

2. Working papers submitted to the Working Group at its sixth session

(a) Model law on international commercial arbitration: revised draft articles A to G on adaptation and supplementation of contracts, commencement of arbitral proceedings, minimum contents of statements of claim and defence, language in arbitral proceedings, court assistance in taking evidence, termination of arbitral proceedings and period for enforcement of arbitral award: note by the secretariat (A/CN.9/WG.II/WP.44)

INTRODUCTORY NOTE

1. This working paper contains revised draft articles A to G of a model law on international commercial arbitration prepared by the secretariat in accordance with the conclusions of the Working Group on International Contract Practices at its fifth session (New York, 22 February-4 March 1983).¹

2. It may be noted that headings of draft provisions are merely for reference purposes, not intended to be later included in the model law.

3. In view of the tentative nature of the revised draft articles A to G, proposals as to the possible place where they may be included in the model law will be made at a later stage.

A. Adaptation and supplementation of contracts²

1. Introduction

4. At its fifth session the Working Group discussed various aspects of adaptation and supplementation of contracts on the basis of working paper A/CN.9/WG.II/WP.41 prepared by the secretariat. The Working Group postponed its decision on whether the model law should contain a provision on this issue. It requested the secretariat to study the matter and, if appropriate, prepare a revised draft provision.³

5. To facilitate discussion in the Working Group it seems advisable to recall the main points of agreement and disagreement in the Working Group and on that basis to define the main issues of adaptation and supplementation of contracts relevant in the context of the model law.

6. In the discussion at the Working Group it appeared that there was a widely shared view that there was a practical need for the parties to have a possibility of agreeing to entrust a third person with the task of adapting or supplementing their contract. The main issue on which divergent views were expressed in the Working Group was whether such third party assistance would be within the domain of arbitration. Under one view, such assistance could be rendered by an arbitral tribunal, although it was recognized that there were certain differences between the cases where the arbitral tribunal adapted or supplemented a contract and cases where it decided legal disputes. Under another view, it was inappropriate and, in fact, not necessary to qualify such assistance as arbitration.

2. Object of a provision in the model law on adaptation of contracts

7. After the conclusion of a contract circumstances may change and affect the original balance in the obligations to be performed by the parties. For such cases the parties may wish to have available a procedure under which a third party could decide on whether the change of circumstances warrants a modification of the contract and, if so, would modify the contract to adapt it to the changed circumstances.

8. The provision on adaptation of contracts in the model law would deal with cases in which the adaptation of a contract is an independent objective of the proceedings, i.e. where the goal is to rewrite one or more terms of the contract which would then have to be carried out by the parties.

9. The provision on adaptation of contracts would, thus, not deal with cases in which a party to a legal dispute over a contract may raise a defence in that dispute or may claim a remedy or relief from the other party on the grounds of changed circumstances which have allegedly caused him undue hardship. If in such legal dispute a court or arbitral tribunal reaches the decision that because of fundamentally changed circumstances the claim or defence is justified, the final

¹"Report of the Working Group on International Contract Practices on the work of its fifth session" (A/CN.9/233) paras. 15-45 (Yearbook 1983, part two, III, C).

²*Ibid.*, paras. 15-20; and A/CN.9/WG.II/WP.41, paras. 2-11 (Yearbook 1983, part two, III, D, 2).

³See A/CN.9/233, para. 20.

decision on the dispute would be preceded, as a matter of logic, by an adaptation of the relevant contract provision to the changed circumstances. Such adaptation of the contract would form an interim step in the process of making the final decision. For this type of adaptation no special authorization by the parties is needed and no provision need be included in the model law.

10. Furthermore, the provision on adaptation of contracts in the model law would only regulate procedural aspects of adaptation of contracts; it would not regulate substantive conditions, as may be contained in a contract clause or in a substantive law provision, for the right of a party to request an adaptation of a contract.

3. *Object of a provision in the model law on supplementation of contracts*

11. The parties may at the time of the conclusion of the contract consider it necessary to postpone the agreement on some issues. Also, after the conclusion of the contract a provision on an issue which has not been dealt with in the contract may be found to be needed. In such cases the parties may wish to authorize a third person to supplement the contract by formulating additional contract provisions on that issue.

12. As in the case of adaptation of contracts, the provision on supplementation of contracts in the model law would deal with cases where the supplementation of a contract is an independent objective of the proceedings, i.e. where the goal is to add one or more contract terms to the original contract.

13. The provision on supplementation of contracts would, thus, not deal with deciding legal disputes arising from breach of contract where the arbitral tribunal may have to deal with situations which are not expressly covered by the contract. If the resolution of a legal dispute on a claim for a remedy or relief based on breach of contract depends on a question which is not expressly covered by a contract provision, a court or arbitral tribunal may fill such gap by interpreting the contract. As regards the power to fill such gaps in the course of deciding legal disputes, no special authorization by the parties is needed and no provision need be included in the model law.

4. *Reasons against the inclusion of a rule on adaptation and supplementation of contracts in the model law*

14. The main reason against allowing arbitral tribunals to assist parties by adapting or supplementing contracts stems from the position of many legal systems according to which the courts are not allowed to adapt or supplement contracts. Under this reasoning the

competence of an arbitral tribunal could not be wider than the competence of a court since the competence of arbitral tribunals is substituted, by an agreement of the parties, for the competence of the courts.

15. A related reasoning is that a decision adapting or supplementing a contract is made on the basis of an assessment of economic factors and not in direct application of substantive legal rules or trade usages. As a court may lack special expertise to make such economic assessment, an arbitral tribunal should not engage in such decision-making either.

16. A further reason is that there is no need for such a provision in a model law on arbitration because legal systems often provide procedures for adaptation and supplementation of contracts outside the framework of arbitration.

5. *Reasons in favour of the inclusion of a rule on adaptation and supplementation of contracts in the model law*

17. In support of the view that adaptation and supplementation should fall within the domain of arbitration it may be said that the competence of arbitral tribunals need not be regarded as parallel to the competence of courts. The mere fact that arbitration is to the exclusion of court competence does not necessarily mean that the competence of the arbitral tribunal cannot be wider than the (excluded) competence of the court.

18. A further reason for defining more broadly the domain of arbitration is that parties, especially those engaged in long-term contracts, have a legitimate interest in a mechanism for adapting and supplementing their contracts. Parties may have an interest to entrust such task to arbitrators who have their confidence and are familiar with their business relationship.

19. Furthermore, rules governing the conduct of arbitral proceedings would also be appropriate for third-party assistance in adapting or supplementing contracts. By subjecting the process of adaptation and supplementation to the same procedural safeguards which arbitrators have to observe in deciding legal disputes, the model law would further enhance legal certainty in international trade.

20. Lastly, a procedure for adaptation and supplementation of contracts would enable the third party to intervene immediately after a controversy arises concerning the need for adaptation or supplementation of a contract. Such instant decision is particularly desirable in ongoing relationships and certainly preferable to having a party adjust his conduct to changed circumstances or decide on his conduct in the absence of a clear contract provision, and determining only later, in arbitral proceedings or litigation, whether such conduct was justified and what claims result therefrom.

6. *Possible contents of a provision on adaptation and supplementation of contracts*

21. A provision in the model law on adaptation and supplementation of contracts would possibly have to deal with the following issues:

- (a) The capacity in which a third person decides on the adaptation or supplementation of contracts;
- (b) The authorization to decide on the adaptation or supplementation of contracts;
- (c) Procedural rules which are to govern the adaptation and supplementation of contracts; and
- (d) The legal status and effect of decisions adapting or supplementing contracts.

(a) *The capacity in which a third person decides on the adaptation or supplementation of contracts*

22. In deciding the question whether an arbitral tribunal, in its capacity as an arbitral tribunal, may be authorized to adapt or supplement a contract, account may be taken of the trend towards a broader concept of arbitration and of the goal of the model law to meet the needs of parties in international trade in decades to come. However, because of possible difficulties for some legal systems to give arbitral tribunals a broader competence than courts, two approaches may be considered.

23. The first approach is a rule under which an arbitral tribunal, acting as an arbitral tribunal, would not be precluded from adapting or supplementing a contract if the parties have authorized it to do so. This approach has been adopted in alternative A of the draft provision.⁴

24. The second approach is a rule which would enable the parties to authorize the persons appointed as arbitrators to adapt or supplement a contract, making it clear, however, that such proceedings are special and are not necessarily to be qualified as arbitration. It is submitted that a provision along these lines would not preclude future developments of law and practice in this field. This second approach has been adopted in alternative B of the draft provision.⁴

(b) *The authorization to decide on the adaptation or supplementation of contracts*

25. The provision in the model law should also deal with the form and contents of the authorization given by the parties to a third person to adapt or supplement their contract. The Working Group may wish to consider whether such authorization should be in writing (like the arbitration agreement under article II (2) in A/CN.9/WG.II/WP.45; reproduced in this *Yearbook*, part two, A, 2, b) and whether the authorization should be made expressly or whether an implied authorization would suffice. Since the power of the arbitral tribunal to adapt or supplement a contract is based on the authorization, the parties are free to limit the mandate

of the arbitral tribunal by giving certain instructions or indicating certain conditions which the third person would have to observe in making a decision.

(c) *Procedural rules which are to govern the adaptation and supplementation of contracts*

26. Regarding the procedures to be followed in deciding on the adaptation and supplementation of contracts and the rules governing the decision on adaptation and supplementation, the Working Group may consider whether all or only certain provisions of the model law would be applicable. A related question would be whether the applicable provisions of the model law are to be applied directly or by analogy.

27. It is submitted that the answers to these questions to a large extent depend on which of the alternative draft provisions the Working Group adopts.

(d) *The legal status and effect of decisions adapting or supplementing contracts*

28. The objective of third-party assistance in adapting or supplementing a contract is to lay down new contract provisions to be implemented by the parties in the future. It would accord with that objective if the decision adapting or supplementing a contract had the same legal status and effect as the contract which it adapts or supplements. The newly determined contract provisions should, thus, become an integral part of the contract.

29. With regard to a decision on adaptation or supplementation establishing new contract terms to be observed by the parties, disputes may arise about the interpretation or the fulfilment of these terms. Since the terms form an integral part of the adapted or supplemented contract, such disputes would be treated like any other dispute relating to a contract, i.e. a claim would be submitted to a court or to an arbitral tribunal which would then render an enforceable decision.

30. The contract terms established by a decision on adaptation or supplementation, like any other contract, should not be contrary to mandatory rules of the applicable law. Thus, this decision could be challenged before a court or an arbitral tribunal for violation of a mandatory law provision. In addition to that, in view of the specific process in which the obligation has come into existence, there are also other grounds on which a decision adapting or supplementing a contract may later be challenged before a court or an arbitral tribunal: e.g. there has been no valid authorization to adapt or supplement the contract; the third party has exceeded the mandate or disregarded instructions given in the authorization; or the right of the party to be heard has been violated.

31. It may be noted that the above considerations as to the status and effect of a decision adapting or supplementing a contract would also apply if that decision would be qualified in the model law as an

⁴See para. 32, below.

arbitral award (see wording between the second square brackets of alternative A of article A (3) in the next paragraph).

7. *Draft provision on adaptation and supplementation of contracts*

32. The following draft provisions may form a basis for discussion:

Article A

Alternative A

(1) The arbitral tribunal has the power to adapt or supplement the contract upon request of a party provided that the parties have [expressly] authorized the arbitral tribunal [in writing] to do so; the arbitral tribunal shall decide on the adaptation or supplementation of the contract in accordance with any indication agreed upon by the parties as to [the specific conditions under which the contract should be adapted or supplemented] [the changed circumstances to which the contract or certain provisions of the contract should be adapted or any indication as to the issues which should be regulated in the contract].

(2) The arbitral tribunal authorized to decide on the adaptation or supplementation of the contract shall apply [the provisions of this Law] [the provisions of articles . . . of this Law].

(3) [The decision of the arbitral tribunal adapting or supplementing the contract] [The arbitral award in which the arbitral tribunal adapts or supplements the contract] shall be binding on the parties and [the parties shall give effect to it] [shall be carried out by the parties] as an integral part of the contract.

Alternative B

(1) The person or persons appointed as arbitrators have the power to adapt or supplement the contract upon request of a party provided that the parties [expressly] authorized him or them [in writing] to do so; the person or persons shall decide on the adaptation or supplementation of the contract in accordance with any indication agreed upon by the parties as to [the specific conditions under which the contract should be adapted or supplemented] [the changed circumstances to which the contract or certain provisions of the contract should be adapted or any indication as to the issues which should be regulated in the contract].

(2) The person or persons authorized to decide on the adaptation or supplementation of the contract shall apply [the provisions of this Law by analogy] [the provisions of articles . . . of this Law by analogy].

(3) The decision adapting or supplementing the contract shall be binding on the parties and [the parties shall give effect to it] [shall be carried out by the parties] as an integral part of the contract.

B. *Commencement of arbitral proceedings*⁵

Article B

Unless otherwise agreed by the parties, the arbitral proceedings shall be deemed to commence on the date at which a request that a dispute be referred to arbitration is received⁶ by the respondent provided that such a request [sufficiently] identifies the claim.

C. *Minimum contents of statements of claim and defence*⁷

Article C

(1) The claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought. The respondent shall state his defence in respect of these particulars. [The parties may annex to their statements all documents they deem relevant or may add a reference to the documents or other evidence they will submit.]⁸

[(2) Unless otherwise agreed by the parties, the statements of the claimant and the respondent [, made in accordance with the preceding paragraph,] shall be communicated to the other party and to each of the arbitrators within a period of time to be determined by the arbitral tribunal.]⁹

[(3) During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.]¹⁰

⁵See A/CN.9/233, paras. 21-23 (*Yearbook 1983*, part two, III, C) and A/CN.9/WG.II/WP.41, paras. 12-18 (*idem*, D, 2).

⁶It may be desirable to include in the model law a general rule on the date when any notice or other communication is deemed to have been received. Such a rule, modelled on article 2 (1) of the UNCITRAL Arbitration Rules, might read as follows: "For the purposes of this Law, any written communication is deemed to have been received if it is physically delivered to the addressee 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 or residence. Communication shall be deemed to have been received on the day it is so delivered."

⁷See A/CN.9/233, paras. 24-26 (*Yearbook 1983*, part two, III, C) and A/CN.9/WG.II/WP.41, paras. 19-21 (*idem*, D, 2).

⁸The provision in square brackets is modelled on article 18 (2) and article 19 (2) of the UNCITRAL Arbitration Rules.

⁹Draft paragraph (2) is modelled on article 18 (1) and article 19 (1) of the UNCITRAL Arbitration Rules. It may be noted that the decision whether paragraph (2) of this draft article is necessary largely depends on the decision of the Working Group on the two alternatives in draft article XVII (3) (A/CN.9/WG.II/WP.40; *Yearbook 1983*, part two, IV, D, 1); if the first alternative in draft article XVII (3) is adopted, i.e. that all documents or information supplied to the arbitral tribunal by one party shall be communicated to the other party, there may be little need for the provision of paragraph (2) of this draft article.

¹⁰Draft paragraph (3) is modelled on article 20 of the UNCITRAL Arbitration Rules (*Yearbook 1976*, part one, II, A, para 57; or UNCITRAL Arbitration Rules, United Nations publication, Sales No. E.77.V.6).

D. *Language in arbitral proceedings*¹¹*Article D*¹²

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

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

E. *Court assistance in taking evidence*¹³*Article E*

(1) The arbitral tribunal or a party [with the approval of the arbitral tribunal] may request from [a court] [the Court specified in article V] assistance in taking evidence. The court shall execute such a request by either taking the evidence itself or by ordering a party or a third person to give evidence to the arbitral tribunal.

(2) Where an arbitration takes place outside this State, the arbitral tribunal or a party [with the approval of the arbitral tribunal] may submit such a request through a court of the State where the arbitration takes place. Such a request shall be treated by the court referred to in paragraph (1) as a request by that foreign court.

F. *Termination of arbitral proceedings*¹⁴*Article F*

(1) The arbitral proceedings are terminated:

¹¹See A/CN.9/233, paras. 27-30 (*Yearbook 1983*, part two, III, C) and A/CN.9/WG.II/WP.41, paras. 22-26 (*idem*, D, 2).

¹²This provision is modelled on article 17 of the UNCITRAL Arbitration Rules.

¹³See A/CN.9/233, paras. 31-37 (*Yearbook 1983*, part two, III, C) and A/CN.9/WG.II/WP.41, paras. 27-37 (*idem*, D, 2).

¹⁴See A/CN.9/233, paras. 38-41 (*Yearbook 1983*, part two, III, C) and A/CN.9/WG.II/WP.41, paras. 38-41 (*idem*, D, 2).

(a) by the [making] [delivery] of the final award which constitutes or completes the disposition of all claims submitted to arbitration; or

(b) by an agreement of the parties that the arbitral proceedings are to be terminated;¹⁵ or

(c) by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) After having given suitable notice to the parties, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim or if for any other reason the continuation of the proceedings becomes unnecessary or inappropriate.

(3) The mandate of the arbitral tribunal is terminated with the termination of the arbitral proceedings, subject to the provisions of article XXIV.¹⁶

G. *Period for enforcement of arbitral award*¹⁷*Article G*

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

¹⁵This subparagraph also covers the case where the parties agree on the settlement of the dispute without requesting the recording of the settlement in the form of an arbitral award; such a case implies the agreement of the parties that the arbitral proceedings are to be terminated. If the parties, after having settled the dispute, request that the settlement be recorded in the form of an award, the arbitral proceedings are terminated by the making of the award on agreed terms.

¹⁶Another possible extension of the mandate of the arbitral tribunal to be listed in this article could be the case of remission by a court as envisaged under article XXX (3) in A/CN.9/WG.II/WP.46 (reproduced in this *Yearbook*, part two, II, A, 2, c).

¹⁷See A/CN.9/233, paras. 42-45 (*Yearbook 1983*, part two, III, C) and A/CN.9/WG.II/WP.41, paras. 42-45 (*idem*, D, 2).