

INTRODUCTORY NOTE

1. This working paper contains revised draft articles XXV to XXX 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 These revised draft articles (on recognition and enforcement of arbitral award and on recourse against award) are based on previous draft articles XXV, XXVI and 37 to 41.²

2. It may be noted that the revised draft articles are presented in the same order as the previous ones, although two suggestions for rearranging the articles were made at the last session: (a) to place the articles on recourse against award before the articles on recognition and enforcement; (b) to combine the provisions on setting aside with the articles on recognition and enforcement of domestic awards. It may be recalled that the Working Group was agreed that these suggestions could be considered at a later stage.³

3. In fact, it seems premature to rearrange these draft articles before final decisions are made on their retention and exact contents. This is particularly true with regard to the draft provisions on recognition and enforcement, since conflicting views were expressed on policy questions such as the extent to which draft article XXVII (previously 37) and especially article XXVIII (previously 38) should be aligned with article V of the 1958 New York Convention and whether one should

¹"Report of the Working Group on the work of its fifth session" (A/CN.9/233) paras. 121-195 (*Yearbook 1983*, part two, III, C).

²The previous draft articles were set forth in A/CN.9/WG.II/WP.40 and 42 (*Yearbook 1983*, part two, III, D, 1 and 3).

³See A/CN.9/233, para. 182 (*Yearbook 1983*, part two, III, C).

strive for a uniform system for all awards irrespective of their place of origin.⁴

REVISED DRAFT ARTICLES ON RECOGNITION AND ENFORCEMENT OF ARBITRAL AWARD AND ON RECOURSE AGAINST AWARD

J. *Recognition and enforcement of arbitral award*

Article XXV⁵

An arbitral award made in the territory of this State shall be recognized as binding and enforced in accordance with the following procedure:*

An application shall be made in writing to the competent court, accompanied by the duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement referred to in article II, or a duly certified copy thereof. If the said award or agreement is not made in an official language of this State, the party applying for recognition and enforcement of the award shall supply a [duly certified] translation of these documents into such language [, certified by an official or sworn translator or by a diplomatic or consular agent].

*The following text might be given in a footnote to this article in the model law in order to express the common understanding in the Working Group that the objective of article XXV was to set forth maximum procedures (see A/CN.9/233, para. 123):

"The procedure set forth in this article is 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 an even less onerous procedure."

⁴*Ibid.*, paras. 137-139, 159-161.

⁵*Ibid.*, paras. 122-126.

*Article XXVI*⁶

An arbitral award made outside the territory of this State shall be recognized as binding and enforced in accordance with the following procedure:

An application shall be made in writing to the Court specified in article V, accompanied by the duly authenticated original award, or a duly certified copy thereof, and the original arbitration agreement referred to in article II, or a duly certified copy thereof. If the said award or agreement is not made in an official language of this State, the party applying for recognition and enforcement of the award shall supply a translation of these documents into such language, certified by an official or sworn translator or by a diplomatic or consular agent.

*Article XXVII*⁷

(1) Recognition and enforcement of an arbitral award made in the territory of this State shall be refused, at the request of the party against whom it is invoked, only if that party furnishes proof that:

(a) a party to the arbitration agreement referred to in article II [was under some incapacity] [lacked the capacity to conclude such an agreement], or the said agreement is not valid; or

(b) 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

(c) the award decides on a dispute or matter [not submitted to arbitration] [outside the scope of the arbitration agreement or not referred to the arbitral tribunal]; however, if any 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

(d) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties [, unless in conflict with any mandatory provision of this Law,] or, failing such agreement, was not in accordance with the provisions of this Law [, whether mandatory or not]; or

(e) the award has not yet become binding on the parties or has been set aside by a court of this State.

(2) Recognition and enforcement of an award [may] [shall] also be refused if the court finds that the recognition or enforcement would be contrary to the public policy of this State.

* * *

⁶*Ibid.*, paras. 128-131. It should be noted that the proviso contained in the previous version of this article ("subject to any multilateral or bilateral agreement...") is now contained in a provision of general application (i.e. article I (1) in A/CN.9/WG.II/WP.45; reproduced in this *Yearbook*, part two, II, A, 2, b).

⁷See discussion and conclusions by the Working Group on the relevant previous draft article 37 in A/CN.9/233, paras. 134-156 (*Yearbook 1983*, part two, III, C).

(In view of the suggestion reported in A/CN.9/233, para. 139 (*Yearbook 1983*, part two, III, C), the Working Group may wish to consider the following short version of draft article XXVII:

Recognition and enforcement of an arbitral award made in the territory of this State may be refused if:

(a) the arbitral tribunal was not competent to make that award; or

(b) the subject-matter of the award was not [arbitrable] [capable of settlement by arbitration]; or

(c) the award is not binding; or

(d) recognition and enforcement would be contrary to public policy.)

*Article XXVIII*⁸

(1) Recognition and enforcement of an arbitral award made outside the territory of this State [may] [shall] be refused, at the request of the party against whom it is invoked, only if that party furnishes [to the competent authority where the recognition and enforcement is sought]⁹ proof that:

(a) the parties to the arbitration agreement referred to in article II were, under the [applicable law] [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

(b) 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

(c) 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

(d) 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

(e) the award has not yet become binding on the parties, or has been set aside or suspended by a [court] [competent authority] of the country in which, or under the [procedural] law of which, that award was made.

⁸See discussion and conclusions by the Working Group on the relevant previous draft article 38 in A/CN.9/233, paras. 158-175 (*Yearbook 1983*, part two, III, C).

⁹The wording between square brackets, which is taken from the 1958 New York Convention, might be regarded as superfluous, or it could be replaced by the words "to the Court" (in line with the decision on article XXVI according to which "the Court specified in article V" is the competent one).

(2) Recognition and enforcement of an arbitral award may also be refused if the [competent authority] [Court]¹⁰ finds that:

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

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

(3) If an application for the setting aside or suspension of an award has been made to a [court] [competent authority] referred to in paragraph (1) (e), the [authority before which the award is sought to be relied upon] [Court] may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.¹¹

K. Recourse against arbitral award

*Article XXIX*¹²

No recourse against an arbitral award made under this Law may be made to a court except as provided in article XXX.

*Article XXX*¹³

(1) An award made under this Law may be set aside, whether in whole or in part, only on grounds on which

¹⁰The term "Court" seems to be more appropriate than the words "competent authority" in view of the decision on the competent body under article XXVI (cf. footnote 9).

¹¹This draft provision, which is based on previous draft article 39, has been incorporated into article XXVIII in view of the decision of the Working Group to limit the scope of this rule to recognition and enforcement of only foreign awards (A/CN.9/233, para. 177; *Yearbook 1983*, part two, III, C).

¹²See discussion and conclusions of the Working Group on the relevant previous draft article 40 in A/CN.9/233, paras. 179-180 (*Yearbook 1983*, part two, III, C).

¹³See discussion and conclusions of the Working Group on the relevant previous draft article 41 in A/CN.9/233, paras. 182-195 (*Yearbook 1983*, part two, III, C).

recognition and enforcement may be refused under article XXVII (1) (a), (b), (c), (d) or (2) [or on which an arbitrator may be challenged under article IX (2)].¹⁴

(2) An [application] [action] for setting aside may not be [made] [brought] after four months have elapsed from the date on which the party [making that application] [bringing that action] had received the award [in accordance with article XXII (4)]. [However, where the arbitration agreement provides for appeal to another arbitral tribunal, this period commences on the date of the receipt of the decision of that arbitral tribunal.]¹⁵

(3) The Court, when asked to set aside an award, may also order,¹⁶ where appropriate¹⁷ [and if so requested by a party], that the arbitral proceedings be continued. Depending upon the [reason for setting aside] [procedural defect found by the Court], this order may specify the matters to be considered by the arbitral tribunal and may contain other instructions concerning the composition of the arbitral tribunal or the conduct of the proceedings.

¹⁴The words between square brackets would not be necessary if the Working Group were to decide in favour of the second alternative set forth in article X (3) in A/CN.9/WG.II/WP.45 (reproduced in this *Yearbook*, part two, II, A, 2, b).

¹⁵The sentence between square brackets is submitted for consideration in the light of the suggestion reported in A/CN.9/233, para. 184 (*Yearbook 1983*, part two, III, C). If a provision concerning appeal to another arbitral tribunal were to be included in the model law, the Working Group may wish to consider also the case where a party does not bring such appeal (within any agreed period of time) but directly requests the court to set aside the award (of first instance).

¹⁶This opening phrase would leave it open whether remission to the arbitral tribunal is an alternative or a supplementary remedy to setting aside. The Working Group may wish to consider whether the provision should leave open this question to which varying answers are given in different national laws.

¹⁷This almost self-evident proviso is submitted in this short form since no other, more detailed formula could be found which would cover the great variety of cases where remission would either be appropriate or inappropriate.