international element.

30. Even where no substantial part of the obligations is to be performed abroad, an arbitration would be international under sub-paragraph (ii) if the subject-matter of the dispute is most closely connected with a foreign place. Since instances of this kind will be very exceptional, one may accept the disadvantage of this criterion which lies in the fact that the international character cannot be determined before the dispute arises.

Yet other international link, sub-paragraph (c)

31. The final criterion, laid down in sub-paragraph (c), is that "the subject-matter of the arbitration agreement is otherwise related to more than one State". This "residual" test is designed to catch all worthy cases, not covered by sub-paragraphs (a) or (b); it is apparent that this wide scope is accompanied by a considerable degree of imprecision. It may be added that "the subject-matter of the arbitration agreement" is not to be construed as referring to the arbitration itself but to the substantive matters that may be subject to arbitration.

Determination of place of business, paragraph (3)

32. If a party has two or more places of business, one of which is in the same State as is the other party's place of business, it is necessary to determine which of his places is relevant for the purposes of paragraph (2). According to paragraph (3), first sentence, it is the one which has the closest relationship to the arbitration agreement. An instance of such close relationship would be that a contract, including an arbitration clause, is fully negotiated by the branch or office in question, even if it is signed at another place (e.g. the principal place of business).

33. As indicated in this example, the location of the principal place of business (or head office) is irrelevant. If one were to take the principal place of business as the decisive criterion, one would have a somewhat wider application of the model law since it would cover also those cases where the "closely connected" place of business, but not the principal place of business, is in the same State as is the other party's place of business. Nevertheless, the criterion of "closest connection" was adopted because it was thought to reflect better the expectations of the parties and, in particular, for the sake of consistency with the 1980 Vienna Sales Convention (article 10(a)). 25/

34. The second sentence of paragraph (3) deals with the rare situation that a person involved in a commercial transaction does not have an established "place of business". In such case, his habitual residence would be the decisive place for the purposes of paragraph (2).

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Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(b) "court" means a body or organ of the judicial system of a country;

(c) where a provision of this Law leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

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

(e) unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known place of business, habitual residence or mailing address. The communication shall be deemed to have been received on the day it is so delivered.

25/ In this Convention the test serves two purposes which tend to balance overall the effects of widening or narrowing the scope of application. One is, as in the model law, to distinguish between strictly domestic cases and those of an international character; the other one, foreign to the model law, is to distinguish between those international cases where the parties have their places in Contracting States and those international cases where one party has his place of business in a non-contracting State.

REFERENCES

A/CN.9/233, paras. 75, 101-102
A/CN.9/245, paras. 28, 169-172
A/CN.9/246, paras. 172-173

COMMENTARY

"Arbitral tribunal" and "court" defined, paragraphs (a) and (b)

1. The definition of the terms "arbitral tribunal" and "court" may be regarded as self-evident and, thus, superfluous. However, they have been retained, in particular, for a terminological reason. Their juxtaposition is intended to draw a clear distinction between the two different types of dispute settlement organs. This is to avoid, for example, the misunderstanding, possible in languages such as French and Spanish, that the word "tribunal" is an abbreviated form of the term "tribunal arbitral" or that the term "court" would include any arbitration body or administering institution bearing the name "court" (e.g. ICC Court of Arbitration or London Court of International Arbitration).

2. Paragraph (b) simply refers to, without interfering with, the national judicial system, which is not necessarily the system of State X (cf. articles 9, 35(3), 36(1)(a)(v), (2)). Taking into account the varied nomenclature, the term "court" is not restricted to those organs actually called "court" in a given country but would include any other "competent authority" (such is the expression used in the 1958 New York Convention). The reference to the judicial system of "a country" (instead of "a State") has been used for the sole purpose of avoiding the misconception, possible in a federation of states, that merely "state courts" are covered but not "federal courts". 26/

Interpretation of "parties' freedom" and "agreement", paragraphs (c) and (d)

3. Paragraphs (c) and (d) are designed to prevent too literal an interpretation of the references in the model law to the parties' freedom to determine an issue or to their agreement. According to the reasonable interpretation laid down in paragraph (c), such freedom covers the liberty of the parties not only to decide the issue themselves but also to authorize a third person or institution to determine the issue on their behalf. Practical examples of such issues would be the number of arbitrators, the place of arbitration and other procedural points.

4. Paragraph (d) recognizes the common practice of parties to refer in their agreement to arbitration rules (of institutions, associations or other bodies), instead of negotiating and drafting a fully original and individual ("one-off") arbitration agreement. A general rule of interpretation seems preferable to including a clarification in each of the many provisions of the model law where this matter may be relevant.

26/ The Commission may wish to examine the appropriateness of the term "country", used also in articles 35(1), (3) and 36(1), with a view to achieving consistency throughout the model law by using exclusively the expression "State".

5. Paragraphs (c) and (d) are overlapping rules in that the freedom to determine an issue (under (c)) is included in the notion that the parties may agree (under (d)) and in that the authorization of a third party (under (c)) is often envisaged in arbitration rules (under (d)). However, this is not so in all cases: an authorization may be added to the regime established by arbitration rules (e.g. designation of an appointing authority), it may be made to replace a provision in these rules, or it may be made in a "one-off" arbitration agreement.

"Receipt of communication" defined, paragraph (e)

6. Paragraph (e), which is modelled on article 2(1) of the UNCITRAL Arbitration Rules, lists a variety of instances in which a written communication, by a party or the arbitral tribunal, "is deemed to have been received". Despite this latter wording, the list starts with instances of actual (i.e. non-fictional) receipt and then enters into the realm of legal fiction. The last sentence makes it clear that any such instance is not only conclusive of the fact of receipt but also determines the date of receipt.

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(Article 3 deleted) 27/

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Article 4. Waiver of right to object

A party who knows or ought to have known that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

REFERENCES

A/CN.9/233, para. 66
A/CN.9/245, paras. 176-178
A/CN.9/246, paras. 178-182

27/ Previous draft article 3 was deleted by the Working Group at its seventh session (A/CN.9/246, paras. 174-177). In order to avoid confusion, the necessary re-numbering of articles has been postponed until the final stages of the revision of the draft by the Commission.

COMMENTARY

1. Where a procedural requirement, whether laid down in the model law or in the arbitration agreement, is not complied with, any party has a right to object with a view to getting the procedural defect cured. Article 4 implies a waiver of this right under certain conditions, based on general principles such as "estoppel" or "venire contra factum proprium".

2. The first condition is that the procedural requirement, which has not been complied with, is contained either in a non-mandatory provision of the model law or in the arbitration agreement. The restriction of this rule to provisions of law from which the parties may derogate was adopted on the ground that an estoppel rule which also covered fundamental procedural defects would be too rigid. It may be mentioned, however, that the model law contains specific rules concerning objections with regard to certain fundamental defects such as lack of a valid arbitration agreement or the arbitral tribunal's exceeding its mandate (article 16(2)). As regards non-compliance with a requirement under the arbitration agreement, it may be noted that the procedural stipulation by the parties must be valid and, in particular, not be in conflict with a mandatory provision of "this Law".

3. The second condition is that the party knew or ought to have known of the non-compliance. It is submitted that the expression "ought to have known" should not be construed as covering every kind of negligent ignorance but merely those instances where a party could not have been unaware of the defect. This restrictive interpretation, which might be expressed in the article, seems appropriate in view of the principle which justifies statutory impliance of a waiver.

4. The third condition is that the party does not state his objection without delay or, if a time-limit is provided therefor, within such period of time. This latter reference to time is, logically speaking, the first one to be examined since a time-limit, whether provided for in the model law or the arbitration agreement, has priority over the general formula "without delay".

5. There is yet another condition which should not be overlooked. A party loses his right to object only if, without stating his objection, he proceeds with the arbitration. Acts of such "proceeding" would include, for example, appearance at a hearing or a communication to the arbitral tribunal or the other party. Therefore, a party would not be deemed to have waived his right if, for instance, a postal strike or similar impediment prevented him for an extended period of time from sending any communication at all.

6. Where, by virtue of article 4, a party is deemed to have waived his right to object, he is precluded from raising the objection during the subsequent phases of the arbitral proceedings and, what may be of greater practical relevance, after the award is rendered. In particular, he may not then invoke the non-compliance as a ground for setting aside the award or as a reason for refusing its recognition or enforcement. Of course, a waiver has this latter effect only in cases where article 4 is applicable, i.e. with regard to those awards which are made "under this Law" (whatever criterion may be adopted for the territorial scope of application). It is submitted that a court from which recognition or enforcement of any other award is sought could also disregard late objections of a party by applying any similar rule of the applicable procedural law or the general idea of estoppel.

* * *

Article 5. Scope of court intervention

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

REFERENCES

A/CN.9/233, paras. 69-73
A/CN.9/245, paras. 183-184
A/CN.9/246, paras. 183-188

COMMENTARY

1. This article relates to the crucial and complex issue of the role of courts with regard to arbitrations. The Working Group adopted it on a tentative basis and invited the Commission to reconsider that decision in the light of comments by Governments and international organizations. 28/ In assessing the desirability and appropriateness of this provision the following considerations should be taken into account.

2. Although the provision, due to its categorical wording, 29/ may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the model law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the model law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.

3. Consequently, the desired balance between the independence of the arbitral process and the intervention by courts should be sought by expressing all instances of court involvement in the model law but cannot be obtained within article 5 or by its deletion. The Commission may, thus, wish to consider whether any further such instance need be included, in addition to the various instances already covered in the present text. These are not only the functions entrusted to the Court specified in article 6, i.e. the functions referred to in articles 11(3), (4), 13(3), 14 and 34(2), but also those instances of court involvement envisaged in articles 9 (interim measures of protection), 27 (assistance in taking evidence), 35 and 36 (recognition and enforcement of awards).

28/ A/CN.9/246, para. 186.

29/ A less categorical wording was suggested at the seventh session of the Working Group but was not adopted: "In matters governed by this Law concerning the arbitral proceedings or the composition of the arbitral tribunal, courts may exercise supervisory or assisting functions only if so provided in this Law" (A/CN.9/246, paras. 183-184).

4. Another important consideration in judging the impact of article 5 is that the above necessity to list all instances of court involvement in the model law applies only to the "matters governed by this Law". The scope of article 5 is, thus, narrower than the substantive scope of application of the model law, i.e. "international commercial arbitration" (article 1), in that it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the model law.

5. Article 5 would, therefore, not exclude court intervention in any matter not regulated in the model law. Examples of such matters include the impact of State immunity, the contractual relations between the parties and the arbitrators or arbitral institution, the fees and other costs, including security therefor, as well as other issues mentioned above in the discussion on the character of the model law as "lex specialis" where the same distinction has to be made. 30/

6. It is submitted that the distinction is reasonable, even necessary, although it is not in all cases easily made. For example, article 18 governs the arbitral tribunal's ordering of interim measures of protection, by implying an otherwise doubtful power, but it does not regulate the possible enforcement of these orders. A State would, thus, not be precluded (by article 5) from either empowering the arbitral tribunal to take itself certain measures of compulsion (as known in some legal systems) or providing for enforcement by courts (as known in other systems). 31/ On the other hand, where the model law, for example, grants the parties freedom to agree on a certain point (e.g. appointment of arbitrator, article 11(2)), the matter is thereby fully regulated, to the exclusion of court intervention (e.g. any court confirmation, as required under some laws even in the case of a party-appointed arbitrator).

* * *

Article 6. Court for certain functions of arbitration assistance and supervision

The Court with jurisdiction to perform the functions referred to in articles 11 (3), (4), 13 (3), 14 and 34 (2) shall be the ... (blanks to be filled by each State when enacting the model law).

REFERENCES

A/CN.9/232, paras. 89-98
A/CN.9/233, paras. 82-86
A/CN.9/245, paras. 190-191
A/CN.9/246, paras. 189-190

30/ See commentary to article 1, para. 8.
31/ See commentary to article 18, para. 4.

COMMENTARY

1. Article 6 calls upon each State adopting the model law to designate a particular Court which would perform certain functions of arbitration assistance and supervision. The functions referred to in this article relate to the appointment of an arbitrator (article 11(3), (4)), the challenge of an arbitrator (article 13(3)), the termination of the mandate of an arbitrator because of his failure to act (article 14) and the setting aside of an arbitral award (article 34(2)).

2. To concentrate these arbitration-related functions in a specific Court is expected to result in the following advantages. It would help parties, in particular foreign ones, more easily to locate the competent court and obtain information on any relevant features of that "Court", including its policies adopted in previous decisions. Even more beneficial to the functioning of international commercial arbitration would be the expected specialization of that Court.

3. Although these two advantages would best be achieved by a full centralization, the designation of a Court does not necessarily mean that it will in fact be only one individual court in each State. In particular larger countries may wish to designate one type or category of courts, for example, any commercial courts or commercial chambers of district courts.

4. The designated Court need not necessarily be a full court or a chamber thereof. It may well be, for example, the president of a court or the presiding judge of a chamber for those functions which are of a more administrative nature and where speed and finality are particularly desirable (i.e. articles 11, 13 and 14). To what extent this further expected advantage will materialize depends on each State's provisions on court organization or procedure, whether they already exist or are adopted together with "this Law". It is submitted that a State may entrust these administrative functions even to a body outside its court system, for example, a national arbitration commission or institution handling international cases.

* * *

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

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

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

REFERENCES

A/CN.9/216, paras. 22-24, 26
A/CN.9/232, paras. 37-46
A/CN.9/233, paras. 61-68
A/CN.9/245, paras. 179-182
A/CN.9/246, paras. 17-19

COMMENTARY

Definition (and recognition), paragraph (1)

1. Paragraph (1) describes the important legal instrument which forms the basis and justification of an arbitration. The term "arbitration agreement" is defined along the lines of article II(1) of the 1958 New York Convention; as more clearly expressed in that Convention, there is an implied guarantee of recognition which goes beyond a mere definition.

2. The model law recognizes not only an agreement concerning an existing dispute ("compromis") but also an agreement concerning any future dispute ("clause compromissoire"). Inclusion of this latter type of agreement seems imperative in view of its frequent use in international arbitration practice and will, it is hoped, contribute to global unification in view of the fact that at present some national laws do not give full effect to this type.

3. The model law recognizes an arbitration agreement irrespective of whether it is in the form of an arbitration clause contained in a contract or in the form of a separate agreement. Thus, any existing national requirement that the agreement be in a separate document would be abolished. By the nature of things, an arbitration clause in a contract would be appropriate for future disputes, while a separate agreement is suitable not only for an existing dispute but also for any future disputes.

4. The model law recognizes an arbitration agreement if the existing or future dispute relates to a "defined legal relationship, whether contractual or not". It is submitted that the expression "defined legal relationship" should be given a wide interpretation so as to cover all non-contractual commercial cases occurring in practice (e.g. third party interfering with contractual relations; infringement of trade mark or other unfair competition).

5. The model law provisions on the arbitration agreement do not retain the requirement, expressed in article II(1) of the 1958 New York Convention, that the dispute concern "a subject-matter capable of settlement by arbitration". However, this does not mean that the model law would give full effect to any arbitration agreement irrespective of whether the subject-matter is arbitrable. The Working Group, when discussing pertinent proposals, recognized the importance of the requirement of arbitrability but saw no need for an express provision. 32/ It was noted, for example, that an arbitration agreement covering a non-arbitrable subject-matter would normally, or at least in some jurisdictions, be regarded as null and void and that the issue of non-arbitrability was adequately addressed in articles 34 and 36. 33/ In this connection, it may be noted that the Working Group decided at an early stage not to deal with the material validity of the arbitration agreement and not to attempt to achieve unification or at least certainty as to which subject-matters are non-arbitrable, either by listing them in the model law or calling upon each State to list them exclusively in "this Law". 34/

Requirement of written form, paragraph (2)

6. The model law follows the 1958 New York Convention in requiring written form, although, in commercial arbitration, oral agreements are not unknown in practice and are recognized by some national laws. In a way, the model law is even stricter than that Convention in that it disallows reliance on a "more favourable provision" in the subsidiary national law (on domestic arbitration), as would be possible under that Convention by virtue of its article VII(1). The model law is intended to govern all international commercial arbitration agreements and, as provided in article 7(2), requires that they be in writing. 35/ However, non-compliance with that requirement may be cured by submission to the arbitral proceedings, i.e. participation without raising the plea referred to in article 16(2). 36/

7. The definition of written form is modelled on article II(2) of the 1958 New York Convention but with two useful additions. It widens and clarifies the range of means which constitute a writing by adding "telex or other means of telecommunication which provide a record of the agreement", in order to cover modern and future means of communication.

32/ A/CN.9/246, para. 23; similarly A/CN.9/245, para. 187; cf. also A/CN.9/232, para. 40.

33/ As regards article 34, where the inclusion of the non-arbitrability of the subject-matter is controversial, see commentary to article 34, para. 12.

34/ A/CN.9/216, paras. 25, 30-31.

35/ A/CN.9/233, para. 66; A/CN.9/232, para. 46.

36/ As to the possible need for modifying article 35(2) in order to accommodate the situation of a cured defect of form, see footnote 91.

8. The second addition, contained in the last sentence, is intended to clarify a matter, which, in the context of the 1958 New York Convention, has led to problems and divergent court decisions. It deals with the not infrequent case where parties, instead of including an arbitration clause in their contract, refer to a document (e.g. general conditions or another contract) which contains an arbitration clause. The reference constitutes an arbitration agreement if it is such as to make that clause part of the contract and, of course, if the contract itself meets the requirement of written form as defined in the first sentence of paragraph (2). As the text clearly states, the reference need only be to the document; thus, no explicit reference to the arbitration clause contained therein is required. 37/

* * *

Article 8. Arbitration agreement and substantive claim before court

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where, in such case, arbitral proceedings have already commenced, the arbitral tribunal may continue the proceedings while the issue of its jurisdiction is pending with the court.

REFERENCES

A/CN.9/216, paras. 35-36
A/CN.9/232, paras. 49-51, 146, 151
A/CN.9/233, paras. 74-81
A/CN.9/245, paras. 66-69, 185-187
A/CN.9/246, paras. 20-23

COMMENTARY

1. Article 8 deals with an important "negative" effect of an arbitration agreement. The agreement to submit a certain matter to arbitration means that this matter shall not be heard and decided upon by any court, irrespective of whether this exclusion is expressed in the agreement. If, nevertheless, a party starts litigation the court shall refer the parties to arbitration unless it finds the agreement to be null and void, inoperative or incapable of being performed.

37/ Cf. A/CN.9/246, para. 19.

2. Article 8 is closely modelled on article II(3) of the 1958 New York Convention, with two useful elements added. Due to the nature of the model law, article 8(1) of "this Law" is addressed to all courts of State X; it is not limited to agreements providing for arbitration in State X and, thus, wide acceptance of the model law would contribute to the universal recognition and effect of international commercial arbitration agreements.

3. As under the 1958 New York Convention, the court would refer the parties to arbitration, i.e. decline (the exercise of its) jurisdiction, only upon request by a party and, thus, not on its own motion. A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute. It is submitted that this point of time should be taken literally and applied uniformly in all legal systems, including those which normally regard such a request as a procedural plea to be raised at an earlier stage than any pleadings on substance.

4. As regards the effect of a party's failure to invoke the arbitration agreement by way of such a timely request, it seems clear that article 8(1) prevents that party from invoking the agreement during the subsequent phases of the court proceedings. It may be noted that the Working Group, despite the wide support for the view that the failure of the party should preclude reliance on the agreement also in other proceedings or contexts, decided not to incorporate a provision on such general effect because it would be impossible to devise a simple rule which would satisfactorily deal with all the aspects of this complex issue. 38/

5. Another addition to the original text in the 1958 New York Convention is the rule in paragraph (2) which confirms that paragraph (1) applies irrespective of whether arbitral proceedings have already commenced. It empowers an arbitral tribunal to continue the arbitral proceedings (if governed by "this Law") while the issue of its jurisdiction is pending with a court. The purpose of giving such discretion to the arbitral tribunal is to reduce the risk and effect of dilatory tactics of a party reneging on his commitment to arbitration.

* * *

Article 9. Arbitration agreement and interim measures by court

It is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

38/ A/CN.9/246, para. 22.

REFERENCES

A/CN.9/216, para. 39
A/CN.9/232, paras. 52-56
A/CN.9/233, paras. 74, 81
A/CN.9/245, paras. 185, 188-189
A/CN.9/246, paras. 24-26

COMMENTARY

1. Article 9 relates - like article 8 - to recognition and effect of the arbitration agreement but in another respect. It lays down the principle, disputed in some jurisdictions, that resort to a court and subsequent court action with regard to interim measures of protection are compatible with an arbitration agreement. It, thus, makes it clear that the "negative" effect of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regard to such interim measures. The main reason is that the availability of such measures is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results.

2. Article 9 expresses the principle of compatibility in two directions with different scope of application. According to the first part of the provision, a request by a party for any such court measures is not incompatible with the arbitration agreement, i.e. neither prohibited nor to be regarded as a waiver of the agreement. This part of the rule applies irrespective of whether the request is made to a court of State X or of any other country. Wherever it may be made, it may not be invoked or treated as an objection against, or disregard of, a valid arbitration agreement under "this Law", i.e. in arbitration cases falling within its territorial scope of application or in the context of articles 8 and 36.

3. However, the second part of the provision is addressed only to the courts of State X and declares their measures to be compatible with an arbitration agreement irrespective of the place of arbitration. Assuming wide adherence to the model law, these two parts of the provision would supplement each other and go a long way towards global recognition of the principle of compatibility, which, in the context of the 1958 New York Convention, has not been uniformly accepted.

4. The range of interim measures of protection covered by article 9 is considerably wider than that under article 18, due to the different purposes of these two articles. Article 18 deals with the limited power of the arbitral tribunal to order any party to take an interim measure of protection in respect of the subject-matter of the dispute and does not deal with enforcement of such orders. Article 9 deals with the compatibility of the great variety of possible measures by courts available in different legal systems, including not only steps by the parties to conserve the subject-matter or to secure evidence but also other measures, possibly required from a third party, and their enforcement. This would, in particular, include pre-award attachments and any similar seizure of assets.

5. It may be noted that the model law does not deal with the possible conflict between an order by the arbitral tribunal under article 18 and a court decision under article 9 relating to the same object or measure of protection. However, it is submitted that the potential for such conflict is rather small in view of the above disparity of the range of measures covered by the two articles.

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CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

REFERENCES

A/CN.9/216, paras. 46-48
A/CN.9/232, paras. 78-82
A/CN.9/233, paras. 92-93
A/CN.9/245, paras. 194-195
A/CN.9/246, paras. 27-28

COMMENTARY

1. Article 10 is the first article presenting and illustrating the "two-level system" so typical of the model law. The first provision falls in the category of articles which recognize the parties' freedom and give effect to their agreement, to the exclusion of any existing national law provision on the issue. 39/ The second provision falls in the category of suppletive rules which provide those parties failing to regulate the procedure by agreement with a set of rules for getting the arbitration started and proceeding to a final settlement of the dispute. 40/

2. Paragraph (1) recognizes the parties' freedom to determine the number of arbitrators. Thus, the choice of any number would be given effect, even in those legal systems which at present require an uneven number. As generally stated in article 2(c), the freedom of the parties is not limited to determining the issue themselves but includes the right to authorize a third party to make that determination.

39/ Cf. A/CN.9/207, para. 13.
40/ Cf. A/CN.9/207, paras. 17-18.

3. For those cases where the number of arbitrators has not been determined in advance or cannot be determined in time, paragraph (2) prevents a possible delay or deadlock by supplying the number. The number three was adopted, as in the UNCITRAL Arbitration Rules (article 5), in view of the fact that it appears to be the most common number in international commercial arbitration. However, arbitrations conducted by a sole arbitrator are also common, in particular in less complex cases. It is thought that those parties who want only one arbitrator for the sake of saving time and costs would normally agree thereon, with an inducement to do so added by this paragraph.

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Article 11. Appointment of arbitrators

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

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days after having been requested to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Court specified in article 6.

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

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

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

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

any party may request the Court specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the Court specified in article 6 shall be final. The Court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

REFERENCES

A/CN.9/216, paras. 41, 49-50
A/CN.9/232, paras. 73-74, 83-88
A/CN.9/233, paras. 87-88, 94-100
A/CN.9/245, paras. 192-193, 196-201
A/CN.9/246, paras. 29-32

COMMENTARY

No legislative discrimination of foreign nationals, paragraph (1)

1. Some national laws preclude foreigners from acting as arbitrators even in international cases. Paragraph (1) is designed to overcome such national bias on the part of the legislator. 41/ As indicated by the words "unless otherwise agreed by the parties", it is not intended to preclude parties (or trade associations or arbitral institutions) from specifying that nationals of certain States may, or may not, be appointed as arbitrators.

Freedom to agree on appointment procedure, paragraph (2)

2. Paragraph (2) recognizes the freedom of the parties to agree on a procedure of appointing the arbitrator or arbitrators. This freedom to agree is to be given a wide interpretation in accordance with the general provisions of article 2(c) and (d).

3. The scope of the parties' freedom is, however, somewhat limited by the mandatory provisions in paragraphs (4) and (5). Parties may not exclude, in their agreement on the appointment, the right of a party under paragraph (4) to resort to the Court specified in article 6 in any of the situations described in that paragraph, or exclude the finality of the Court's decision provided for in paragraph (5). 42/

41/ At the sixth session of the Working Group, a concern was expressed that it would be difficult to implement this provision in States where nationals of certain other States were precluded from serving as arbitrators; it was noted in response that the model law, not being a convention, would not exclude the possibility for a State to reflect its particular policies in national legislation (A/CN.9/245, para. 193).

42/ It is submitted that the last part of paragraph (5) relating to the appointment of a sole or third arbitrator should not be mandatory (see below, para. 8).

Court assistance in agreed appointment procedure, paragraph (4)

4. Paragraph (4) describes three possible defects in typical appointment procedures and provides a cure thereof by allowing any party to request the Court specified in article 6 to take the necessary measure instead (i.e. instead of the "failing" party, persons or authority referred to in sub-paragraphs (a), (b) or (c)). Assistance by this Court is provided in order to avoid any deadlock or undue delay in the appointment process. Such assistance is not needed if the parties themselves have, in their agreement on the appointment procedure, provided other means for securing the appointment. It may be noted, however, that the mere designation of an appointing authority is not fully sufficient in this regard since it would not meet the contingency described in sub-paragraph (c).

Suppletive rules on appointment procedure, paragraph (3)

5. Paragraph (3) supplies those parties that have not agreed on a procedure for the appointment with a system for appointing either three arbitrators or one arbitrator, these numbers being the two most common ones in international cases. Sub-paragraph (a) lays down the rules for the appointment of three arbitrators, whether this number has been agreed upon by the parties under article 10(1) or whether it follows from article 10(2). Sub-paragraph (b) lays down the method of appointing a sole arbitrator for those cases where the parties have made no provision for the appointment, except to agree on the number (i.e. one).

6. In both cases a last resort to the Court specified in article 6 is envisaged in order to avoid any deadlock in the appointment process. There is a difference, however, as regards the time element. While sub-paragraph (a) sets twice a time-limit (of thirty days) for the sake of certainty, sub-paragraph (b) does not fix a time-limit but merely refers to the parties' inability to agree. This general wording seems acceptable in this latter case since the persons expected to agree are the parties and their inability to do so becomes apparent from the request to the Court by one of them.

Rules and guidelines for decision of Court, paragraph (5)

7. According to paragraph (5), the decision of the Court shall be final, whether it relates to a matter entrusted to it by the suppletive rules of paragraph (3) or by the mandatory provision of paragraph (4) in cases where an agreed appointment procedure fails to secure the appointment. Finality seems appropriate in view of the administrative nature of the function and essential in view of the need to constitute the arbitral tribunal as soon as possible.

8. In any case of appointment, the Court shall have due regard to any qualifications required by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is submitted that these criteria are binding since they follow from the arbitration agreement or, as regards impartiality and independence, from article 12, while the special guideline for the appointment of a sole or third arbitrator could be invalidated by a contrary stipulation of the parties.

* * *

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

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

REFERENCES

A/CN.9/216, paras. 42-43
A/CN.9/232, paras. 57-60
A/CN.9/233, paras. 103-106
A/CN.9/245, paras. 202-204
A/CN.9/246, paras. 33-34

COMMENTARY

1. Article 12 implements in two ways the principle that arbitrators shall be impartial and independent. Paragraph (1) requires any prospective or appointed arbitrator to disclose promptly any circumstances likely to cast doubt on his impartiality or independence. Paragraph (2) lays the basis for securing impartiality and independence by recognizing those circumstances which give rise to justifiable doubts in this respect as reasons for a challenge.

2. The duty of a prospective arbitrator to disclose any circumstances of the type referred to in paragraph (1) is designed to inform and alert the person approaching him at an early stage about possible doubts and, thus, helps to prevent the appointment of an unacceptable candidate. Disclosure is required not only where a party or the parties approach the candidate but also where he is contacted by an arbitral institution or other appointing authority involved in the appointment procedure.

3. As stated in the second sentence of paragraph (1), even an appointed arbitrator is, and continues to be, under that duty, essentially for two purposes. The first is to provide the information to any party who did not obtain it before the arbitrator's appointment. The second is to secure information about any circumstances which only arise at a later stage of the arbitral proceedings (e.g. new business affiliation or share acquisitions).

4. Paragraph (2), like article 10(1) of the UNCITRAL Arbitration Rules, adopts a general formula for the grounds on which an arbitrator may be challenged. This seems preferable to listing all possible connections and other relevant situations. As indicated by the word "only", the grounds for

challenge referred to here are exhaustive. Although reliance on any specific reason listed in a national law (often applicable to judges and arbitrators alike) is precluded, it is submitted that it would be difficult to find any such reason which would not be covered by the general formula.

5. It may be noted that the Working Group was of the view that the issue of the arbitrator's competence or other qualifications, specified by the parties, was more closely related to the conduct of the proceedings than to the initial appointment. 43/ It would, thus, have to be considered under article 14 and possibly article 19(3). 44/ However, it is submitted in this connection that the conduct of an arbitrator may be relevant under article 12(2), for example, where any of his actions or statements gives rise to justifiable doubts as to his impartiality or independence. The Commission may wish to consider expressing this interpretation in the text since the word "circumstances" and the close connection with paragraph (1) could lead to a narrower interpretation which would not cover such instances of biased behaviour or misconduct.

6. The second sentence of paragraph (2) estops a party from challenging an arbitrator, whom he himself appointed or in whose appointment he participated, on any ground which he already knew before the appointment. In such case, that party should not have appointed, or agreed to the appointment of, the candidate whose impartiality or independence was in doubt. It is submitted that "participation in the appointment" covers not only the case where the parties jointly appoint an arbitrator (e.g. under article 11(3)(b)) but also a less direct involvement such as the one under the list procedure envisaged in the UNCITRAL Arbitration Rules (article 6(3)).

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Article 13. Challenge procedure

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

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), whichever is the later, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within fifteen days after having received notice of the decision rejecting the challenge, the Court specified in article 6 to decide on the challenge, which decision shall be final; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings.

43/ A/CN.9/233, para. 105.

44/ See commentary to article 14, para. 4, and to article 19, para. 9.

REFERENCES

A/CN.9/216, paras. 44-45
A/CN.9/232, paras. 61-65
A/CN.9/233, paras. 107-111
A/CN.9/245, paras. 205-212
A/CN.9/246, paras. 36-39

COMMENTARY

Freedom to agree, and its limits, paragraph (1)

1. Paragraph (1) recognizes the freedom of the parties to agree on a procedure for challenging an arbitrator, while the reasons for such a challenge are exhaustively laid down in the mandatory provision of article 12(2).

2. The model law, thus, gives full effect to any agreement on how a challenge may be brought and decided upon. However, there is one specific restriction. 45/ The parties may not exclude the last resort to the Court provided for in paragraph (3). This restriction, unlike the one in article 11(2) and (4), 46/ applies irrespective of whether the parties have authorized any other body, e.g. an appointing authority, to take the final decision on the challenge. It is submitted that in such a case the challenging party would have to exhaust the available remedies and seek a decision by that body; but that decision would not be final since the last resort to the Court specified in article 6 cannot be excluded by agreement of the parties.

Suppletive rules on challenge procedure, paragraph (2)

3. Paragraph (2) supplies those parties who have not agreed on a challenge procedure with a system of challenge by specifying the period of time and the form for bringing a challenge and the mode of deciding thereon, subject to ultimate judicial control as provided in paragraph (3).

4. As stated in the second sentence of paragraph (2), the challenge would be decided upon by the arbitral tribunal if a decision is needed, i.e. where the challenged arbitrator does not withdraw from his office or the other party disagrees with the challenge. To let the arbitral tribunal decide on the challenge is obviously without practical relevance in the case of a sole arbitrator who has been challenged and does not resign. However, where one of three arbitrators is challenged it has some merits, despite the possible psychological difficulties of making the arbitral tribunal decide on a challenge of one of its members. At least where the challenge is not frivolous or obviously unfounded, an advantage could be to save time and expense by making the last resort to the Court unnecessary. It may be added that such a decision is not one on a question of procedure within the meaning of article 29 (second sentence) and would, thus, have to be made by all or a majority of the members (article 29, first sentence). 47/ This means that a

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45/ There is also a general restriction since, it is submitted, the fundamental principles laid down in article 19(3) extend to such procedural agreement. See commentary to article 19, para. 7.

46/ Cf. commentary to article 11, paras. 3-4.

47/ Cf. A/CN.9/246, para. 38.

challenge will be sustained only if the two other members decide in favour of the challenging party.

Ultimate judicial control, paragraph (3)

5. Paragraph (3) grants any challenging party, who was unsuccessful in the procedure agreed upon by the parties or in the one under paragraph (2), a last resort to the Court specified in article 6. The provision, in its most crucial part, adopts a compromise solution with regard to the controversy of whether any resort to a court should be allowed only after the final award is made or whether a decision during the arbitral proceedings is preferable. The main reason in support of the first position is that it prevents dilatory tactics; the main reason in support of the second position is that a prompt decision would soon put an end to the undesirable situation of having a challenged arbitrator participate in the proceedings and would, in particular, avoid waste of time and expense in those cases where the court later sustains the challenge.

6. Paragraph (3), like article 14 but unlike article 16(3), provides for court intervention during the arbitral proceedings; however, it includes three features designed to minimize the risk and adverse effects of dilatory tactics. The first element is the short period of time of fifteen days for requesting the Court to overrule the negative decision of the arbitral tribunal or any other body agreed upon by the parties. The second feature is that the decision by the Court shall be final; in addition to excluding appeal, other measures relating to the organization of the Court specified in article 6 may accelerate matters. 48/ The third feature is that the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings while the request is pending with the Court; it would certainly do so, if it regards the challenge as totally unfounded and serving merely dilatory purposes.

* * *

Article 14. Failure or impossibility to act

If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court specified in article 6 to decide on the termination of the mandate, which decision shall be final.

REFERENCES

A/CN.9/216, para. 50
A/CN.9/232, paras. 66-69
A/CN.9/233, paras. 112-117
A/CN.9/245, paras. 213-216
A/CN.9/246, paras. 40-42

48/ See commentary to article 6, para. 4.

COMMENTARY

1. Article 14 deals with the termination of the mandate of an arbitrator who becomes de jure or de facto unable to perform his functions or for other reasons fails to act. In any such case his mandate terminates if he withdraws from his office or if the parties agree on the termination or where this consequence is so self-evident that neither withdrawal nor agreement is needed as, for example, in the case of death.

2. Otherwise, the Court specified in article 6 shall, upon request of a party, make a final decision on the termination of the mandate if there remains a controversy concerning any of the above grounds. A need for such court assistance will rarely arise with regard to de jure or de facto impossibility and will most probably relate to the less precise ground of "failure to act".

3. This formula, taken from the UNCITRAL Arbitration Rules (article 13(2)), is admittedly vague, in particular, as regards the (undefined) time element inherent in the term "failure". It is, nevertheless, used here since no other acceptable, more detailed formula could be found, which would be sufficiently flexible to cover the great variety of situations in which retention of a "non-performing" arbitrator becomes intolerable.

4. It is submitted that in judging whether an arbitrator failed to act the following considerations may be relevant: Which action was expected or required of him in the light of the arbitration agreement and the specific procedural situation? If he has not done anything in this regard, has the delay been so inordinate as to be unacceptable in the light of the circumstances, including technical difficulties and the complexity of the case? If he has done something and acted in a certain way, did his conduct fall clearly below the standard of what may reasonably be expected from an arbitrator? Amongst the factors influencing the level of expectations are the ability to function efficiently and expeditiously and any special competence or other qualifications required of the arbitrator by agreement of the parties.

5. It may be noted that article 14 does not cover all grounds which lead to a termination of the mandate of an arbitrator. Other grounds are to be found in article 15. 49/

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Article 14 bis

The fact that, in cases under article 13 (2) or 14, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator does not imply acceptance of the validity of any ground referred to in article 12 (2) or 14.

49/ See commentary to article 15, paras. 1-3.

REFERENCES

A/CN.9/233, paras. 107, 109
A/CN.9/245, paras. 208, 213, 215
A/CN.9/246, paras. 33, 35

COMMENTARY

1. Article 14 bis provides that the withdrawal of an arbitrator or the consent of a party to the termination of his mandate, whether under article 13(2) or 14, does not imply acceptance of any ground on which the termination was requested. This provision, precluding any inference as to the validity of the grounds, is designed to facilitate such withdrawal or consent in order to prevent lengthy controversies.

2. The provision is presented in a separate article since it relates to two different articles. If retained in this form, it might be given the following heading: "No inference of validity of grounds".

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Article 15. Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, unless the parties agree otherwise.

REFERENCES

A/CN.9/216, para. 50
A/CN.9/232, paras. 70-72
A/CN.9/233, paras. 118-120
A/CN.9/245, paras. 217-219
A/CN.9/246, paras. 42-48

COMMENTARY

Further cases of termination of mandate

1. Article 15 deals primarily with the question how a substitute arbitrator would be appointed. Yet, in order to embrace all possible cases where such a need may arise, it deals, in a less conspicuous manner, also with those manifold situations of termination of mandate which are not covered by articles 13 and 14.

2. The two most important instances added here are the arbitrator's withdrawal from his office "for any reason" (other than the ones covered by articles 13 and 14) and the revocation of the mandate by agreement of the

parties. The latter instance, i.e. removal of an arbitrator by consent of the parties, seems to be justifiedly included in view of the consensual nature of arbitration which gives the parties unrestricted freedom to agree on the termination of the mandate of an arbitrator.

3. Inclusion of the first instance, however, is less easily justified and may, for example, be objected to on the ground that a person who had accepted to act as an arbitrator should not be allowed to resign for capricious reasons. Nevertheless, it is impractical to require just cause for the resignation (or to attempt to list all possible causes justifying resignation) since an unwilling arbitrator could not, in fact, be forced to perform his functions. 50/ It should be noted, in respect of both above instances, that the model law does not deal with the legal responsibility of an arbitrator or other issues pertaining to the contractual party-arbitrator relationship.

Rules of appointing substitute arbitrator

4. Whenever a substitute arbitrator needs to be appointed, this shall be done in accordance with the rules that were applicable to the appointment of the arbitrator being replaced, whether these rules are laid down in the arbitration agreement or, as suppletive rules, in the model law.

5. This provision is non-mandatory, as is clear from the words "unless the parties agree otherwise". Such agreement would normally set forth a new appointment procedure for replacing an arbitrator whose mandate has terminated. 51/ Yet, it might relate to the preliminary question whether a substitute arbitrator should be appointed at all. For example, where the parties named a specific sole arbitrator in their original agreement, they may wish not to continue the arbitral proceedings without him.

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50/ Cf. A/CN.9/246, para. 44.

51/ For example, the parties could in their arbitration agreement include a stipulation intended to eliminate the possible danger that, in the case of a party-appointed arbitrator, the mechanism of resignation and replacement under article 15, in particular by using it repeatedly, could be abused for the purposes of obstructing the proceedings. This concern - which the Working Group, without denying its validity, decided not to deal with (A/CN.9/245, para. 19) - could be met by a stipulation, inspired by article 56(3) of the 1965 Washington Convention, to the effect that a party-appointed arbitrator who resigns without the consent of the arbitral tribunal (i.e. the other two members) would not be replaced by another party-appointed arbitrator but by one who would be appointed by either the third arbitrator (chairman) or a specified appointing authority.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence to rule on own jurisdiction

(1) The arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised promptly after the arbitral tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.

REFERENCES

A/CN.9/216, paras. 34, 81-83
A/CN.9/232, paras. 47-48, 146-150, 152-157
A/CN.9/245, paras. 58-65
A/CN.9/246, paras. 49-52, 54-56

COMMENTARY

A. "Kompetenz-Kompetenz" and separability doctrine, paragraph (1)

1. Article 16 adopts the important principle that it is initially and primarily for the arbitral tribunal itself to determine whether it has jurisdiction, subject to ultimate court control (see below, paras. 12-14). Paragraph (1) grants the arbitral tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as "Kompetenz-Kompetenz", is an essential and widely accepted feature of modern international arbitration but, at present, is not yet recognized in all national laws.

2. The same is true with regard to the second principle adopted in article 16(1), i.e. the doctrine of separability (or autonomy) of the arbitration clause. This doctrine complements the power of the arbitral tribunal to determine its own jurisdiction in that it calls for treating such a clause as an agreement independent of the other terms of the contract. A finding by the arbitral tribunal that the contract is null and void, therefore, does not

require the conclusion that the arbitration clause is invalid. The arbitral tribunal would, thus, not lack jurisdiction to decide on the nullity of the contract (and on further issues submitted to it) unless it finds that the defect which causes the nullity of the contract affects also the arbitration clause itself. It may be mentioned that the principle of separability as adopted in article 16(1), in contrast to some national laws which distinguish in this respect between initial defects and later grounds of nullity, applies whatever be the nature of the defect.

3. Article 16 does not state according to which law the arbitral tribunal would determine the various possible issues relating to its jurisdiction. It is submitted that the applicable law should be the same as that which the Court specified in article 6 would apply in setting aside proceedings under article 34, since these proceedings constitute the ultimate court control over the arbitral tribunal's decision (article 16(3)). This would mean that the capacity of the parties and the validity of the arbitration agreement would be decided according to the law determined pursuant to the rules contained in article 34(2)(a)(i) and that the question of arbitrability and other issues of public policy would be governed by the law of "this State" (see present text of article 34(2)(b)). 52/ As regards these latter issues, including arbitrability, it is further submitted that the arbitral tribunal, like the Court under article 34(2)(b), should make a determination ex officio, i.e. even without any plea by a party as referred to in article 16(2). 53/

B. Time-limits for raising objections, paragraph (2)

4. Paragraph (2) deals with the possible plea of a party that the arbitral tribunal does not have jurisdiction to decide the case before it or that it is exceeding the scope of its authority. It aims, in particular, at ensuring that any such objections are raised without delay.

5. The respondent may not invoke lack of jurisdiction after submitting his statement of defence (as referred to in article 23(1)), unless the arbitral tribunal admits a later plea since it considers the delay justified. With respect to a counter-claim, which is no longer dealt with expressly in the text, 54/ the relevant cut-off point would be the time at which the claimant submits his reply thereto.

6. As stated in the second sentence of paragraph (2), the respondent is not precluded from invoking lack of jurisdiction by the fact that he has appointed, or participated in the appointment of, an arbitrator. Thus, if,

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52/ As regards sub-paragraph (i), the reference to the law of "this State" is tentative and controversial; see commentary to article 34, para. 12.

53/ If the Commission were to accept this interpretation, it may wish to consider expressing this understanding in the text of article 16, possibly combined with a provision on the effect, and its limits, of a waiver or submission, as discussed below, paras. 8-10.

54/ The Working Group, at its seventh session, decided to delete, at the end of the first sentence of article 16(2), the words "or, with respect to a counter-claim, in the reply to the counter-claim", on the understanding that any provisions of the model law referring to the claim would apply, mutatis mutandis, to a counter-claim (A/CN.9/246, para. 196).

despite his objections, he prefers not to remain passive but to take part in, and exert influence on, the constitution of the arbitral tribunal, which would eventually rule on his objections, he need not make a reservation, as would be necessary under some national laws for excluding the effect of waiver or submission.

7. The second type of plea dealt with in paragraph (2), which is that the arbitral tribunal is exceeding the scope of its authority, must be raised promptly after the tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority; here again, a later plea may be admitted if the arbitral tribunal considers the delay to be justified. While any instance of the arbitral tribunal's exceeding its authority may often occur or become certain only in the context of the award or other decision, the above time-limit would be relevant and useful in those cases where there are clear indications at an earlier stage, for example, where the arbitral tribunal requests evidence relating to an issue not submitted to it.

C. Effect of failure to raise plea

8. The model law does not state whether a party's failure to raise his objections within the time-limit set by article 16(2) has effect at the post-award stage. The pertinent observation of the Working Group was that a party who failed to raise the plea as required under article 16(2) should be precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, in particular, in setting aside proceedings or enforcement proceedings, subject to certain limits such as public policy, including those relating to arbitrability. 55/

9. It is submitted that this observation accords with the purpose underlying paragraph (2) and might appropriately be expressed in the model law. 56/ It would mean, in practical terms, that any objection, for example, to the validity of the arbitration agreement may not later be invoked as a ground for setting aside under article 34(2)(a)(i) or for requesting, under article 36(1)(a)(i), refusal of recognition or enforcement of an award (made under this Law); these provisions on grounds for setting aside or refusing recognition or enforcement would remain applicable and of practical relevance to those cases where a party raised the plea in time but without success or where a party did not participate in the arbitration, at least not submit a statement or take part in hearings on the substance of the dispute.

55/ A/CN.9/246, para. 51.

56/ This understanding would also be in line with the one accepted by the Working Group on the effect of a waiver under article 4, concerning non-compliance with a non-mandatory provision of the model law or a clause of the arbitration agreement (see commentary to article 4, para. 6).

10. As expressed in the above observation of the Working Group, there are limits to the effect of a party's failure to raise his objections. These limits arise from the fact that certain defects such as violation of public policy, including non-arbitrability, cannot be cured by submission to the proceedings. Accordingly, such grounds for lack of jurisdiction would be decided upon by a court in accordance with article 34(2)(b) or, as regards awards made under this Law, article 36(1)(b) even if no party had raised any objections in this respect during the arbitral proceedings. It may be added that this result is in harmony with the understanding (stated above, para. 3) that these latter issues are to be determined by the arbitral tribunal ex officio.

D. Ruling by arbitral tribunal and judicial control, paragraph (3)

11. Objections to the arbitral tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision, in order to avoid possible waste of time and costs. However, in some cases, in particular, where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with a partial or complete decision on the merits of the case. Article 16(3), therefore, grants the arbitral tribunal discretion to rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits.

12. As noted earlier (above, para. 1), the power of the arbitral tribunal to rule on its own competence is subject to judicial control. Where a ruling by the arbitral tribunal that it has jurisdiction is, exceptionally, included in an award on the merits, it is obvious that the judicial control of that ruling would be exercised upon an application by the objecting party for the setting aside of that award. The less clear, and in fact controversial, case is where such affirmative ruling is made on a plea as a preliminary question. The solution adopted in article 16(3) is that also in this case judicial control may be sought only after the award on the merits is rendered, namely in setting aside proceedings (and, although this is not immediately clear from the present text, 57/ in any recognition or enforcement proceedings).

57/ The reason for referring in article 16(3) only to the application for setting aside was that the thrust of this provision concerns the faculty of an objecting party to attack the arbitral tribunal's ruling by initiating court proceedings for review of that ruling. However, the Commission may wish to consider the appropriateness of adding, for the sake of clarity, a reference to recognition or enforcement proceedings, which, although initiated by the other party, provide a forum for the objecting party to invoke lack of jurisdiction as a ground for refusal (under article 36(1)(a)(i)).

13. It was for the purpose of preventing dilatory tactics and abuse of any immediate right to appeal that this solution was adopted, reinforced by the deletion of previous draft article 17, which provided for concurrent court control. 58/ The disadvantage of this solution, as was pointed out by the proponents of immediate court control, is that it may lead to considerable waste of time and money where, after lengthy proceedings with expensive hearings and taking of evidence, the Court sets aside the award for lack of jurisdiction.

14. It is submitted that the weight of these two conflicting concerns, i.e. fear of dilatory tactics and obstruction versus waste of time and money, is difficult to assess at a general level imagining all possible cases. It seems that the assessment could better be made with respect to each particular case. Thus, it may be worth considering giving the arbitral tribunal discretion, based on its assessment of the actual potential of these concerns, to cast its ruling in the form either of an award, which would be subject to instant court control, 59/ or of a procedural decision which may be contested only in an action for setting aside the later award on the merits. In considering this suggestion, which would help to avoid the present inconsistency between article 16(3) and article 13(3), thought may be given to adopting the special elements of article 13(3) designed to minimize the risk of dilatory tactics, i.e. short time-limit for resort to court, finality of court decision, discretion of arbitral tribunal to continue proceedings.

58/ A/CN.9/246 paras. 52-56. The text of article 17, which covered not only the case of article 16(3), i.e. ruling of arbitral tribunal affirming its jurisdiction, was as follows:

"Article 17. Concurrent court control

(1) [Notwithstanding the provisions of article 16,] a party may [at any time] request the Court specified in article 6 to decide whether a valid arbitration agreement exists and [, if arbitral proceedings have commenced,] whether the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].

(2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay of the arbitral proceedings]."

59/ It may be noted that the present solution in article 16(3) does not give the arbitral tribunal that option, irrespective of whether a ruling on jurisdiction would be classified as an "award"; as to the desirability of including in the model law a definition of "award", see commentary to article 34, para. 3.

15. Article 16(3) does not regulate the case where the arbitral tribunal rules that it has no jurisdiction. A previous draft provision which allowed recourse to the court, not necessarily with the aim of forcing the arbitrators to continue the proceedings but in order to obtain a decision on the existence of a valid arbitration agreement, was not retained by the Working Group. 60/ It was stated that such ruling of the arbitral tribunal was final and binding as regards these arbitral proceedings but did not settle the question whether the substantive claim was to be decided by a court or by an arbitral tribunal. It is submitted that it thus depends on the general law on arbitration or civil procedure whether court control on such ruling may be sought, other than by way of request in any substantive proceedings as referred to in article 8(1).

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Article 18. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide security for the costs of such measure.

REFERENCES

A/CN.9/216, paras. 65-69
A/CN.9/232, paras. 119-123
A/CN.9/245, paras. 70-72
A/CN.9/246, paras. 57-59

COMMENTARY

1. According to article 18, the arbitral tribunal has the implied power, unless excluded by agreement of the parties, to order any party to take such interim measure of protection as the arbitral tribunal considers necessary in respect of the subject-matter of the dispute. The general purpose of such order would be to prevent or minimize any disadvantage which may be due to the duration of the arbitral proceedings until the final settlement of the dispute and the implementation of its result.

60/ A/CN.9/245, paras. 62-64. The deleted provision read as follows: "A ruling by the arbitral tribunal that it has no jurisdiction may be contested by any party within 30 days before the Court specified in article [6]".

2. Practical examples of interim measures designed to prevent or mitigate loss include the preservation, custody or sale of goods which are the subject-matter of the dispute. However, article 18 is not limited to sales transactions and would, for example, cover measures designed provisionally to determine and "stabilize" the relationship of the parties in a long-term project. Examples of such "modus vivendi" orders include the use or maintenance of machines or works or the continuation of a certain phase of a construction if necessary to prevent irreparable harm. Finally, an order may serve the purpose of securing evidence which would otherwise be unavailable at a later stage of the proceedings.

3. As is clear from the text of article 18, the interim measure must relate to the subject-matter of the dispute and the order may be addressed only to a party (or both parties). This restriction, which follows from the fact that the arbitral tribunal derives its jurisdiction from the arbitration agreement, constitutes one of the main factors narrowing the scope of article 18 as compared with the considerably wider range of court measures envisaged under article 9. 61/

4. Another major difference is that article 18 neither grants the arbitral tribunal the power to enforce its orders nor provides for judicial enforcement of such orders of the arbitral tribunal; an earlier draft provision envisaging court assistance in this respect was not retained by the Working Group. Nevertheless, it was understood that a State would not be precluded from rendering such assistance under its procedural law, 62/ whether by providing judicial enforcement or by empowering the arbitral tribunal to take certain measures of compulsion.

5. Yet, even without such possibility of enforcement, the power of the arbitral tribunal under article 18 is of practical value. It seems probable that a party will comply with the order and take the measure considered necessary by the arbitrators who, after all, will be the ones to decide the case. This probability may be increased by the use of the power to require any party to provide security for the costs of such measure, in particular where the arbitral tribunal would order the other party to provide such security, which, it is submitted, may also cover any possible damages. Finally, if a party does not take the interim measure of protection as ordered by the arbitral tribunal, such failure may be taken into account in the final decision, in particular in any assessment of damages.

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61/ See commentary to article 9, paras. 4-5.
62/ A/CN.9/245, para. 72.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(3) In either case, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

REFERENCES

A/CN.9/216, para. 56
A/CN.9/232, paras. 101-106
A/CN.9/245, paras. 73-75
A/CN.9/246, paras. 60-63

COMMENTARY

"Magna Carta of Arbitral Procedure"

1. Article 19 may be regarded as the most important provision of the model law. It goes a long way towards establishing procedural autonomy by recognizing the parties' freedom to lay down the rules of procedure (paragraph (1)) and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings (paragraph (2)), both subject to fundamental principles of fairness (paragraph (3)). Taken together with the other provisions on arbitral procedure, a liberal framework is provided to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place.

Freedom of parties to lay down procedural rules, paragraph (1)

2. Paragraph (1) guarantees the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to tailor the rules according to their specific needs and wishes. They may do so by preparing their own individual set of rules or, as clarified in article 2(d), by referring to standard rules for institutional (supervised or administered) arbitration or for pure ad hoc arbitration. The parties may, thus, take full advantage of the services of permanent arbitral

institutions or of established arbitration practices of trade associations. They may choose those features familiar to them and even opt for a procedure which is anchored in a particular legal system. However, if they refer to a given law on civil procedure, including evidence, such law would be applicable by virtue of their choice and not by virtue of being the national law.

3. The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions. The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3). Other such provisions concerning the conduct of the proceedings or the making of the award are contained in articles 23(1), 24(2)-(4), 27, 30(2), 31(1), (3), (4), 32 and 33(1), (2), (4), (5).

Procedural discretion of arbitral tribunal, paragraph (2)

4. Where the parties have not agreed, before or during the arbitral proceedings, 63/ on the procedure (i.e. at least not on the particular matter at issue), the arbitral tribunal is empowered to conduct the arbitration in such manner as it considers appropriate, subject only to the provisions of the model law which often set forth special features of the discretionary powers (e.g. articles 23(2), 24(1), (2), 25) and sometimes limit the discretion to ensure fairness (e.g. articles 19(3), 24(3), (4), 26(2)). As stated in paragraph (2), this power includes the power to determine the admissibility, relevance, materiality and weight of any evidence. 64/ This, in turn, includes the power of the arbitral tribunal to adopt its own rules of evidence, although that is no longer expressed in the text.

5. Except where the parties have laid down detailed and stringent rules of procedure, including evidence, the discretionary powers of the arbitral tribunal are considerable in view of the fact that the model law, with its few provisions limiting the procedural discretion, provides a liberal framework. This enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organizing the arbitration, conducting individual hearings or other meetings and determining the important specifics of taking and evaluating evidence.

63/ As was noted by the Working Group, the freedom of the parties under paragraph (1) to agree on the procedure is a continuing one throughout the arbitral proceedings and not limited, for example, to the time before the first arbitrator is appointed (A/CN.9/246, para. 63). It is submitted, however, that the parties themselves may in their original agreement limit their freedom in this way if they wish their arbitrators to know from the start under what procedural rules they are expected to act.

64/ Not regulated in article 16 (or any other provision of the model law) is the question which party bears the burden of proof, as, e.g., answered in article 24(1) of the UNCITRAL Arbitration Rules as follows: "Each party shall have the burden of proving the facts relied on to support his claim or defence".

6. In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them). For example, where both parties are from a common law system, the arbitral tribunal may rely on affidavits and order pre-hearing discovery to a greater extent than in a case with parties of civil law tradition, where, to mention another example, the mode of proceedings could be more inquisitorial than adversary. Above all, where the parties are from different legal systems, the arbitral tribunal may use a liberal "mixed" procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice, and, for instance, let parties present their case as they themselves judge best. Such procedural discretion in all these cases seems conducive to facilitating international commercial arbitration, while being forced to apply the "law of the land" where the arbitration happens to take place would present a major disadvantage to any party not used to that particular and possibly peculiar system of procedure and evidence.

Fundamental requirements of fairness, paragraph (3)

7. Paragraph (3) adopts basic notions of fairness in requiring that the parties be treated with equality and each party be given a full opportunity of presenting his case. As expressed by the words "in either case", these fundamental requirements shall be complied with not only by the arbitral tribunal when using its discretionary powers under paragraph (2) but also by the parties when using their freedom under paragraph (1) to lay down the rules of procedure. It is submitted that these principles, in view of their fundamental nature, are to be followed in all procedural contexts, including, for example, the procedures referred to in articles 13 and 14.

8. The principles, which paragraph (3) states in a general manner, are implemented and put in more concrete form by provisions such as articles 24 (3), (4) and 26(2). 65/ Other provisions, such as articles 16(2), 23(2) and 25(c), present certain refinements or restrictions in specific procedural contexts in order to ensure efficient and expedient proceedings. These latter provisions, which like all other provisions of the model law are in harmony with the principles laid down in article 19(3), make it clear that "full opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.

65/ Another example would be article 24(2), although there may be some doubt whether this provision as presently drafted fully implements and accords with the requirement that each party shall be given a full opportunity of presenting his case (see commentary to article 24, para. 4).

9. Of course, the arbitral tribunal must be guided, and indeed abide, by this principle when determining the appropriate conduct of the proceedings, for example, when fixing time-limits for submission of statements or evidence or when establishing the modalities of hearings. It must, for instance, not require more from a party than what may be reasonably expected under the circumstances. With regard to the observation of the Working Group noted in the commentary to article 12 (para. 5), it might be doubted whether a party is given a full opportunity of presenting his case where, although he is able to state in full his claim and the evidence supporting it, the conduct of an arbitrator reveals clearly lack of competence or of another qualification required of him by agreement of the parties.

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Article 20. Place of arbitration

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

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents.

REFERENCES

A/CN.9/216, paras. 53-55
A/CN.9/232, paras. 99-100, 112-113
A/CN.9/245, paras. 76-79
A/CN.9/246, paras. 64-65

COMMENTARY

Determination of place of arbitration, paragraph (1)

1. Paragraph (1) recognizes the freedom of the parties to agree on the place of arbitration. The parties may either themselves determine that place or, as is clear from article 2(c), authorize a third party, including an institution, to make that determination. Failing any such agreement, the place of arbitration shall be determined by the arbitral tribunal.

2. The place of arbitration is of legal relevance in three respects. First, it is one of the various possible factors establishing the international character of the arbitration, provided it is determined in, or pursuant to,

the arbitration agreement (article 1(2)(b)(i)). Second, it is a connecting factor for the "territorial" applicability of the model law, either as exclusive criterion, if the Commission adopts the view prevailing in the Working Group, or as subsidiary connecting factor, if the model law would in its final form allow the parties to select a procedural law other than that of the State where the arbitration is held. 66/ Third, the place of arbitration is, by virtue of article 31(3), the place of origin of the award and as such relevant in the context of recognition or enforcement proceedings, in particular, by determining, for the purposes of article 36(1)(a)(v), "the country in which ... that award was made".

Meeting at place other than place of arbitration, paragraph (2)

3. The factual significance of the place of arbitration, in particular when determined by the parties themselves, is that, in principle, the arbitral proceedings, including any hearings or other meetings, would be expected to be held at that place. However, there may be good reasons for meeting elsewhere, not merely in the case where a change of locale is necessary (e.g. for purposes of inspection of premises). For example, where witnesses are to be heard or where the arbitrators meet among themselves for consultations, another place may be more appropriate for the sake of convenience of the persons involved and for keeping down the costs of the arbitration. Yet another of the many possible considerations would be to balance the parties' own expenses by scheduling some of the meetings at the place of one party and some of the meetings at the place of the other party.

4. For all such purposes, paragraph (2) empowers the arbitral tribunal, unless otherwise agreed by the parties, to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or (only) the parties, or for inspection of goods, other property, or documents.

* * *

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

REFERENCES

A/CN.9/233, paras. 21-23
A/CN.9/245, paras. 24-27
A/CN.9/246, paras. 66-67

66/ See remarks on the territorial scope of application of the model law in commentary to article 1, paras. 4-6.

COMMENTARY

1. Article 21 provides a rule for determining the point of time at which the arbitral proceedings in respect of a particular dispute commence. Such determination is relevant not only for the purposes of the model law itself but also for legal consequences regulated in other laws, e.g. cessation or interruption of any limitation period.

2. The relevant point of time is the date on which a request for the particular dispute to be referred to arbitration is received by the respondent. 67/ Such request, whether in fact called "request", "notice", "application" or "statement of claim", must identify the particular dispute and make clear that arbitration is resorted to thereby and not, for example, indicate merely the intention of later initiating arbitral proceedings.

3. As stated in the text, the parties may derogate from this provision and select a different point of time. To take an example which is not uncommon in institutional arbitration, they may agree, by reference to the institutional rules, that the relevant date is the one on which the request for arbitration is received by the arbitral institution.

* * *

Article 22. Language

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

REFERENCES

A/CN.9/233, paras. 27-30
A/CN.9/245, paras. 34-36
A/CN.9/246, paras. 68-70

COMMENTARY

1. Article 22 deals with an issue which, while not commonly dealt with in national laws on arbitration, is of considerable practical importance in international commercial arbitration, i.e. the determination of the language

67/ As to what constitutes "receipt" and when a communication is received or deemed to be received, see article 2(e).

or languages to be used in the arbitral proceedings. It is clear from this provision, if there ever could be any doubt on this point, that the arbitral proceedings are not subject to any local language requirement, for example, any "official" language or languages for court proceedings at the place of arbitration.

2. According to paragraph (1), it is primarily for the parties to determine the language or languages of the arbitral proceedings. Autonomy of the parties is particularly important here since such determination affects their position in the proceedings and the expediency and costs of the arbitration. They are in the best position to judge, for example, whether a single language would be feasible and acceptable or, if more than one language need be used, which languages they should be. An agreement by the parties would have the advantage of providing certainty on that point from the start. It would also assist in selecting suitable arbitrators and save the arbitrators, upon their appointment, from having to make a procedural decision, which in practice often turns out to be a rather delicate one.

3. Where the parties have not settled the language question, the arbitral tribunal will make that determination in accordance with paragraph (1). In doing so, it will take into account the factors mentioned above and the language capabilities of the arbitrators themselves. Above all, it must comply with the fundamental principles laid down in article 19(3).

4. However, it is submitted, these principles do not necessarily mean that the language of each party must be adopted as a language "to be used in the arbitral proceedings". For instance, where parties have used only one language in their business dealings, in particular in their contract and their correspondence, a decision by the arbitral tribunal to conduct the proceedings in this language would not per se conflict with the principle of equal treatment of the parties or deprive that party whose language is not adopted from having a full opportunity of presenting his case. That party may, in fact, use his language in any hearing or other meeting but he must arrange, or at least pay, for the interpretation into the language of the proceedings. As this example may show, the determination of the language or languages to be used is, to a certain degree, a decision on costs. To use the opposite example, in the case of proceedings with two languages any cost for interpretation or translation between the two languages would form part of the overall costs of the arbitration and as such be borne in principle by the unsuccessful party (cf., e.g. article 40(1) of the UNCITRAL Arbitration Rules).

5. Article 22 indicates the scope of the determination of the language or languages by listing those items which must be in such language, i.e. any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. Yet, the parties or the arbitrators may determine the scope differently. As regards documentary evidence, paragraph (2) leaves it to the arbitral tribunal to decide whether and to what extent translation into the language of the proceedings is required. This discretion is appropriate in view of the fact that such documents may be voluminous and only in part truly relevant to the dispute.

* * *

Article 23. Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars. The parties may annex to their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.

REFERENCES

A/CN.9/233, paras. 24-26
A/CN.9/245, paras. 29-30, 33
A/CN.9/246, paras. 71-73

COMMENTARY

Essential contents of statement of claim or defence, paragraph (1)

1. Paragraph (1) deals with the preparation of the case in writing. The first sentence sets forth those elements of the initial pleadings which are essential for defining the dispute on which the arbitral tribunal is to give a decision. It is then up to the arbitral tribunal to require further statements or explanations, under its general power of article 19(2). The required contents of the initial statement of claim and of the respondent's reply may be regarded as so basic and necessary as to conform with all established arbitration systems and rules. It is in this spirit that the provision does not go into particulars such as to whom the statements must be addressed. 68/

2. Nevertheless, it is submitted that the provision should be non-mandatory, at least as regards its details. For example, arbitration rules may describe these essential contents in slightly different form or may require their inclusion already in the initial request for arbitration, in which case the reference in paragraph (1) to the period of time would be obsolete.

3. The second sentence of paragraph (1) leaves it to each party, and his procedural strategy, whether to submit all relevant documents or at least refer to the documents or other evidence at this stage. While these documents or listing of evidence are, thus, not part of the essential contents of the initial pleadings, the parties are not fully at liberty to select the point of time for revealing or submitting the documents or other evidence they intend to rely on. Unless specific provision is made in the arbitration agreement,

68/ Article 24(4) ensures that any statement submitted to the arbitral tribunal would be communicated to the other party.

the arbitral tribunal may, in its general discretion under article 19(2), require a party to submit a summary of the documents and other evidence which that party intends to present in support of his claim or defence and, as is clear from article 25(c), require a party to produce documents, exhibits or other evidence within a certain period of time.

Amending or supplementing the claim or defence, paragraph (2)

4. Paragraph (2) leaves it to the discretion of the arbitral tribunal to determine, on the basis of certain criteria, whether a party may amend or supplement his statement of claim or defence. One major criterion would be the extent and the reason for the delay in making the amendment (or supplement 69/). Another criterion would be prejudice to the other party, i.e. procedural prejudice (such as upsetting the normal course of the proceedings or unduly delaying the final settlement of the dispute as defined in the initial pleadings). Yet, since there may be further reasons which would make it inappropriate to allow any later amendment, the arbitral tribunal may, under paragraph (2), take into account "any other circumstances".

5. However, there is one important point in respect of which the arbitral tribunal has no discretion at all: The amendment or supplement must not exceed the scope of the arbitration agreement. This restriction, while not expressed in the article, seems self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement.

6. Paragraph (2), as stated therein, is non-mandatory. The parties may, thus, derogate therefrom and provide, for example, that amendments are generally prohibited or that they are allowed as a matter of right or that they are subject to specified limits.

Analogous application to counter-claim and set-off

7. As noted earlier, 70/ the model law no longer refers expressly to counter-claims but any provision referring to the claim would apply, mutatis mutandis, to a counter-claim. Thus, paragraph (1) would provide, by analogy, that the respondent shall state the facts supporting his counter-claim, the points at issue and the relief or remedy sought, and that he may annex all documents he considers to be relevant or may add a reference to the documents or other evidence he will submit in support of his counter-claim. It is submitted that the same would apply to a claim relied on by the respondent for the purpose of a set-off.

8. As regards paragraph (2), the analogy takes two forms. The first is a true analogy with the claim, that is, the respondent may amend or supplement his counter-claim unless the arbitral tribunal considers it inappropriate to allow such amendment for any of the reasons listed in paragraph (2). The second, and more fundamental, issue covered by analogy is whether the

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69/ The word "amendment" was intended by the drafting group to include "supplement".

70/ Commentary to article 16, para. 5, and footnote 54.

respondent is allowed to "amend or supplement" his statement of defence by bringing at a later stage a counter-claim or a claim for the purpose of a set-off. It may be noted that in both cases the above restriction to the scope of the arbitration agreement applies.

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Article 24. Hearings and written proceedings

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

(2) Notwithstanding the provisions of paragraph (1) of this article, if a party so requests, the arbitral tribunal may, at any appropriate stage of the proceedings, hold hearings for the presentation of evidence or for oral argument.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for inspection purposes.

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

REFERENCES

A/CN.9/216, para. 57
A/CN.9/232, paras. 107-111, 113
A/CN.9/245, paras. 80-83
A/CN.9/246, paras. 74-80

COMMENTARY

Proceedings with or without oral hearing, paragraphs (1) and (2)

1. Paragraphs (1) and (2) deal with the important procedural question whether there will be any oral hearing or whether, as is less common, the arbitral proceedings will be conducted exclusively on the basis of documents and other materials (i.e. as "written proceedings"). Under paragraph (1), the arbitral tribunal shall decide that question, 71/ subject to any contrary agreement by the parties and subject to paragraph (2), which should, thus, be commented upon together with paragraph (1). In order to facilitate understanding the inter-play of these two paragraphs, it seems advisable to distinguish three situations.

71/ As a practical matter, "decision" does not mean that the arbitral tribunal would have to render a "decree" on this question at an early stage with binding effect for the whole proceedings. What is meant, is a continuing discretion to determine in the light of the development of the case whether an oral hearing is needed or at least desirable.

2. The first situation is that the parties have agreed that there shall be an opportunity for oral argument or hearings for the presentation of evidence, either upon request of a party or even without any such specific request. In such case, which is probably not very common, the arbitral tribunal would have to comply with that agreement, although a literal interpretation of the words "notwithstanding the provisions of paragraph (1)" could lead to the conclusion that even in such case the arbitral tribunal would have discretion as to whether to follow any later request of a party.

3. The second situation is that the parties have agreed on written proceedings. In such case, which is probably even less common than the first one, the arbitral tribunal would have to comply with the wish of the parties (paragraph (1)). However, if a party later requests a hearing, paragraph (2) empowers the arbitral tribunal to disregard the original agreement of the parties and, in exercising its discretion, to hold a hearing at an appropriate stage of the proceedings. 72/ The underlying philosophy is that the right of a party to request a hearing is of such importance, as emphasized by article 19(3), that the parties should not be allowed to exclude it by agreement, while, on the other hand, it is desirable to envisage a certain control by the arbitral tribunal in order to avoid its abuse for purposes of delaying or obstructing the proceedings.

4. The third situation is that the parties have not made any stipulation on the mode of the proceedings. In such case, which appears to be the most common of all three situations, the arbitral tribunal would have discretion under paragraph (1) to decide whether to hold an oral hearing. According to paragraph (2), it would retain this discretion even if a party requests an oral hearing. It is submitted that this latter rule, which appears to be the result of a legislative oversight, 73/ should be reconsidered since it may be regarded as not being consistent with article 19(3). Under the present text, a party would have the fundamental right to present his views or evidence in an oral hearing, unrestricted by any discretion of the arbitral tribunal, only if so provided in the agreement of the parties, which, as mentioned above, is rarely the case and should not be made a necessity by the model law.

5. As regards the particulars of paragraph (2), it may be noted that the wording "hearings for the presentation of evidence or for oral argument" is intentionally adopted in such general form. The formula "presentation of evidence" is intended to cover all possible types of evidence recognized in various legal systems and potentially admitted under article 19(1) or (2), e.g. evidence by witness, expert witness, cross-examination of any such witness, testimony and cross-examination of a party. 74/ The formula "oral argument" is intended to cover arguments not only on the substance of the dispute but also on procedural issues. 75/

72/ The text set forth in the annex of document A/CN.9/246 speaks of "any" appropriate stage. However, as is clear from para. 75 of that report, this is a typographical error; it should read "an" appropriate stage.

73/ It appears from the report of the seventh session of the Working Group (A/CN.9/246, paras. 77-78) that the discussion focused on the second situation and that the view prevailing there, which was to allow a certain control by the arbitral tribunal, was inadvertently extended to cover the third situation.

74/ As regards the hearing and interrogation of an expert appointed by the arbitral tribunal, see article 26(2).

75/ A/CN.9/245, para. 81.

Sufficient advance notice, paragraph (3)

6. Paragraph (3) implements in a certain respect the principles of article 19(3) by providing that the parties shall be notified sufficiently in advance of any hearing and of any meeting of the arbitral tribunal for the purpose of inspecting goods, other property, or documents. The required notification is fundamental in that it enables the parties to participate effectively in the proceedings and to prepare and present their case. It is also fundamental in that it is a condition, based on the principle of fairness, for continuing the proceedings in the case of default of a party under article 25(c).

7. Since the provision expresses merely a principle as an essential requirement, it does not deal with specifics such as who is in fact to notify the parties (e.g. arbitral tribunal, presiding arbitrator, secretary, or arbitral institution). It also refrains from setting a fixed period of time, in view of the great variety of circumstances. While, thus, a period of time may be agreed upon by the parties, including any reference to arbitration rules, such agreement (under article 19(1)) might not be effective for the reason that it does not provide for "sufficient" advance notice.

Forwarding of communications, paragraph (4)

8. Paragraph (4) also implements in a certain respect the principles of article 19(3) by providing that each party shall receive a copy of any communication by the other party to the arbitral tribunal, and of any expert report or other document, on which the arbitral tribunal may rely in making its decision. It is submitted that "other document" means any written material of similar, i.e. evidentiary, nature (e.g. weather report or exchange rate listing of a given day).

9. Paragraph (4) is based upon the essential principle that both parties should have full and equal access to information. It does not regulate specifics, such as who is in fact to communicate any statement, report, document or other information to the party who needs to be informed. It is submitted, however, that in the instances covered by the first sentence of paragraph (4) the arbitral tribunal (or an administering institution) is under a duty either to ensure that a party sends a copy to the other party or itself to communicate the statement or document of one party to the other party.

* * *

Article 25. Default of a party

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

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral proceedings shall be terminated;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

REFERENCES

A/CN.9/216, para. 71
A/CN.9/232, paras. 124-131
A/CN.9/245, paras. 86
A/CN.9/246, paras. 81-84

COMMENTARY

1. Article 25 deals with those cases where a party, in particular the respondent, fails to play his part in the proceedings in disregard of his earlier commitment to arbitration. The provision, which is non-mandatory, lays down the consequences of such failure and thereby ensures the effectiveness of the parties' agreement.

2. Article 25 would especially contribute to the desired harmonization of national arbitration laws in view of the fact that some existing laws do not give effect to ex parte awards. Of course, not only these States would be opposed to recognizing such an award if they were not convinced that fundamental requirements of fairness had been met. The model law, therefore, adopts as procedural safeguards the requirements that the defaulting party had been requested or notified sufficiently in advance and that he defaulted without showing sufficient cause therefor.

3. These procedural safeguards are of particular importance in the cases dealt with in article 25(b) and (c) where the arbitral tribunal is empowered to continue the arbitral proceedings and make an award. However, for the sake of completeness, article 25 also covers the case where a party initiates arbitral proceedings but then fails to communicate his statement of claim (article 25(a)); in such case, the arbitral proceedings shall be terminated.

4. As regards the failure of the respondent to communicate his statement of defence, article 25(b) ensures that the arbitration cannot be frustrated by such failure. It obliges the arbitral tribunal to continue the proceedings "without treating such failure as an admission of the claimant's allegations". This rule concerning the assessment of the respondent's failure seems useful in view of the fact that under many national laws on civil procedure default of the defendant in court proceedings is treated as an admission of the claimant's allegations. However, this does not mean that the arbitral tribunal would have no discretion as to how to assess the failure and would be bound to treat it as a full denial of the claim and all supporting facts.

5. As regards the failure of a party to appear at a hearing or to produce documentary evidence, article 25(c) empowers the arbitral tribunal to continue the proceedings and make the award on the evidence before it. In practical terms, this includes the power not to admit or to disregard any documentary evidence presented by that party after the specified time-limit for producing such evidence. Moreover, the arbitral tribunal is not precluded from drawing inferences from a party's failure to produce any evidence as requested.

Although the provision does not itself say so, "failure to appear at a hearing" presupposes that the party was given sufficient advance notice (article 24(3)) and "failure to produce documentary evidence" presupposes that the party was requested to do so within a specified period of time which was reasonable in accordance with the fundamental principles of article 19(3).

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Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to interrogate him and to present expert witnesses in order to testify on the points at issue.

REFERENCES

A/CN.9/216, paras. 63-64
A/CN.9/232, paras. 105, 114-118
A/CN.9/245, paras. 80-81, 84-85
A/CN.9/246, paras. 85-89

COMMENTARY

1. Article 26 deals with experts appointed by the arbitral tribunal; it does not deal with expert witnesses which a party may present. Paragraph (1) grants the arbitral tribunal an implied power, i.e. without special authorization by the parties, to appoint one or more experts to report to it on specific issues and to order a party to co-operate in a certain way with the expert.

2. Since the provision is non-mandatory, the parties may exclude such power. This would mean that the arbitral tribunal would have to decide the dispute without obtaining the necessary expertise which it itself lacks. While not everyone would like to act as arbitrator under such conditions, the solution of paragraph (1) was adopted in recognition of the paramount nature of party autonomy (and of the underlying practical considerations that the parties know best by what means their dispute should be decided, that they are the ones to pay for any expert, and that they are wise enough not to put their arbitrators in a dilemma of the type described above). It is also for this reason that the parties may exclude such power at any time during the

proceedings and not, as suggested in an earlier draft version, only before the appointment of the first arbitrator. 76/

3. Article 26, like most provisions of the model law concerning the conduct of the arbitral proceedings, embodies a statement of principle without regulating all particulars, as often treated in detail by arbitration rules. Paragraph (2) is no exception since it guarantees a fundamental procedural right, which is another concrete implementation of the principles laid down in article 19(3). The parties are given the opportunity to interrogate the expert, after he has delivered his written or oral report, and to present expert witnesses in order to testify on the points at issue. Such opportunity may be taken in a hearing, which the arbitral tribunal must hold if one party so requests or which the arbitral tribunal may call on its own if it considers it necessary.

* * *

Article 27. Court assistance in taking evidence

(1) In arbitral proceedings held in this State or under this Law, the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The request shall specify:

(a) the names and addresses of the parties and the arbitrators;

(b) the general nature of the claim and the relief sought;

(c) the evidence to be obtained, in particular,

(i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

(ii) the description of any document to be produced or property to be inspected.

(2) The court may, within its competence and according to its rules on taking evidence, execute the request either by taking the evidence itself or by ordering that the evidence be provided directly to the arbitral tribunal.

REFERENCES

A/CN.9/216, paras. 61-62
A/CN.9/233, paras. 31-37
A/CN.9/245, paras. 37-46
A/CN.9/246, paras. 90-101

76/ A/CN.9/246, para. 87.

COMMENTARY

Purpose of provision

1. Article 27 calls upon the courts to render assistance in taking evidence, in particular by compelling appearance of a witness, production of a document or access to a property for inspection. Such assistance, although not frequently sought in practice and at times sought for dilatory purposes, is considered useful in view of the fact that the arbitral tribunal, under the model law and most existing laws, does not itself possess powers of compulsion. 77/

2. Article 27 has effect beyond the realm of arbitral procedure in that it does not merely cover the admissibility or mechanics of a request for court assistance. It rather attaches to such a request the expectation that the national law under certain circumstances provides for assistance by courts. Article 27 is designed to change, for example, a national law which envisages court assistance only to other courts but not to arbitral tribunals, however, without interfering with national rules on civil procedure concerning the taking of evidence and the organization of the judicial system including court competence.

Territorial scope of provision

3. Assistance by courts of the State adopting the model law is envisaged for arbitral proceedings "held in this State or under this Law" (paragraph (1)). Conceivably, this double criterion might be retained if the Commission were to allow party autonomy in respect of the applicable procedural law. 78/ The criterion "in this State" would then extend to arbitral proceedings held under a law other than the model law, and the criterion "under this Law" would extend to arbitrations held elsewhere under the law of "this State". It is submitted, however, that it would be more appropriate to use only the general criterion which the Commission may wish to adopt for the applicability of the model law, in which case there may not be any need for expressing the territorial scope in article 27.

4. More important than this issue of detail is the observation that article 27 is limited essentially to arbitrations taking place in "this State"; unlike earlier draft provisions, it envisages neither assistance to foreign arbitrations nor requests to foreign courts in arbitral proceedings held under

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77/ Merely in those cases where the evidence is in the possession or under the control of a party the arbitral tribunal may exert a certain influence by indicating its intention to use the "sanction" provided for in article 25(c); see commentary to article 25, para. 5.

78/ As to the question of the territorial scope of application of the model law in general, see commentary to article 1, paras. 4-6.

the model law. 79/ This limitation is the result of a compromise between those in favour of international court assistance and those opposed to any provision on court assistance. 80/

Request for assistance, paragraph (1), and its execution, paragraph (2)

5. According to paragraph (1), assistance would be rendered by a "competent court" which is not necessarily the one designated pursuant to article 6 since its competence may be based, for example, on the residence of the witness to be heard or the location of the property to be inspected. A request for court assistance may be made by the arbitral tribunal or by a party with the approval of the arbitral tribunal. Although the obtaining of evidence may be regarded as being strictly a matter for the parties, the involvement of the arbitral tribunal would be conducive to preventing dilatory tactics of a party. Paragraph (1) lists the required contents of the request, without going into further details of form or procedure.

6. Paragraph (2) implements the earlier mentioned "expectation" of court assistance, without interfering with established national rules on court competence and organization (see above, para.2). The court may, within its competence and according to its rules on taking evidence, execute the request in either of the following ways: It may take the evidence itself (e.g. hear the witness, obtain the document or access to property and, unless the arbitrators and parties were present, communicate the results to the arbitral tribunal), or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion.

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CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

79/ A/CN.9/233, para. 36; A/CN.9/245, paras. 37, 42-46; A/CN.9/246, paras. 90-91, 95-96.

80/ It was stated in this context that court assistance to foreign arbitral tribunals or assistance by foreign courts in taking evidence could not appropriately be dealt with in a model law, and it was suggested as a possible future item of work to be discussed by the Commission that it might be desirable to elaborate rules on international judicial assistance either in a separate convention or by extending an existing convention (A/CN.9/233, para. 37; A/CN.9/246, paras. 43-44).

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.

REFERENCES

A/CN.9/216, paras. 84-94
A/CN.9/232, paras. 158-170
A/CN.9/245, paras. 93-100
A/CN.9/246, paras. 102-104

COMMENTARY

1. Article 28 deals with the question which law or rules the arbitral tribunal shall apply to the substance of the dispute. This question, which should be distinguished from the issue of the law applicable to the arbitral procedure or the arbitration agreement, is often dealt with in conventions and national laws devoted to private international law or conflict of laws. However, it is sometimes covered by national laws on arbitration and often by arbitration conventions and arbitration rules.

2. The model law follows this latter practice with a view to providing guidance on this important point and to meet the needs of international commercial arbitration. It adopts the same policy as in respect of procedural matters by granting the parties full autonomy to determine the issue (including the option of "amiable composition") and, failing agreement, by entrusting the arbitral tribunal with that determination.

Parties' freedom to choose substantive "rules of law", paragraph (1)

3. The provision of paragraph (1) that the dispute shall be decided in accordance with such rules of law as are chosen by the parties is remarkable in two respects. The first one is the recognition or guarantee of the parties' autonomy as such, which is at present widely but not yet uniformly accepted. Article 28(1) could enhance global acceptance and help to overcome existing restrictions such as substantial connection with the country of the chosen law.

4. The second one is the freedom to choose "rules of law" and not merely a "law", which could be understood as referring to the legal system of one particular State only. This provides the parties with a wider range of options and allows them, for example, to designate as applicable to their case rules of more than one legal system, including rules of law which have been

elaborated on the international level. 81/ Adoption of this formula, to date only found in the 1965 Washington Convention (art. 42) and the recent international arbitration laws of France (art. 1496 new CPC) and Djibouti (art. 12), constitutes a progressive step, designed to meet the needs and interests of parties to international commercial transactions. A useful rule of interpretation is added for those cases where the parties designate the law or legal system of a particular State.

Determination of substantive law by arbitral tribunal, paragraph (2)

5. Paragraph (2) reflects a more cautious approach in that it does not provide, as would be in line with paragraph (1), that the arbitral tribunal shall apply the rules of law it considers appropriate. Instead, it requires the arbitral tribunal to apply a conflict of laws rule, namely that which it considers applicable, in order to determine the law applicable to the substance of the dispute.

6. The resulting disparity may be regarded as acceptable in view of the fact that paragraph (1) is addressed to the parties who are free to take advantage of the wider scope, while paragraph (2) is addressed to the arbitral tribunal and applied only in the case where the parties have not made their choice. Incidentally, the parties could agree to widen the scope of the arbitral tribunal's determination, just as they are free to limit it, for example, by excluding one or more specified national laws. Above all, paragraph (2) deserves to be judged on its own. In this regard it seems worth noting that it is in full harmony with the 1961 Geneva Convention (art. VII(1)) and with widely used arbitration rules (art. 13(3) ICC-Rules, art. 33(1) UNCITRAL Arbitration Rules), which equally recognize the interests of the parties in having some degree of certainty as to which will be the law determined by the arbitral tribunal.

Express authorization of "amiable composition", paragraph (3)

7. Arbitration rules often provide that parties may authorize the arbitral tribunal to decide as amiable compositeur provided, however, that such arbitration is permitted by the law applicable to the arbitral procedure. Article 28(3) grants this permission and, thus, gives effect to an express authorization by the parties that the arbitral tribunal shall decide ex aequo et bono, as this arbitration is labelled in some legal systems, or, as labelled in others, as amiable compositeur.

81/ As a further aid in interpreting the term "rules of law" and defining its limits, it may be reported that some representatives would have preferred an even wider interpretation or an even broader formula to include, for example, general legal principles or case law developed in arbitration awards but that this, in the view of the Working Group, was too far-reaching to be acceptable to many States, at least for the time being (A/CN.9/245, para. 94).

8. Although this type of arbitration is not known in all legal systems, its inclusion in the model law seems appropriate for the following reasons. It is sound policy to accommodate features and practices of arbitration even if familiar only to certain legal systems. This is reasonable not merely because it would be contrary to the purpose of the model law to disregard or even prevent established practices but because it is in harmony with the principle of reducing the importance of the place of arbitration by recognizing types of arbitration not normally used or known at that place. Finally, such recognition does not entail a risk for any unwary party unfamiliar with this type of arbitration since an express authorization by the parties is required.

9. No attempt is made in the model law to define this type of arbitration which comes in various and often vague forms. It is submitted, however, that the parties may in their authorization provide some certainty, to the extent desired by them, either by referring to the kind of amiable composition developed in a particular legal system or by laying down the rules or guidelines and, for example, request a fair and equitable solution within the limits of the international public policy of their two States.

Relevance of terms of contract and trade usages

10. Article 28 does not expressly call upon the arbitral tribunal to decide in accordance with the terms of the contract and to take into account the trade usages applicable to the transaction. However, this does not mean that the model law would disregard or reduce the relevance of the contract and the trade usages.

11. This is clear from the various reasons advanced during the discussion of the Working Group against retaining such a provision. 82/ As regards the reference to the terms of the contract, it was stated, for example, that such reference did not belong in an article dealing with the law applicable to the substance of the dispute and was not needed in a law on arbitration, though appropriate in arbitration rules, or that such reference could be misleading where the terms of the contract were in conflict with mandatory provisions of law or did not express the true intent of the parties. As regards the reference to trade usages, the concerns related primarily to the fact that their legal effect and qualification were not uniform in all legal systems. For example, they may form part of the applicable law, in which case they were already covered by paragraph (1) or (2) of article 28. Finally, it was difficult to devise acceptable wording, in particular, to decide whether to adopt the formula of the UNCITRAL Arbitration Rules (art. 33(3)) or of the 1980 Vienna Sales Convention (art. 9).

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82/ A/CN.9/245, para. 99; A/CN.9/232, para. 164.

Article 29. Decision making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, the parties or the arbitral tribunal may authorize a presiding arbitrator to decide questions of procedure.

REFERENCES

A/CN.9/216, paras. 76-77
A/CN.9/232, paras. 136-140
A/CN.9/245, paras. 101-104
A/CN.9/246, paras. 105-108

COMMENTARY

1. Article 29 deals with one important aspect of the decision-making process in those common cases where the arbitral tribunal consists of more than one arbitrator (in particular: three arbitrators). While leaving out other aspects relating to the mechanics of how a decision is arrived at, article 29 adopts the majority-principle for any award or other decision of the arbitral tribunal, with a possible exception for questions of procedure, which, for the sake of expediency and efficiency, the parties or the arbitral tribunal may authorize a presiding arbitrator to decide.

2. The majority-principle, as compared with requiring unanimity, is more conducive to reaching the necessary decisions and the final settlement of the dispute. This principle, which is also adopted for the signatures required on the award (article 31(1)), does not mean, however, that not all arbitrators need take part in the deliberations or at least have the opportunity to do so.

3. Since article 29 is non-mandatory, the parties may lay down different requirements. For example, they may authorize a presiding arbitrator, if no majority can be reached, to cast the decisive vote, or to decide as if he were a sole arbitrator. The parties may also, for quantum decisions, provide a formula according to which the decisive amount would be calculated on the basis of the different votes of the arbitrators.

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Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

RFERENCES

A/CN.9/216, paras. 95-97
A/CN.9/232, paras. 171-176
A/CN.9/245, paras. 105-107
A/CN.9/246, paras. 109-110

COMMENTARY

1. Article 30 deals with the fortunately not infrequent case that the parties themselves settle the dispute during, and often induced by, the arbitral proceedings. In order to make the settlement agreement enforceable, it is necessary, under nearly all legal systems, to record it in the form of an arbitral award.

2. The arbitral tribunal shall issue such an award on agreed terms, if requested by the parties and not objected to by it. The first condition is based on the view that there are fewer dangers of injustice by requiring the request of both parties, instead of only one who, however, may have a particular interest, since a settlement may be ambiguous or subject to conditions which might not be apparent to the arbitral tribunal. The second condition is based on the view that the arbitral tribunal, although it would normally accede to such a request, should not be compelled to do so in all circumstances (e.g. in case of suspected fraud, illicit or utterly unfair settlement terms).

3. According to paragraph (2), an award on agreed terms shall be treated like any other award on the merits of the case, not only as regards its form and contents (article 31) but also its status and effect.

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Article 31. Form and contents of award

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

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

REFERENCES

A/CN.9/216, paras. 78-80, 100-102, 105
A/CN.9/232, paras. 141-145, 184-186
A/CN.9/245, paras. 108-116
A/CN.9/246, paras. 111-112

COMMENTARY

Award in writing and signed, paragraph (1)

1. For the sake of certainty, the arbitral award shall be made in writing and signed by the arbitrator or arbitrators. However, corresponding with the provision on decision making by a panel of arbitrators (article 29), 83/ the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

2. This proviso is certainly appropriate for those cases where, after the award has been finalized, an arbitrator dies or becomes physically unable to sign or cannot in fact be reached anymore. Where, however, an arbitrator refuses to sign, the proviso may be open to objection by those who are strictly against revealing whether an award was made unanimously or whether an arbitrator dissented. On the other hand, there are those who, based on their legal systems and practice, even want a provision in the model law entitling the dissenting arbitrator to state his opinion. The Commission might wish to consider whether the requirement of stating the reason for the omitted signature should be maintained in the proviso and whether the model law should take a stand on the separate issue of dissenting opinions, i.e. either generally allow or generally prohibit their issuance. At present, it is submitted, this question falls under article 19(1) or (2) as a matter of the conduct of the proceedings.

83/ The Commission may wish to consider the appropriateness of establishing full correspondence with article 29, by aligning the signature requirement to any agreed system other than decision by majority (see commentary to article 29, para. 3).

Statement of reasons, paragraph (2)

3. The practice of stating the reasons upon which the award is based is more common in certain legal systems than in others and it varies from one type or system of arbitration to another. Paragraph (2) adopts a solution which accommodates such variety by requiring that the reasons be stated but allowing parties to waive that requirement. An agreement that no reasons are to be given would normally be made expressly, including reference to arbitration rules containing such waiver, but may also be implied, for example, in the submitting of a dispute to an established arbitration system which is known not to contemplate the giving of reasons. The same would apply to an intermediate solution, practised in certain systems, such as to state the reasons in a separate and confidential document.

Date and place of award, paragraph (3)

4. The date and the place at which the award is made are of considerable importance in various respects, in particular, as far as procedural consequences are concerned, in the context of recognition and enforcement and any possible recourse against the award. Paragraph (3), therefore, provides that the award shall state its date and the place of arbitration, which shall be deemed to be the place of the award.

5. This presumption, which should be regarded as irrebuttable, 84/ is based on the principle that the award shall be made at the place of arbitration determined in accordance with article 20(1). It also recognizes that the making of the award is a legal act which in practice is not necessarily one factual act but, for example, done in deliberations at various places, by telephone or correspondence.

Delivery of award, paragraph (4)

6. Paragraph (4) provides that a signed copy of the award be delivered to each party. Receipt of this copy is relevant, for example, as "receipt of the award" for the purposes of articles 33(1), (3) and 34(3) and as a necessary condition for obtaining recognition or enforcement under article 35(2). The model law does not require any other administrative act such as filing, registration or deposit of the award.

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84/ A/CN.9/245, para. 115.

Article 32. Termination of proceedings

(1) The arbitral proceedings are terminated by the final award or by agreement of the parties or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal

(a) shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) may issue an order of termination when the continuation of the proceedings for any other reason becomes unnecessary or inappropriate.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

REFERENCES

A/CN.9/232, paras. 132-135
A/CN.9/245, paras. 47-53, 117-119
A/CN.9/246, paras. 113-116

COMMENTARY

1. Article 32, which deals with the termination of the arbitral proceedings, serves three purposes. The first one is to provide guidance in this last, but not unimportant, phase of the proceedings. A good example is paragraph (2)(a) which makes it clear that withdrawal of the claim does not ipso facto lead to termination of the proceedings.

2. The second purpose is to regulate the consequential termination of the mandate of the arbitral tribunal and its exceptions (paragraph (3)). A good example is that the arbitrators would become functus officio by making an award only if that is "the final award", i.e. the one which constitutes or completes the disposition of all claims submitted to arbitration. The third purpose is to provide certainty as to the point of time of the termination of the proceedings. This may be relevant for matters unrelated to the arbitration itself, for example, the continuation of the running of a limitation period or the possibility of instituting court proceedings.

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Article 33. Correction and interpretation of awards and additional awards

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties, a party, with notice to the other party, may request the arbitral tribunal:

(a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) to give an interpretation of a specific point or part of the award.

The arbitral tribunal shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal shall make the additional award within sixty days, if it considers the request to be justified.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

REFERENCES

A/CN.9/216, para. 98
A/CN.9/232, paras. 177-183
A/CN.9/245, paras. 120-123
A/CN.9/246, paras. 117-125

COMMENTARY

1. Article 33 extends the mandate of the arbitral tribunal beyond the making of the award for certain measures of clarification and rectification, which may help to prevent continuing disputes or even setting aside proceedings. The first possible measure is to correct any error in computation or any clerical, typographical or similar error, either upon request by a party or on its own initiative. The second possible measure is to give an interpretation of a specific point or part of the award, as specified by a party, and to add this interpretation to the award. The third possible measure is to make an additional award as to any claim presented in the arbitral proceedings but omitted from the award (e.g. claimed interest was erroneously not awarded). If the arbitral tribunal considers the request, not necessarily the omitted claim, to be justified, it shall make an additional award, irrespective of whether any further hearing or taking of evidence is required for that purpose.

2. The period of time during which a party may request any such measure is thirty days of receipt of the award. The same period of time, calculated from the receipt of the request, is accorded to the arbitral tribunal for making the correction or giving the interpretation, while a time-limit of sixty days is set for the usually more difficult and time-consuming task of making an additional award. However, there are circumstances in which the arbitral tribunal would be unable, for good reasons, to comply with these time-limits. For example, the preparation of an interpretation may require consultations between the arbitrators, the making of an additional award may require hearings or taking of evidence, and in any case initially sufficient time must be given to the other party for replying to the request. The arbitral tribunal may, therefore, extend the time-limits, if necessary.

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CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award made [in the territory of this State] [under this Law] may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the Court specified in article 6 only if:

(a) the party making the application furnishes proof that:

(i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award or any decision contained therein is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

REFERENCES

A/CN.9/232, paras. 14-22
A/CN.9/233, paras. 178-195
A/CN.9/245, paras. 146-155
A/CN.9/246, paras. 126-139

COMMENTARY

Sole action for attacking award, paragraph (1)

1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Article 34 is designed to ameliorate this situation by providing only one means of recourse (paragraph (1)), available during a fairly short period of time (paragraph (3)) and for a rather limited number of reasons (paragraph (2)). It does not, beyond that, regulate the procedure, neither the important question whether a decision by the Court of article 6 may be appealed before another court nor any question as to the conduct of the setting aside proceedings itself.

2. The application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review. A party retains, of course, the right to defend himself against the award, by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 35 and 36). Obviously, article 34(1) does not exclude the right of a party to request any correction or interpretation of the award or the making of an additional award under article 33, since such request would be directed to the arbitral tribunal and not to a court; the situation is different in the case of a remission to the arbitral tribunal under article 34(4), which is envisaged as a possible response by a court to an application for setting aside the award. Finally, article 34(1) would not exclude recourse to a second arbitral tribunal, where such appeal within the arbitration system is envisaged (as, e.g., in certain commodity trades).

3. Article 34 provides recourse against an "arbitral award" without specifying which kinds of decision would be subject to such recourse. The Working Group was agreed that it was desirable for the model law to define the term "award" and noted that such definition had important implications for a number of provisions of the model law, especially articles 34 and 16. After commencing consideration of a proposed definition, the Working Group decided, for lack of time, not to include a definition in the model law to be adopted by it and to invite the Commission to consider the matter. 85/

4. Another matter to be considered by the Commission is the question of the territorial scope of application, the pending nature of which is clear from the alternative wordings placed between square brackets in paragraph (1). It is submitted that the territorial scope of article 34 should be the same as the one of the model law in general, whichever may be the criterion adopted by the Commission. 86/

Reasons for setting aside the award, paragraph (2)

5. Paragraph (2) lists the various grounds on which an award may be set aside. This listing is exhaustive, as expressed by the word "only" and reinforced by the character of the model law as lex specialis. 87/

6. Paragraph (2) sets forth essentially the same reasons as those on which recognition or enforcement may be refused under article 36(1) (or article V of the 1958 New York Convention on which it is closely modelled). It even uses, with few exceptions, the same wording, for the sake of harmony in the interpretation.

7. The list of reasons presented in paragraph (2) is based on two different policy considerations, which, however, converge in their result. First, after an extensive selection process, which included a considerable number of other grounds suggested for inclusion in the list, the reasons set forth in paragraph (2), and only these, were regarded as appropriate in the context of setting aside of awards in international commercial arbitration.

8. Second, conformity with article 36(1) is regarded as desirable in view of the policy of the model law to reduce the impact of the place of arbitration. It recognizes the fact that both provisions with their different purposes (in one case reasons for setting aside and in the other case grounds for refusing recognition or enforcement) form part of the alternative defence system which provides a party with the option of attacking the award or invoking the grounds when recognition or enforcement is sought. It also recognizes the fact that these provisions do not operate in isolation. The effect of traditional concepts and rules familiar and peculiar to the legal system ruling at the place of arbitration is not limited to the State where the arbitration takes place but extends to many other States by virtue of article 36(1)(a)(v) (or article V(1)(e) of the 1958 New York Convention) in that an

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85/ A/CN.9/246, paras. 129, 192-194.

86/ As to this general question of the territorial scope of application of the model law, see commentary to article 1, paras. 4-6.

87/ See commentary to article 1, paras. 7-8.

award, which has been set aside for whatever reasons recognized by the competent court or applicable procedural law, would not be recognized and enforced abroad.

9. Drawing the consequences from this undesirable situation, article IX of the 1961 Geneva Convention cuts off this international effect in respect of all awards which have been set aside for reasons other than those listed in article V of the 1958 New York Convention. The model law merely takes this philosophy one step further by going beyond the angle of recognition and enforcement to the source and aligning the very reasons for setting aside with those for refusing recognition or enforcement. This step has the salutary effect of avoiding "split" or "relative" validity of international awards, i.e. awards which are void in the country of origin but valid and enforceable abroad. 88/

10. Since the grounds listed in paragraph (2) are essentially those of article V of the 1958 New York Convention, they are familiar and require no detailed explanation; however, the fact that they are used for purposes of setting aside under the model law leads to some differences. For example, the application of sub-paragraphs (a)(i) and (iv), possibly also (iii), may be limited by virtue of an implied waiver or submission, as mentioned in the commentary to article 4 (para. 6) and to article 16 (paras. 8-9).

11. Sub-paragraph (a)(iv) expresses the priority of the mandatory provisions of the model law over any agreement of the parties, which is different from article 36(1)(a)(iv), at least according to the predominant interpretation of the corresponding provision in the 1958 New York Convention (article V(1)(d)). The fact that the composition of the arbitral tribunal and the arbitral procedure are, thus, to be judged by the mandatory provisions of the model law entails, for example, that this sub-paragraph (a)(iv) covers to a large extent also the grounds of sub-paragraph (a)(ii), copied from the 1958 New York Convention, which comprise cases of violations of articles 19(3) and 24(3), (4).

12. Yet another difference is less obvious since it follows merely from the different effect of setting aside as compared to refusing recognition or enforcement. Under sub-paragraph (b)(i), an award would be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration "under the law of this State". This reason is certainly appropriate for refusing recognition or enforcement in a given State, which often regards it as part of its public policy and may reduce its impact by protecting only its ordre public international, i.e. its public policy concerning international cases. However, this same reason used for setting aside gains a different dimension by virtue of the global effect of setting aside (article 36(1)(a)(v), or article V(1)(e) of the 1958 New York Convention). As was suggested in the Working Group, to quote now from the report of the seventh session (A/CN.9/246, paras. 136-137),

> "such global effect should obtain only from a finding that the subject-matter of the dispute was not capable of settlement by arbitration under the law applicable to that issue which was not

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88/ As to another effect, referred to as the potential risk of "double control" of domestic awards, see commentary to article 36, para. 3.

necessarily the law of the State of the setting aside proceedings. It was, therefore, suggested to delete the provision of paragraph (2) (b) (i). The result of that deletion, which received considerable support, would be to limit the court control under article 34 to those cases where non-arbitrability of a certain subject-matter formed part of the public policy of that State (para. (2) (b) (ii)) or where the Court regarded arbitrability as an element of the validity of an arbitration agreement (para. (2) (a) (i)), although some proponents of that suggestion sought the more far-reaching result of excluding non-arbitrability as a reason for setting aside. Another suggestion was to delete, in paragraph (2) (b) (i), merely the reference to "the law of this State" and, thus, to leave open the question as to which was the law applicable to arbitrability. The Working Group, in discussing those suggestions, was agreed that the issues raised were of great practical importance and, in view of their complex nature, required further study. The Working Group, after deliberation, decided to retain, for the time being, the provision of paragraph (2) (b) (i) in its current form so as to invite the Commission to reconsider the matter and to decide, in the light of comments by Governments and organizations, on whether the present wording was appropriate or whether the provision should be modified or deleted."

"Remission" to arbitral tribunal, paragraph (4)

13. Paragraph (4) envisages a procedure which is similar to the "remission" known in most common law jurisdictions, though in various forms. Although the procedure is not known in all legal systems, it should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the Court.

14. Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of setting aside proceedings. The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). Only if such "remission" turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36(2), would the Court resume the setting aside proceedings and set aside the award.

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CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.*

(3) Filing, registration or deposit of an award with a court of the country where the award was made is not a pre-condition for its recognition or enforcement in this State.

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

REFERENCES

A/CN.9/216, paras. 103-104, 109
A/CN.9/232, paras. 19-21, 187-189
A/CN.9/233, paras. 121-175
A/CN.9/246, paras. 140-148

COMMENTARY

Appropriateness of including provisions on recognition and enforcement of awards irrespective of their place of origin

1. The chapter on recognition and enforcement of awards presents the result of extensive deliberations on basic questions of policy, in particular, whether the model law should contain provisions on recognition and enforcement of domestic and foreign awards, and, if so, whether these two categories of awards should be treated in a uniform manner, and how closely any provisions on recognition and enforcement should follow the corresponding articles of the 1958 New York Convention. As evidenced by article 35 and its companion article 36, the prevailing answer to these basic policy questions was that the model law should contain uniform provisions on recognition and enforcement of all awards, irrespective of the place of origin, and in full harmony with the 1958 New York Convention.

2. The main reasons are, in short, the following: While foreign awards are appropriately dealt with in the 1958 New York Convention, which is widely adhered to, often with the restriction of reciprocity, and is open to any State prepared to accept its liberal provisions, the model law would be incomplete if it would not offer an equally liberal set of rules, in full harmony with the 1958 New York Convention, including its safeguards in article V, and without adversely affecting its effect and application, in order to establish a supplementary network of recognition and enforcement of awards not covered by any multilateral or bilateral treaty. While domestic awards are often treated by national laws under the same favourable conditions as local court decisions, the disparity of national laws is not conducive to facilitating international commercial arbitration and the model law should, therefore, aim at unifying the domestic treatment in all legal systems, without imposing restrictive conditions.

3. Above all, these provisions on recognition and enforcement would go a long way towards securing the uniform treatment of all awards in international commercial arbitration irrespective of where they happen to be made. To draw the line between such "international" awards and "non-international", i.e. truly domestic, awards (instead of distinguishing on territorial grounds between foreign and domestic awards), would further the policy of reducing the relevance of the place of arbitration and thereby widen the choice and enhance the vitality of international commercial arbitration. This idea of uniform treatment of all international awards was the major decisive reason which any State may wish to consider when assessing the acceptability of this chapter of the model law.

Recognition of award and application for its enforcement, paragraph (1)

4. Article 35 draws a useful distinction between recognition and enforcement in that it takes into account that recognition not only constitutes a necessary condition for enforcement but also may be standing alone, e.g. where an award is relied on in other proceedings. Under paragraph (1), an award shall be recognized as binding, which means, although this is not expressly stated, binding between the parties and from the date of the award. 89/ An award shall be enforced upon application in writing to the "competent court". 90/ Both recognition and enforcement are subject to the provisions of article 36 and the conditions laid down in paragraph (2) of article 35.

Conditions of recognition and enforcement, paragraph (2)

5. Paragraph (2), which is modelled on article IV of the 1958 New York Convention, does not lay down the procedure but merely the conditions for recognition and enforcement. The party relying on an award or applying for its enforcement shall supply, in an official language of the State, that award

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89/ A/CN.9/246, para. 148. As a practical matter, the award may, in fact, be relied on by a party only from the date of receipt.

90/ The reference is to the competent court, and not to the Court specified in article 6, because the model law does not aim at unifying national laws on the organization of the judicial system and, in particular, because the competence of courts for enforcement is normally linked to the residence of the debtor or location of property or assets.

and its constituent document, i.e. the arbitration agreement. 91/ According to the footnote accompanying the text, these conditions are intended to set maximum standards; thus a State may retain even less onerous conditions.

No filing, registration or deposit required, paragraph (3)

6. The model law, which itself does not require filing, registration or deposit of awards made under its regime (article 31), also does not require such actions in respect of foreign awards whose recognition or enforcement is sought under its regime, following the policy of the 1958 New York Convention of doing away with the "double exequatur".

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Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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91/ As regards this second condition, it is submitted that an exception be made for those cases where an original defect in form was cured by waiver or submission, for example, where arbitral proceedings were on the basis of an oral agreement initiated and not objected to by any party. In such case the supply of an award, which records the waiver or submission, should suffice.

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security.

REFERENCES

A/CN.9/216, para. 109
A/CN.9/232, paras. 19-20
A/CN.9/233, paras. 133-177
A/CN.9/245, paras. 137-145
A/CN.9/246, paras. 149-155

COMMENTARY

Grounds for refusing recognition or enforcement of "international" awards, paragraph (1)

1. Based on the prevailing policy considerations stated above, 92/ article 36(1) adopts almost literally the well-known grounds set forth in article V of the 1958 New York Convention and declares them as applicable to refusal of recognition or enforcement of all awards, irrespective of where they were made. Thus, the provision, like article 35, covers foreign as well as domestic awards, provided they are rendered in "international commercial arbitration" as referred to in article 1 and, of course, subject to any multilateral or bilateral treaty to which the enforcement State is a party.

2. As regards foreign awards, full harmony with article V is obviously desirable. The reasons taken from there were even viewed as providing sufficient safeguards to the enforcement State which would make it unnecessary

92/ Commentary to article 35, paras. 1-3.

to restrict recognition and enforcement by requiring reciprocity. It was also thought that a model law on international commercial arbitration should not promote the use of such territorial restrictions and that, from a technical point of view, it was difficult, although not impossible, to devise a workable mechanism in a "unilateral" text such as the model law. Nevertheless, the model law does not preclude a State from adopting a mechanism of reciprocity, in which case the basis or connecting factor and the technique used should be specified in the national enactment.

3. The list of reasons seems also appropriate for domestic awards, although its correspondence with the grounds for setting aside entails the potential of what has been referred to as undesirable "double control", i.e. two occasions for judicial review of the same grounds. This should be an acceptable consequence of the uniform treatment of all awards, based on the policy of reducing the relevance of the place of arbitration. In view of the different purposes and effects of setting aside and of invoking grounds for refusal of recognition or enforcement, a party should be free to avail himself of the alternative system of defences (as such recognized by the 1958 New York Convention) also in those cases where recognition or enforcement happens to be sought in the State where the arbitration took place. As regards the potential risk of double procedures on the same grounds, it is submitted that these concerns are essentially met by paragraph (2) (see below, para. 5).

4. The fact that the grounds listed in paragraph (1) are applicable to foreign as well as domestic awards, must be taken into account when interpreting the text, which is in large measure copied from an article applicable only to foreign awards (article V of the 1958 New York Convention). For example, the references to "the law of the country where the award was made" (sub-paragraph (a)(i)) or "the law of the country where the arbitration took place" (sub-paragraph (a)(iv)) or to "a court of the country in which, or under the law of which, that award was made" (sub-paragraph (a)(v)) may either lead to a foreign law, which may or may not have been modelled on the model law, or to the model law of "this State". In the latter case, i.e. a domestic setting, account should be taken of the kind of considerations mentioned in respect of the grounds for setting aside, for example, the limiting effect of an implied waiver or submission (articles 4 and 16(2)) upon the reasons set forth in paragraph (1)(a)(i) and (iv). 93/

Suspension of recognition or enforcement, paragraph (2)

5. Paragraph (2) is modelled on article VI of the 1958 New York Convention. In line with the wider scope of the model law, it covers not only foreign but also domestic awards rendered in international commercial arbitration. Thus, it can be used to avoid concurrent judicial review of the same grounds and possibly conflicting decisions, where this risk is not already excluded by the fact that the same court is seized with the application for setting aside and the other party's application for enforcement.

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93/ Commentary to article 34, paras. 10-11.