

- (b) *Model law on international commercial arbitration: redrafted articles I to XII on scope of application, general provisions, arbitration agreement and the courts, and composition of arbitral tribunal: note by the secretariat (A/CN.9/WG.II/WP.45)*

#### INTRODUCTORY NOTE

1. This Working Paper contains a redraft of revised draft articles I to XII 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).<sup>1</sup>

<sup>1</sup>"Report of the Working Group on International Contract Practices on the work of its fifth session" (A/CN.9/233), paras. 47-120 (*Yearbook 1983*, part two, III, C). The revised draft articles were set forth in A/CN.9/WG.II/WP.40 (*Yearbook 1983*, part two, III, D, 1), together with a comparative table of numbers of previous draft articles.

2. In addition to this second revision of draft articles I to XII, three new draft articles (I *bis*, I *ter* and I *quater*) are submitted for consideration by the Working Group. They contain some rules of interpretation or definitions and other provisions of general relevance, based on decisions or suggestions made by the Working Group.

3. It may be noted that not only the heading of these three new articles ("General provisions") but also all other chapter headings are tentatively suggested by the secretariat for reference purposes. The Working Group may wish to decide at a later stage whether and, if so, which headings should be used.

## REDRAFTED ARTICLES I TO XII OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

### A. *Scope of application*

#### *Article I<sup>2</sup>*

(1) This Law applies to international commercial\* arbitration [, subject to any multilateral or bilateral agreement entered into by this State].<sup>3</sup>

(2) An arbitration is international if the parties to an arbitration agreement have [, at the time of the conclusion of that agreement,]<sup>4</sup> their places of business in different States. 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.<sup>5</sup>

[(3) An arbitration shall also be regarded as international for the purpose of paragraph (1) where the

\* (The following explanations could be given in a footnote to the term "commercial", as envisaged by the Working Group at its fifth session; see A/CN.9/233, para. 56; *Yearbook 1983*, part two, III, C.)

The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial [or economic] nature, irrespective of whether the parties are "commercial persons" (merchants) under any given national law. 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.

<sup>2</sup>See relevant discussion and conclusions by the Working Group in A/CN.9/233, paras. 48-60 (*Yearbook 1983*, part two, III, C).

<sup>3</sup>The Working Group may wish to consider whether this proviso, which was felt to be a principle of general application (A/CN.9/233, para. 128; *Yearbook 1983*, part two, III, C), should be expressed in this paragraph or in a separate article (following article I).

<sup>4</sup>The Working Group may wish to consider whether the words placed between square brackets are necessary in order to clarify the decisive point of time.

<sup>5</sup>While it was suggested that the relevant connecting factor was not only the arbitration agreement but also its implementation and, possibly, the subject-matter of the dispute (see A/CN.9/233, para. 59; *Yearbook 1983*, part two, III, C), it is submitted that such additions might introduce an undesirable degree of uncertainty and that the first criterion (i.e. implementation of the arbitration agreement) tends to relate to a third ("neutral") place which seems less appropriate for determining the link to the place of business of one of the parties.

parties to an arbitration agreement have stipulated that this Law shall apply in lieu of a national law on domestic arbitration, provided that [their relationship involves international trade interests. A relationship is deemed to involve international trade interests if] not all of the following places are situated in the same State: the place where the offer for the contract containing the arbitration clause or for the separate arbitration agreement was made; the place where the corresponding acceptance was made; the place of performance of any contractual obligation or of the location of the subject-matter; the place where each party is registered or incorporated or where its central management and control is exercised; the place of arbitration if determined in the arbitration agreement.]<sup>6</sup>

### B. *General provisions*

#### *New article I bis*

For the purposes of this Law:

(a) where a provision of this Law grants the parties freedom to determine a certain issue, such freedom includes the right of the parties to authorize a third person or institution to make that determination;<sup>7</sup>

(b) 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;<sup>7</sup>

(c) "arbitral tribunal" [refers to] [means] a sole arbitrator or a [panel] [plurality] of arbitrators [, as the case may be];<sup>8</sup>

(d) "court" means a body or organ of the judicial system of a country;<sup>9</sup>

[(e) if a party does not have a place of business, reference is to be made to his habitual residence.]<sup>10</sup>

<sup>6</sup>This draft provision would form a separate provision in addition to paragraph (2), if accepted by the Working Group as an "opting-in" provision. Another possibility suggested at the previous session (A/CN.9/233, para. 60; *Yearbook 1983*, part two, III, C) would be to replace the text laid down in paragraph (2) by a wider formula along the lines of the proviso set forth in draft paragraph (3).

<sup>7</sup>The draft provisions under lit. (a) and (b) are designed to implement the decision of the Working Group reported in A/CN.9/233, paras. 101-102 (*Yearbook 1983*, part two, III, C).

<sup>8</sup>This draft provision might be deemed useful not only in view of the clarification expressed therein but also as an aid in emphasizing the distinction between arbitral tribunal and "court" as defined in the following provision.

<sup>9</sup>This draft provision attempts to define, for two different reasons, the term "court" as used in the model law. One reason is to clarify that "court" includes any competent "judicial authority" even if not called court in the respective country. The other reason is to emphasize the distinction between arbitral tribunal and court which seems particularly desirable in languages other than English since, for example, in French and Spanish the term *tribunal* could otherwise be misunderstood as an abbreviated reference to *tribunal arbitral*.

<sup>10</sup>This draft provision, which is modelled on article 10 (b) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980; *Yearbook 1980*, part three, I, B), might, if adopted, be incorporated in article I (2) unless the place of business is referred to in other provisions as well (e.g. draft article on receipt of communications).

*[New article I ter*

The parties may not derogate from the following provisions of this Law: articles . . . (to be listed here: all mandatory provisions).]<sup>11</sup>

*New article I quater*<sup>12</sup>

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

C. *Arbitration agreement and the courts**Article II*<sup>13</sup>

(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 [whether] [. 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 would [preserve a record of the agreement] [produce a record on paper automatically or at the option of the recipient]. The reference in a contract to an arbitration clause contained in another legal text constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a term of the contract.

*[Article III*

In matters governed by this Law, no court shall intervene except where so provided in this Law.]<sup>14</sup>

<sup>11</sup>The Working Group may wish to consider at a later stage the appropriateness of a general provision on which rules of the law are of a mandatory character (cf. A/CN.9/232, paras. 77, 181; *Yearbook 1983*, part two, III, A).

<sup>12</sup>This draft provision, which is modelled on article 30 of the UNCITRAL Arbitration Rules, is designed to implement a suggestion made in various contexts (e.g. A/CN.9/233, paras. 66, 188; *Yearbook 1983*, part two, III, C).

<sup>13</sup>See A/CN.9/233, paras. 62-68 (*Yearbook 1983*, part two, III, C).

<sup>14</sup>The Working Group, at its fifth session, postponed the decision on this tentative draft article to a later stage but accepted its underlying policy as an intention to clarify, in the course of the preparation of the draft model law, instances of court intervention (A/CN.9/233, para. 73; *Yearbook 1983*, part two, III, C).

*Article IV*<sup>15</sup>

(1) A court, before which an action is brought in a matter which is the subject of an arbitration agreement, shall, at the request of a party, [decline jurisdiction and] refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. [A plea that the court has no jurisdiction because of] [Such a request based on] the existence of an arbitration agreement may be made by a party not later than when submitting his first statement on the substance of the dispute.<sup>16, 17</sup>

(2) It shall not be deemed incompatible with the arbitration agreement that a party, before or during arbitral proceedings, requests from a court interim measures of protection [in respect of the subject-matter of the dispute or in respect of evidence] and that a court [orders or takes] [grants] such measures.

*Article V*<sup>18</sup>

The Court [with jurisdiction] [entrusted] to perform the functions referred to in articles VIII (2), (3), X (3), XI (2), XIII (3), XIV, XXVI and XXX shall be the . . . (blanks to be filled by each State when enacting the model law).<sup>19</sup>

<sup>15</sup>See A/CN.9/233, paras. 75-81 (*Yearbook 1983*, part two, III, C).

<sup>16</sup>This draft provision combines the provisions previously set forth in paragraphs (1) and (2). Two modifications are suggested in an attempt (a) to emphasize the issue dealt with in this provision, i.e. the competence—or lack of competence—of a court before which a substantive claim is brought; (b) to clarify the relationship between the "request", mentioned in the first sentence, and the "plea", previously referred to in paragraph (2).

<sup>17</sup>It is suggested that the provision previously contained in paragraph (3) of article IV be transferred, with some modifications, to article XIII as new paragraph (4):

"(4) Where, after arbitral proceedings have commenced, a party invokes before a court lack of jurisdiction of the arbitral tribunal, whether impliedly by bringing a substantive claim or expressly by requesting a decision on the jurisdiction of the arbitral tribunal directly from the court without first raising this plea before the arbitral tribunal, the arbitral tribunal may continue the proceedings while the issue is pending with the court."

In this context, the Working Group may wish to consider the relationship between the two ways of pleading lack of jurisdiction of the arbitral tribunal as envisaged in article XIII (2), (3), i.e. plea raised before arbitral tribunal, with later control by court, and in above paragraph (4), i.e. direct resort to court without first requesting a ruling by the arbitral tribunal on its jurisdiction. The main question would be whether these two procedures are provided cumulatively or alternatively. In the latter case, a party who has chosen one of the procedures would be precluded from using the other one.

<sup>18</sup>See A/CN.9/233, paras. 83-86 (*Yearbook 1983*, part two, III, C). It may be recalled here that, according to a decision by the Group, the procedural issues previously dealt with in (now deleted) paragraph (2), i.e. right to request the court to act and finality of the court's decision, should be considered in the context of the individual provisions entrusting certain functions to the court.

<sup>19</sup>The "Court" to be designated by each State may be a court or part of a court (e.g. special chamber), whether already existing (e.g. commercial court) or established for that purpose; certain functions of a more administrative nature and where speed is required (e.g. appointment, challenge) may be assigned to a specific person (e.g. president of court or chamber).

#### D. *Composition of arbitral tribunal*

##### *Article VI*<sup>20</sup>

No person shall be by reason of his nationality precluded from acting as an arbitrator, unless otherwise agreed by the parties.<sup>21</sup>

##### *Article VII*<sup>22</sup>

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

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

##### *Article VIII*<sup>23</sup>

(1) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators.

(2) 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 30 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 30 days from their appointment, the appointment shall be made [, upon request of a party,] by the Court specified in article V;

(b) if, in an arbitration with a sole arbitrator, the parties [are unable to agree] [do not within 40 days after the request for arbitration agree] on the arbitrator, he shall be appointed by the Court specified in article V.

(3) 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 from 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 V to take the necessary measure instead, unless the agreement on the appointment procedure [, in particular by reference to arbitration rules,] provides [another procedure for meeting such contingency] [other means for securing the appointment].

[(3 bis) Any decision entrusted by paragraphs (2) and (3) to the Court specified in article V shall be final.]

<sup>20</sup>See A/CN.9/233, paras. 88-91 (*Yearbook 1983*, part two, III, C).

<sup>21</sup>This provision might later be combined with the provisions of article VII or VIII.

<sup>22</sup>See A/CN.9/233, para. 93 (*Yearbook 1983*, part two, III, C).

<sup>23</sup>*Ibid.*, paras. 95-100.

(4) This Court, in appointing an arbitrator, shall have due regard [to any qualifications required of the arbitrator by 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 the nationalities of the parties] [the national of a State where neither of the parties has his relevant place of business as referred to in article I (2)].

##### *Article IX*<sup>24</sup>

(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 thereafter,] shall disclose any such circumstances to the parties unless they have already been informed by him of these circumstances.

(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 the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

##### *Article X*<sup>25</sup>

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

(2) Failing such agreement, a party may challenge an arbitrator before the arbitral tribunal within 15 days after knowing any circumstance referred to in article IX (2). The mandate of the arbitrator terminates when he withdraws from his office or the other party agrees to the challenge; [in neither case does this imply] [neither reaction implies] acceptance of the validity of the grounds for the challenge.

(3) If a challenge is not successful within 30 days under the procedure of paragraph (2) or is not successful under any procedure agreed upon by the parties, the challenging party may [pursue his objections before a court only in an action for setting aside the arbitral award] [request, within 15 days, from the Court specified in article V a decision on the challenge which shall be final; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings].<sup>26</sup>

<sup>24</sup>*Ibid.*, paras. 104-106.

<sup>25</sup>*Ibid.*, paras. 108-111.

<sup>26</sup>In the latter alternative, some elements have been added (i.e. time-limit for request; finality of decision; discretion to continue arbitral proceedings) in an attempt to alleviate the fear of dilatory tactics. An additional device could be to accelerate the decision by assigning it to a person rather than a court (cf. footnote 19).

*Article XI*<sup>27</sup>

(1) In the event that an arbitrator fails to act or in the event of the *de jure* or *de facto* impossibility of his performing his functions, his mandate terminates if he withdraws from his office or if the parties agree on the termination; in neither case does this imply acceptance of the validity of any ground referred to in the first sentence.

(2) If [the mandate of the arbitrator does not terminate in accordance with paragraph (1) and if] a controversy remains concerning any of the events

<sup>27</sup>See A/CN.9/233, paras. 113-117 (*Yearbook 1983*, part two, III, C).

envisaged in paragraph (1), any party [or arbitrator] may request from the Court specified in article V a decision on the termination of the mandate [which shall be final].

*Article XII*<sup>28</sup>

Where the mandate of an arbitrator terminates under article X or XI, or in the event of his death or resignation, 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.

<sup>28</sup>*Ibid.*, paras. 119-120.