

(b) *Model law on international commercial arbitration: territorial scope of application and related issues: note by the secretariat (A/CN.9/WG.II/WP.49)*

INTRODUCTORY NOTE

1. The model law, by providing in article 1 that it applies to international commercial arbitration, defines its scope of application in substantive terms. However, it does not define the territorial scope of its provisions. While the question of territorial scope was tentatively discussed by the Working Group in respect of some articles,<sup>1</sup> it was agreed to discuss the question in more detail and with regard to the complete set of draft provisions at the seventh session of the Working Group.<sup>2</sup>

2. The general assumption in the preparation of the model law has been that it essentially applies to arbitrations taking place in the State of the model law. The Working Group may wish to express this principle in the model law. However, it may need to be qualified in two respects.

3. Firstly, it may be useful to decide whether the place of arbitration is the exclusive factor in determining the applicability of the model law or whether the parties have a right to agree on the procedural law applicable to the arbitration. This aspect is discussed under A, below.

4. Secondly, there may be provisions in the model law which require a special delimitation of their scope of application different from the general delimitation of the scope of application of the model law. This aspect is discussed under B, below.

5. In this section possible conflicts of procedural laws, which may arise as a result of a given delimitation of the scope of application of the model law, are also discussed. Possible ways of dealing with such conflicts are discussed under C, below.

A. POSSIBLE CRITERION FOR DELIMITING THE SCOPE OF APPLICATION OF PROVISIONS ON ARBITRAL PROCEDURE

6. The basic criterion, common to all legal systems, for determining the applicability of procedural law on arbitration is a territorial one. While it appears that in most legal systems the territorial criterion is applied strictly, it is supplemented by an autonomy criterion in some other systems.

7. Under the strict territorial criterion, the place of arbitration is the exclusive determining factor for the applicability of the law of a State. Under this approach,

a State (State A) does not give effect to an agreement by the parties that an arbitration taking place in State A is to be governed by the procedural law of another State (State B). State A also does not give effect to an agreement by the parties that an arbitration taking place in State B is to be governed by the procedural law of State A.

8. Under the territorial criterion supplemented by the autonomy criterion, the place of arbitration determines the applicability of the law unless the parties have agreed otherwise. Under this approach, the law of a State (State A) applies to an arbitration if the arbitration takes place in State A provided that the parties have not agreed to subject the arbitration to the procedural law of another State (State B), in which case State A considers that the arbitration is governed by the procedural law of State B. The law of State A also applies to an arbitration if the parties have agreed to subject the arbitration to the procedural law of State A even if the arbitration does not take place in State A.

9. It may be noted in this connection that the 1958 New York Convention, while applying the territorial criterion for its application, recognizes the possibility that a State may allow the parties to subject an arbitration to a procedural law different from the law of the place of arbitration. For legal systems which allow such an autonomy of parties, article I (1) of the Convention provides that the Convention also applies to the awards made in the State of recognition and enforcement but not considered as domestic in that State. Furthermore, article V (1) (e) of the Convention envisages the situation where the competent authority of a State sets aside an award, i.e. an award considered as domestic in that State, which was made outside that State but under the procedural law of that State.

10. A reason in favour of the strict territorial criterion is the simplicity in its application since in most cases it can easily be ascertained which procedural law governs an arbitration. Furthermore, the court assistance or supervision is easily accessible to the parties and to the arbitral tribunal since the place of arbitration determines the court competence to provide such assistance or supervision.

11. On the other hand, there is advantage in not preventing the parties from subjecting an arbitration to a procedural law other than the law of the place of arbitration. The parties may have an interest in being able to agree on the place of arbitration in State A, for example, because of the convenience of participants, cost of proceedings or the availability of evidence. Yet, the parties may prefer that the arbitration is governed by the procedural law of State B rather than the law of State A.

12. It may be noted that, under the model law, the arbitral tribunal is not bound to conduct the entire

<sup>1</sup>E.g. articles V and XXX. See "Report of the Working Group on International Contract Practices on the work of its sixth session" (A/CN.9/245) paras. 148 and 191 (reproduced in this *Yearbook*, part two, II, A, 1).

<sup>2</sup>*Ibid.*, paras. 149 and 191.

arbitral proceedings in the State of the place of arbitration. Under article 20 (2), the arbitral tribunal may decide to meet outside the State of the place of arbitration for consultations, hearings or inspection of goods or documents.

13. In addition to the territorial criterion, whether or not supplemented by the autonomy criterion, the Working Group may wish to provide a criterion for determining the applicability of the model law in cases where the place of arbitration or the law governing the arbitration has not been agreed upon or determined. The reason for this is that a party may need court assistance before the competence of the court to grant such assistance has been established by an agreement on the place of arbitration or on the governing procedural law. The model law could provide, for example, that in the absence of a factor determining the applicability of the model law, a party may rely on the model law, including its provisions on the assistance of the court specified in article 6, if his place of business or residence is in the State of the model law. (For a discussion on the possibility of a conflict created by such a provision see paragraphs 33 and 34, below.)

#### B. SPECIAL CONSIDERATIONS WITH REGARD TO PROVISIONS ON COURT ASSISTANCE AND SUPERVISION

14. It may be useful to consider which provisions of the model law dealing with court assistance and supervision should have the same scope of application as the model law in general and which provisions should have a special delimitation of the scope of application. On the basis of such consideration the Working Group may wish to decide whether in a particular case an express provision on the scope of application is needed.

##### 1. *Provisions on court assistance and supervision which should have the same scope of application as the model law in general*

15. It is submitted that the provisions dealing with the following instances of court assistance and supervision are directed to the courts of the State of the model law and relate to arbitrations which are governed by the procedural law of that State whose court is to decide on the matter:

- (a) Control over the validity of an arbitration agreement (article 17);
- (b) Review of a decision by an arbitral tribunal that it has jurisdiction (article 16 (3));
- (c) Appointment of an arbitrator (article 11);
- (d) Challenge of an arbitrator (article 13);
- (e) Termination of the mandate of an arbitrator (article 14);
- (f) Setting aside of an award (article 34).

16. If the Working Group adopts the strict territorial criterion, the court specified in article 6 would be

competent to make a decision in a matter mentioned in the previous paragraph if the place of arbitration is in the State of the model law.

17. If the Working Group adopts the territorial criterion supplemented by the autonomy criterion, the court specified in article 6 would be competent to make a decision in a matter mentioned in paragraph 15 when the place of arbitration is in the State of the model law, unless the parties have subjected the arbitration to a foreign procedural law. The court would also be competent to make such a decision if the parties have subjected the arbitration to the procedural law of the State of the model law even if the arbitration does not take place in that State.

##### 2. *Provisions on court assistance and supervision which should have a special delimitation of scope of application*

18. Some provisions in the model law dealing with court assistance and supervision are of such a nature that they may require a different scope of application than the model law in general. These provisions are discussed below.

##### (a) *Referral of parties to arbitration because of existence of arbitration agreement (article 8 (1))*

19. Under article 8 (1), a court before which an action is brought in a matter which is the subject of a valid arbitration agreement, refers the parties to arbitration. This provision is directed to the courts of the State of the model law; however, it is submitted that the arbitration agreement which is the ground for referral of the parties to arbitration may be any arbitration agreement irrespective of the place of arbitration or the law governing the arbitration. The reason for such universal recognition of arbitration agreements is that an arbitration agreement can only be effective if it prevents the parties from bringing an action before a court in any State.

##### (b) *Granting of interim measure (article 9)*

20. Article 9 expresses the principle of compatibility of an arbitration agreement with a request to a court for an interim measure. There are two aspects of this principle.

21. One aspect is that it applies to courts of the State of the model law requested to grant an interim measure and provides that a court shall not refuse to grant such a measure on the ground that there is an arbitration agreement. In this respect the scope of application of the rule should be the same as the rule of article 8 (1) mentioned in paragraph 19.

22. The other aspect is that the rule expresses the principle according to which a request by a party for an interim measure should not be construed as a waiver of the arbitration agreement. This principle should apply irrespective of whether such a request is made to a court in the State of the model law or to a court in any other State.

(c) *Assistance in taking evidence (article 27)*

23. Article 27 deals with the assistance of the courts of the model law to arbitrations, in paragraphs (1) and (2) to arbitrations governed by the procedural law of that State and in paragraph (3) to arbitrations not governed by that procedural law. In this respect the scope of application of this article is wider than the general scope of application of the model law.

24. Assistance to arbitrations not governed by the procedural law of the State where the assistance is to be given may be subject to stricter conditions than the assistance to arbitrations governed by that law. The reason is that a foreign procedural law may be different from the law of the State where assistance is to be given and that the courts of that State do not have supervisory powers over such arbitrations. It is, therefore, suggested that, for the purpose of assistance in taking evidence, the distinction between arbitrations governed by the procedural law of the State where assistance is to be given and arbitrations not governed by that procedural law should follow the general scope of application of the model law.

(d) *Recognition and enforcement of arbitral awards (articles 35 and 36)*

25. The prevailing view in the Working Group was that the model law should regulate recognition and enforcement of awards governed by the procedural law of the State where recognition and enforcement are sought, i.e. domestic awards, as well as recognition and enforcement of awards not governed by that law, i.e. foreign awards.<sup>3</sup> In this respect the scope of application of this article is wider than the general scope of application of the model law.

26. The Working Group was also of the view that there was no convincing reason for providing different rules for domestic and foreign awards and it was therefore decided that a uniform regime should be adopted for both categories of awards.<sup>4</sup>

27. However, in view of the tentative nature of this decision,<sup>5</sup> it might be useful to discuss a criterion for distinguishing between domestic and foreign awards, such as the criterion consistent with the one to be adopted for the delimitation of the scope of application of the model law. This would mean that an award made in a domestic arbitration, i.e. arbitration governed by the model law of the State of recognition and enforcement, would be recognized and enforced under procedures for domestic awards, and that an award made in a foreign arbitration, i.e. arbitration not governed by the model law of the State of recognition and enforcement, would be recognized and enforced under procedures for foreign awards.

<sup>3</sup>*Ibid.*, para. 129.

<sup>4</sup>*Ibid.*, paras. 135 and 139.

<sup>5</sup>*Ibid.*, paras. 133 and 140.

## C. CONFLICT OF LAWS ISSUES

1. *Conflict of laws created by a delimitation of scope of application of the model law*

28. A conflict of procedural laws and the resulting conflict of court competence may arise if the criterion for the delimitation of the scope of application of the model law adopted in a State is different from the criterion for the delimitation of the scope of application of the procedural law on arbitration adopted in another State.

29. For example, if a State does not permit the parties to subject an arbitration taking place in that State to a foreign procedural law, while the State of the chosen procedural law accepts the choice, the courts of both States might consider themselves competent to supervise the arbitration (positive conflict of competence). In such a case it would also be uncertain which procedural law the arbitral tribunal and the parties have to follow.

30. On the other hand, if a State permits the parties to subject an arbitration taking place in that State to a foreign procedural law, while the State of the chosen procedural law does not accept the choice, the courts of both States might decline to supervise the arbitration (negative conflict of competence) and it would also be uncertain which is the governing procedural law.

31. The Working Group may wish to consider whether it would be useful to include in the model law a provision designed to mitigate the effects of positive and negative conflicts of court competence.

32. The effects of a positive conflict of competence may be mitigated by authorizing the court of the State of the model law to decline its competence in respect of an arbitration when a foreign court may take up or has taken up an issue in respect of that arbitration. The effects of negative conflicts of competence may be mitigated by giving a right to the court of the State of the model law to assume the competence in respect of an arbitration when a foreign court has declined to decide an issue in respect of that arbitration.

33. In paragraph 13, above, it has been suggested that a criterion for determining the applicability of the model law may be provided for cases where the place of arbitration or the law governing the arbitration has not been agreed upon or determined. The suggested solution was that the model law should be applicable if a party has his place of business or residence in the State of the model law. Under this solution it may happen that a party relies on the model law in his State for the purpose of, for example, the appointment of the sole arbitrator, while the other party relies for the same purpose on the law in his State (which may or may not have adopted the model law). The consequence may be conflicting court decisions or that the two different laws contain provisions which conflict in substance.

34. A way of dealing with the problem may be to provide that the request by the claimant or by the most diligent party pre-empts the right of the other party to rely on his law. Such a provision would eliminate conflicts where each party is from a State which has adopted the model law. In situations where one of the two potentially applicable laws is not the model law, such a provision may reduce the possibility of conflicting situations, without, however, eliminating them.

2. *Conflict of laws governing validity of arbitration agreement*

35. The model law provides in the procedure for setting aside an award and in the procedure for recognition and enforcement of an award a rule on the law governing the validity of arbitration agreements (articles 34 (2) (a) (i) and 36 (1) (a) (i)). In both cases the chosen law is primarily applicable, while if no choice is made, different solutions are given for each of the cases just referred to. In setting aside, the applicable law is the law of the court which is to decide the issue of setting aside, and in recognition and enforcement, it is the law of the place of the making of the award.

36. Since these conflict rules might be regarded as applicable only in the context of articles 34 and 36, the Working Group may wish to consider the usefulness of a general rule which would also apply to the time before the making of the award or even before the commencement of arbitral proceedings.

37. As to the content of the conflict rules in articles 34 and 36, it may be noted that both rules would lead to the same result if the Working Group adopts the strict territorial criterion in delimiting the scope of application of the model law. If in such a case a general rule on the law governing the arbitration agreement were adopted, the governing law should be the law to which the parties have subjected the arbitration agreement or, failing any indication thereon, the law of the place of arbitration.

38. If, however, the Working Group decides that the parties should be allowed to subject the arbitration to a

law different from the law of the place of arbitration, a conflict between the two rules might arise. If the parties have subjected the arbitration to a law different from the law of the place of the making of the award, in the setting-aside procedure the validity of the arbitration agreement would be governed by the law which governs the arbitration and not by the law of the State where the award was made. In the same arbitration, but in the recognition and enforcement procedure, the validity of the arbitration agreement would be governed by the law of the State where the award was made.

39. Therefore, if the parties were to be given the autonomy to subject their arbitration to a procedural law different from the law of the place of arbitration, the Working Group may wish to consider aligning the two conflict rules. To achieve the alignment, article 36 (1) (a) (i) would have to be modified to the effect that, if the award is not made in the State of the law which governs the arbitration, the arbitration agreement would be governed by the law governing the arbitration. If, at the same time, a general rule on the law governing the validity of the arbitration agreement were to be adopted, it is submitted that the governing law should be the law to which the parties have subjected the arbitration agreement or, failing any indication thereon, the law which governs the arbitration.

40. Furthermore, it may be noted that no solution has been provided for cases where the parties have not subjected the arbitration agreement to a law and it cannot be ascertained where the award is to be made. Since the question of the validity of an arbitration agreement may arise before these connecting factors are established, the Working Group may wish to consider whether it would be useful to include in the conflict rule a provision on a supplementary connecting factor.

41. As to the question which connecting factor might be included in the conflict rule, no ideal solution has been found to date. However, it appears that it would not be contrary to the expectation of the parties if, failing the first two connecting factors, the arbitration agreement is governed by the law which governs the contract in relation to which the dispute has arisen.

(c) *Composite draft text of a model law on international commercial arbitration: some comments and suggestions for consideration: note by the secretariat (A/CN.9/WG.II/WP.50)*

INTRODUCTORY NOTE

1. This Working Paper contains some comments and suggestions which the Working Group may wish to consider during its deliberations on the composite draft text of a model law on international commercial arbitration. The composite draft text is contained in document A/CN.9/WG.II/WP.48 (reproduced in this *Yearbook*, part two, II, B, 3, a).

2. Most of the comments and suggestions apply to more than one draft article. They deal, for example,

with the operation and effect of a given rule in the context of other relevant provisions or, generally speaking, deal with the inner consistency and practical workability of the various draft provisions.

SOME COMMENTS AND SUGGESTIONS FOR CONSIDERATION

A. *Model law as "lex specialis" (articles 1, 5, 34, 36)*

3. It seems to be clear and accepted that the model law is designed to establish a special legal régime for