

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

international commercial arbitration which, in the States adopting it, would prevail over any other municipal law on arbitration. The Working Group may wish to consider whether this principle of *lex specialis* is sufficiently covered by the words, "This Law applies to international commercial arbitration" (article 1 (1)), or whether it should be made more explicit.

4. If an explicit rule to that effect were envisaged, it could state that the application of other national provisions of law dealing with arbitration is excluded by "the provisions of this Law" or, preferably, "this Law in respect of all matters dealt with herein". The latter wording (or words of similar import) could help to clarify that the model law is not a self-contained and self-sufficient legal system which would exclude the application of all other national provisions of law dealing with arbitration.

5. The suggested qualification could help to draw attention to the fact that there are certain matters or aspects of arbitration not governed by the Law. As an illustration, one need only recall a number of issues which the Working Group decided not to settle in the model law: arbitrability of subject-matter of dispute, capacity of parties to conclude arbitration agreement, impact of State immunity, enforcement by courts of interim measures granted by arbitral tribunal, competence of arbitral tribunal to adapt contracts, fixing of fees and request for a deposit, time-limit for enforcement of award. However, as these examples show, it would not always be an easy task to determine whether a certain issue is governed by the model law, though possibly not expressly regulated, or whether it is not dealt with therein and thus governed by another law.

6. It is submitted that similar considerations apply with regard to draft article 5, although to a more limited extent, since the distinction between matters governed by the Law and those not governed thereby is relevant there only in respect of possible court supervision or assistance.

7. Finally, the recognition of the fact that certain provisions of a national law other than the model law may be applicable might lead to a modification of article 34 (2) (a) (iv). The Working Group may wish to consider whether the conference in that sub-paragraph to "this Law" is too narrow and whether it should be replaced by the words "law of this State". It may be noted that, in the parallel provision of article 36 (1) (a) (iv), the reference is to "the law of the country where the arbitration took place" (which, in the domestic setting, does not restrict the test of compliance to the model law).

B. Listing of mandatory provisions (article 3)

8. Draft article 3 is designed to clarify, in one place, from which provisions of the model law the parties may not derogate. Such centralisation by means of a list of all mandatory provisions would make it unnecessary to include in the non-mandatory provisions such wording as "unless otherwise agreed by the parties".

9. However, there are certain difficulties and other considerations which cast some doubt on the appropriateness and need for such approach. Firstly, a considerable number of provisions are obviously by their content of a mandatory nature. Secondly, there are a number of provisions granting freedom to the parties, accompanied by suppletive rules failing agreement by the parties; here the question of mandatory nature seems to be a philosophical one and equally redundant. Thirdly, with respect to some draft articles only a part of the provision (e.g. a time-limit) is non-mandatory. Fourthly, in respect of some of the provisions already decided to be non-mandatory, the Working Group was of the view that this should, for the sake of emphasis, be expressed in the individual provision, despite the general listing in article 3. Fifthly, it is suggested that, in addition to the provisions already decided to be non-mandatory and drafted accordingly, i.e. articles 11 (1), 15, 18, 20 (2), 21, 24 (1), 25, 26 (1), 29, 33 (2), there are only few further provisions which may be regarded as non-mandatory and, if so, could be easily marked as such by adding the words "unless otherwise agreed by the parties"; articles 2 (e), 23 (2), and possibly article 26 (2), (3).

C. Scope and effect of waiver rule (articles 4, 34, 36)

10. The Working Group may wish to consider, in the light of its decision on which provisions of the model law are to be mandatory, whether the present restriction of the operation of the waiver rule to non-mandatory requirements of the law should be maintained. If only the provisions mentioned in paragraph 9 above were to be non-mandatory, the restriction might be regarded as too narrow. A wider operation of the waiver rule could, for example, be achieved by excluding from its scope only any fundamental procedural defects such as violations of public policy, including arbitrability of the subject-matter of the dispute.

11. The Working Group may also wish to consider clarifying the effect of a waiver by virtue of article 4. While it is obvious that a party would be precluded from raising his objection during the further stages of the arbitral proceedings, it is not immediately clear whether that party is also precluded from invoking the non-compliance in an application for setting aside or for refusing recognition or enforcement of the award. It is submitted that a waiver under article 4 should have such extensive effect and that this interpretation may be expressed either in article 4 or in articles 34 and 36. It may be noted, however, that in the latter case the effect of the waiver rule would be further extended in that its inclusion in article 36 would also apply to foreign arbitral awards made under a procedural law other than the model law.

D. Arbitration agreement and agreements by the parties on arbitral procedure (articles 4, 7, 19)

12. The Working Group may wish to consider the relationship between the term "arbitration agreement"

and the various references in the model law to agreements by the parties relating to the composition of the arbitral tribunal or to the arbitral procedure. While arbitration agreements frequently contain such procedural stipulations, in particular by reference to standard arbitration rules, it is not uncommon to agree on most or at least some procedural issues only when a dispute arises, or even during the arbitral proceedings, that is, long after the conclusion of the agreement to submit future disputes to arbitration. This varied practice leads to two suggestions for consideration by the Working Group.

13. The first idea is to use the term "arbitration agreement" as defined in article 7 (1) in its literal and rather narrow sense, i.e. agreement to submit disputes to arbitration. This basic agreement would be the foundation of the arbitral tribunal's jurisdiction, to the exclusion of court jurisdiction, irrespective of whether it is accompanied by any agreement on the procedure. The term "arbitration agreement" should then not be used when the emphasis is on the procedural stipulations (as, e.g., in article 4). An important practical consequence of such interpretation would be that article 7 (2) would require written form only for that basic agreement, including any later determination or modification of the claims or dispute submitted, but not for any procedural agreements by the parties.

14. The second idea would be to require that the parties conclude any agreement on the arbitral procedure, if not already included in the arbitration agreement, before the first or sole arbitrator is appointed. The reason for such time-limit would be that the rules of procedure should be clear when that procedure starts and that any arbitrator should know from the beginning under what rules he is expected to perform his function. It may be recalled that this very reason led the Working Group to include this time-limit in article 26 (1). The suggestion here would be to adopt the same limit on a more general level, for example, in the basic provision of article 19 (1), possibly with the proviso "unless otherwise provided in this Law".

E. *Effect of failure to invoke existence or non-existence of valid arbitration agreement (articles 8, 16, 17, 34, 36)*

15. The Working Group may wish to consider the effect of a party's failure to invoke the arbitration agreement in the case of article 8 (1) or, conversely, to plead in the case of article 16 (2) that the arbitral tribunal lacks jurisdiction. In the first case, there may be some doubt as to whether failure to make a timely request of referral to arbitration should preclude a party from relying on the arbitration agreement in other contexts or forums since, for example, its recognition or its scope in terms of arbitrability of the subject-matter may vary from one place to another. However, for the sake of preventing parallel proceedings and conflicting decisions, one might consider treating the failure to request referral as a waiver of the right to rely anywhere on the arbitration agreement. This would

then, for example, bind the court which is asked under article 17 to decide whether or not there exists a valid arbitration agreement.

16. In the reverse case, i.e. article 16 (2), the answer seems to be less difficult. It is submitted that a party who fails to raise the plea as required under article 16 (2) should be precluded from raising objections with respect to the existence or validity (or scope) of the arbitration agreement also in other contexts, including the court control envisaged under article 17 and, in particular, the post-award stage (i.e. articles 34 (2) (a) (i) and 36 (1) (a) (i)). However, such waiver by submission should be subject to certain limits such as public policy including arbitrability.

F. *Court control of arbitral tribunal's jurisdiction (articles 16, 17)*

17. Where the arbitral tribunal has ruled on a plea referred to in article 16 (2) as a preliminary question and has decided that it has jurisdiction, such ruling may be contested, according to paragraph (3) of that article, only in an action for setting aside the arbitral award. The secretariat has placed this provision between square brackets, not because it wished to indicate any doubts as to the appropriateness of this very rule, but in order to invite reconsideration of the relationship between this rule and article 17.

18. From a formal point of view, the two provisions deal with different matters since article 16 (3) provides recourse to a court only against a ruling of the arbitral tribunal while article 17 envisages direct resort. However, from a substantive point of view and for all practical purposes, these two provisions deal with the same issue and are, it is submitted, in conflict with each other. There would seem to be two possible approaches to avoid any conflict.

19. One possibility is to delete the last sentence of article 16 (3). In this case, one may consider adding to article 17 (2) the device adopted in article 13 (3) for accelerating matters, i.e. that the court's decision shall be final. The other possibility is to exclude the concurrent court control under article 17 to the extent it would be in conflict with article 16 (3). Article 17 would, then, be limited to those cases where the arbitral proceedings have not yet commenced or where they have been terminated by a ruling of the arbitral tribunal that it lacks jurisdiction. Where the proceedings have been terminated by a final award which is based on a ruling that the arbitral tribunal has jurisdiction, the court control would be exercised in the proceedings governed by article 34 and articles 35 (2) and 36.

G. *Suspension of award (articles 33, 34, 36)*

20. The draft model law refers to the procedural possibility of a suspension of the award only indirectly in article 36 (1) (a) (v) and (4), stating certain legal

consequences of a suspension or an application for suspension. The Working Group may wish to consider adding a positive provision which would grant a right to request suspension of an award made under this law. Such a right may be appropriate in conjunction with the right to request a correction under article 33 (1) (a), possibly in conjunction with the right to request an interpretation under article 33 (1) (b), and certainly in conjunction with an application for setting aside under article 34.

H. *Additional award requiring further hearings or evidence (articles 33, 34)*

21. Article 33 (2) envisages the making of an additional award as to claims presented in the arbitral proceedings but omitted from the award only where such omission can be rectified without any further hearings or evidence. The question therefore remains what would happen in those cases where further evidence or hearings are required.

22. From a practical point of view, the suggested answer would be that the arbitral tribunal could still be entitled or required to make the additional award since it did not completely fulfill the mandate entrusted to it. If this view were adopted, it would mean that the restriction contained in article 33 (2) would be abolished, although this provision might be retained for the residual purpose of setting a time-limit of sixty days for these restricted cases. A supplementary consideration would be to include in article 34 a provision to the effect that the award may be set aside if the points dealt with therein cannot be separated from the points omitted. In this context, the possibility of remission under article 34 (4) may prove to be a very useful device.

23. The need for an express rule on this question becomes apparent when one looks at the present draft provisions. It is at least a possible interpretation of articles 33 (2) and 34 that omission of a claim requiring further hearings or evidence constitutes a ground for setting aside the award, irrespective of whether the omitted points can be separated from the points dealt with in the award. The omission could then be rectified by the arbitral tribunal if the award would be remitted to it for completion. If, however, the court would not remit the award but would set it aside, a problem of general relevance arises which is treated in the following section (paragraphs 24-26).

I. *Effect of setting aside on arbitration agreement (articles 32, 34)*

24. The Working Group may wish to consider the question how a party may pursue his claim after the award has been set aside under article 34. Where lack of a valid arbitration agreement was the ground for setting aside, the answer would be that the party may resort to a court. If the award was set aside for other reasons, there are essentially two possible solutions.

25. One possibility would be to conclude that arbitration did not work and to refer the parties to court litigation without, of course, taking away the (here probably more theoretical than practical) option of concluding a new arbitration agreement.

26. The other possibility would be to re-activate the original arbitration agreement or to regard it as still operative, on the ground that the final award, which under article 32 would terminate the mandate of the arbitral tribunal, has been set aside and, thus, cannot have this terminating effect. However, in order to limit the risk of repeated futile arbitrations, one might consider adopting the recent innovation in Austrian law (sect. 595 (2) Code of Civil Procedure) according to which the arbitration agreement becomes invalid if an arbitral award on the matter has been set aside twice.

J. *Recognition of award as binding (article 35 (1))*

27. The Working Group may wish to consider supplementing the provision of article 35 (1) in three respects. The first would be to add after the words "shall be recognized as binding" the words "between the parties". This would clarify that a decision which is founded on an arbitration agreement between two (or more) parties cannot bind other persons. It would also help to convey the idea of *res judicata*, without using that term which is not known in all legal systems although the concept seems to be commonly shared.

28. The second suggestion would be to indicate the exact point of time from which an award shall be recognized as binding. While it may be in the interest of a party to be bound by an award only from the date of the receipt of such award, it might be preferable, for the sake of certainty, to use the date of the award, referred to in article 31 (3). In this context, consideration might be given to expressing the idea, accepted in substance by the Working Group, that an award would not be binding (and may not be set aside) if, and as long as, it is subject to appeal before arbitrators, i.e. an arbitral tribunal of second instance, as often envisaged in commodity arbitrations.

29. The third suggestion for consideration would be to state that registration or deposit of an award in the country of origin is not a requirement for recognition and enforcement under the model law. While this rule might already be inferred from the above suggested provision that an award is binding from its date, an express statement may be advisable in view of the fact that a foreign procedural law may require such registration or deposit. It is even advisable in respect of awards made under the model law since registration or deposit is not expressly regulated, in fact not even mentioned, therein (see article 31). An express statement would help to clarify that this fact should not be regarded as an intentional gap to be filled by another municipal law but as a positive regulation to the effect that registration or deposit is not a pre-condition for recognition or enforcement. This clarification would, thus, help to avoid the uncertainty alluded to earlier (in paragraph 5 above).

K. *Possible separate treatment of foreign and of domestic awards (articles 35, 36)*

30. Finally, it may be recalled that the Working Group decided to consolidate the previous draft articles XXV and XXVI as well as articles XXVII and XXVIII so as to have uniform rules covering domestic and foreign arbitral awards alike. However, in view of the tentative nature of the policy decision as regards uniform treatment, observations were made on the

draft articles in case a separate régime were to be retained, at least as an option for the time being. Nevertheless, the secretariat did not prepare alternative draft provisions for such separate treatment since their eventual wording could be easily deduced from draft provisions already existing, i.e. article 35 for domestic and foreign awards, article 36 for foreign awards and previous draft article XXVII, as modified by the Working Group (A/CN.9/245, paras. 140 and 141; reproduced in this *Yearbook*, part two, II, A, 1), for domestic awards.