IV. INTERNATIONAL COMMERCIAL ARBITRATION

Co-ordination of work: activities of international organizations on certain aspects of arbitration: report of the Secretary-General (A/CN.9/280)
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INTRODUCTION

1. The Commission, at its fourteenth session, decided that, to further strengthen the co-ordinating role of the Commission, the secretariat should select a particular area of international trade law for intensive consideration and submit a report on the work of other organizations in that area.1 The area selected for this year’s report is international commercial arbitration, which has been a field of prime interest and successful activity of the Commission since its inception.

2. The scope of the present report is shaped by the following characteristics of this area, viewed from the perspective of harmonization and progressive development of legal rules. A considerable degree of uniformity has been achieved by various multilateral treaties, with global or regional orientation, sometimes devoted to special categories of disputes or certain aspects of arbitration. A prominent example is the Convention on the


3. As regards the level of non-convention law, the Commission has laid a solid and promising foundation for achieving greater harmony and substantive improvement by adopting the UNCITRAL Model Law on International Commercial Arbitration.  

It is to be expected that States will favourably respond to the recommendation of the General Assembly, in its resolution 40/72 of 11 December 1985, that “all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.”  

4. Finally, as regards the contractual level, the Commission has made a major contribution by preparing and adopting in 1976 the UNCITRAL Arbitration Rules. Unlike other arbitration rules, these Rules are not tied to a particular arbitral institution or other special body such as a trade association. Thus, they offer a viable, and increasingly chosen, option to parties who wish to use the same set of rules in various parts of the world, whether their arbitration would be ad hoc or administered by one of the many arbitral institutions offering services under the UNCITRAL Arbitration Rules. The practical attractiveness of this option is enhanced by the growing number of arbitral institutions or centres which use the UNCITRAL Arbitration Rules as their own institutional rules or otherwise act as appointing authority and provide administrative services in cases conducted under these Rules.  

5. In light of the above, one may conclude that, in the area of international commercial arbitration, a considerable degree of harmonization has been achieved or a basis therefor provided. Nevertheless, there remain a number of issues or aspects of arbitration which are not, at least not completely, covered.  

6. In selecting the issues dealt with in this report and in determining the manner of their presentation, the secretariat was guided by the following considerations. Of the many issues discussed at international forums and of the various aspects covered by special rules, guides or recommendations of international organizations only those are dealt with here which are intended, or may be expected, to contribute in some way to the harmonization of the legal rules and which are, at least in part, clearly within the realm of arbitration.  

7. The presentation of issues in this report is influenced by the fact, typical of the field of arbitration, that legal developments are often initiated by discussions at international congresses and seminars. Normally stimulated by problems encountered in practice, these discussions help to determine the desirability and feasibility of a possible harmonization effort and provide useful guidance in the search for solutions. The report, therefore, includes a number of excerpts or summaries of such discussions, sometimes of consecutive congresses reflecting the development of the views. In order to present an accurate and complete picture as regards the desirability and feasibility of any initiative towards harmonization, the report includes even those discussions which led an organization to decide not to undertake further efforts. Finally, where one of the selected issues was dealt with, or at least touched upon, in the course of the preparation of the UNCITRAL Model Law on International Commercial Arbitration, the report recalls the relevant discussion in the Commission or the Working Group on International Contract Practices.  

8. The primary purpose of this report is to provide and disseminate information on the activities of international organizations in respect of the selected aspects of arbitration. The considerations of these organizations and any text elaborated by them are thus presented in some detail and at times reproduced verbatim. The secretariat did not deem it appropriate, at this stage, to submit any comments on these texts or any assessment of the desirability or feasibility of any future involvement of the Commission. However, such comments and assessment could be included in any future study by the secretariat, if the Commission were to determine that one or more of the issues presented here warranted closer examination.  

I. Multi-party arbitration  

A. International Council for Commercial Arbitration  

9. International arbitration in multi-party commercial disputes was the subject of the Interim Meeting of the International Council for Commercial Arbitration held in 1980 at Warsaw.  

The general report to that International Symposium, noting that commercial projects often  

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5 Thus not included in the report are, for example, the rules of the ICC International Centre for Technical Expertise (ICC Brochure, No. 307, 1977) and the Draft Rules for an Arbitral Reference Procedure, prepared by a working party of the ICC Commission on International Arbitration (ICC document No. 420/272, 15 April 1985).  

6 Some specific suggestions as to the possible scope of such a study are set forth below (see “Conclusions”, paras. 72–75).  

7 International Arbitration in Multi-party Commercial Disputes, Materials of an International Symposium, Warsaw, June 29th–July 2nd 1980, (Warsaw, Polish Chamber of Foreign Trade, 1982).  

involve several parties, distinguished between two types of multi-party commercial disputes.

10. The first type of multi-party dispute is one which may arise from a multilateral contract, that regulates rights and obligations among more than two contracting parties. A joint venture or a consortium agreement may be an example of such a multilateral contract. An arbitral clause in such contract would normally bind all parties and oblige them to participate in a multi-party arbitration. Problems may arise, however, concerning the appropriate number of arbitrators and their appointment, in particular in those cases where it is difficult or impossible to foresee, at the time of conclusion of the contract, the precise number and identity of the parties who might be involved in a later arbitration.

11. The second type of multi-party dispute is one which may stem from a contractual “network” consisting of several independent but commercially related contracts. For example, a party engages a contractor to complete a project, and the contractor concludes one or more ancillary contracts with a third person or third persons for the purpose of completing or taking part in the completion of the project. Since each arbitral clause normally relates only to the contract in which it is contained, a given issue involving several parties to different contracts may be the subject of separate arbitral proceedings. A particular concern is, as noted in the general report, the possibility of conflicting awards with the ensuing result of uncertainty and distrust of arbitration.

12. The results of the deliberations may be seen from the summing up of the various views, according to which the participants of the Symposium:

1. Noted that in the framework of contemporary international trade and economic co-operation, the realization of major projects is in many cases achieved by means of multi-party business transactions which may be laid down in a multi-party contract or in a network of separate and legally independent contracts executed between different parties.

2. Recognized that in the case of disputes arising out of or in connection with multi-party contracts or separate but interrelated contracts the business transaction in its entirety is likely to be affected.

3. Expressed the view that, upon the occurrence of such disputes, in many cases consolidation of a number of separate arbitral proceedings, as well as the intervention and/or summoning to an instituted proceeding of persons who are parties to multilateral or related contracts into one arbitration may be desirable with a view to avoiding conflicting awards and duplication of efforts. Other views were expressed that such consoli-

dation into one proceeding might not be desired by all parties or might lead to practical difficulties in conducting arbitration cases.

4. Heard reports that under certain legal systems, where parties have agreed to arbitration in multi-party transactions (e.g. in joint venture contracts) or in a network of related agreements, courts may interpret such agreements as a basis for ordering a consolidation of arbitral proceedings or for parties to intervene or to be summoned, whereas under other legal systems courts will not act to bring about consolidation of arbitral proceedings, or to bring about such intervention or summoning.

5. Noted that agreements of parties who desire to consolidate arbitral proceedings or to make other arrangements for coordinating the conduct of cases may be found either in the original contract or in a separate agreement after a dispute has arisen.

6. Pointed out that when the agreement of the parties provides that arbitration will be administered by an arbitral institution the administering body can contribute to the creation of a system of consolidation and coordination, based on the will of the parties, by suggesting model clauses for this purpose, or by providing guidelines or by other appropriate means (e.g. by suitable methods for the appointment of the arbitral tribunal). This possibility was widely viewed as one of the advantages of using administered arbitration in multi-party transactions.

7. Considered in detail specific contractual clauses which might be used in multi-party transactions but did not reach agreement on any particular form, that being a matter deserving further study and review.

8. Expressed the view that conciliation might be a valuable alternative for resolving multi-party disputes because it can help to avoid many of the complexities and difficulties of arbitration in such cases. In that connection, welcomed and encouraged the efforts of the United Nations Commission on International Trade Law to develop UNCITRAL Conciliation Rules; noted that such Rules are desirable in order to promote greater harmonization between conciliation and arbitration and to provide a flexible uniform system of conciliation which would be acceptable in all geographic regions and legal, social and economic systems; and expressed appreciation to UNCITRAL for the opportunity granted to ICCA to assist, through consultation, in the preparation of UNCITRAL Conciliation Rules.

9. Noted that, where consolidation of arbitral proceedings is not desired by the parties, other methods can be used to lessen the danger of conflicting awards. This includes, inter alia, the set of the same arbitrators, presentation of the same witnesses and evidence, and the same technical expertise.

10Ibid., p. 13.
12 Ibid., pp. 13–14.
14Summary of various views expressed at the Symposium, International Arbitration in Multi-party..., pp. 220–223.
B. International Chamber of Commerce

1. Guide on Multi-party Arbitration under the Rules of the ICC Court of Arbitration

13. At its Congress at Manila in 1981, the International Chamber of Commerce (ICC) adopted the Guide on Multi-party Arbitration under the Rules of the ICC Court of Arbitration.\(^{13}\) The purpose of the Guide is to avoid difficulties concerning multi-party disputes. The Guide does not contain a set of rules to be applied to a multi-party arbitration; it explains issues arising in such an arbitration and possible approaches thereto, and advises parties on how to establish multi-party proceedings before the ICC Court of Arbitration.

14. The Guide suggests several points which should be agreed upon in advance where participants in a project wish that any disputes arising among all or some of them will be resolved by a single arbitral tribunal in a comprehensive arbitration proceeding. These points include the right of any party adhering to the arrangement: (a) to pursue any type of claim against any other adhering party regardless of whether or not they are parties to the same contract; (b) to intervene in any arbitration proceeding between two or more other adhering parties, again, regardless of whether or not they are parties to the same contract; (c) to involve one or more adhering parties in the arbitration; (d) to obtain the recognition of or compliance with any award on the part of all of the other adhering parties, whether or not they were parties to the arbitration proceeding, so long as they were given an adequate opportunity to become parties. In all these cases the adhering party must provide evidence of an actual interest.\(^{14}\)

15. Other points on which suggestions are made in the Guide include: (a) renunciation by an adhering party of the possibility to challenge the jurisdiction of the arbitral tribunal; (b) restricting the multi-party arbitration to a limited number of participants, which may be advisable in projects involving a large number of participants; (c) aspects of the formulation of the arbitration agreement in the case of a multilateral contract or in the case of several related contracts, and, with respect to the latter case, the conclusion of a separate multi-party arbitration protocol or the insertion of a uniform arbitral clause in each contract; (d) difficulties that may arise in any multi-party dispute with respect to the number and the appointment of arbitrators, and the possibility of involving the ICC Court of Arbitration in the appointment of the whole arbitral tribunal, envisaging either direct appointment or confirmation of any appointments made by the parties.\(^{15}\)

16. At the time of adoption of the Guide, the ICC was studying model agreements which could be included in pertinent contracts. However, in order not to impede further developments in the area and to permit the parties to set their own guidelines, the ICC refrained from including such model agreements in the Guide.

17. After the completion of the Guide, work continued on the preparation of model clauses to be used in agreeing on multi-party arbitration. In the course of that work, the following two draft texts have been elaborated: draft guidelines for ICC multi-party arbitration,\(^{16}\) together with a draft multi-party arbitration clause.\(^{17}\) Work on these two draft texts has not yet been completed.

2. Draft guidelines for ICC multi-party arbitration

18. The draft guidelines for ICC multi-party arbitration are designed to provide a procedural framework for a multi-party arbitration administered by the ICC Court of Arbitration. The guidelines, the applicability of which is based on the agreement of parties expressed in the model multi-party arbitration clause (see below, para. 26), apply together with the “Rules for the ICC Court of Arbitration”. However, in view of the special aspects of multi-party arbitration, the draft guidelines expressly state that the parties (or, failing agreement of the parties, the arbitral tribunal) may adopt special rules governing the multi-party proceedings.\(^{18}\)

19. According to the draft guidelines, the ICC Court of Arbitration will not organize a multi-party arbitration under the ICC Rules unless a party to a pending or proposed ICC arbitration makes a specific request to that effect in the form required and within the prescribed period of time.\(^{19}\) If the ICC Court of Arbitration is satisfied of the prima facie existence of an agreement for an ICC multi-party arbitration, but no party has made a request for a multi-party arbitration, the ICC Court will generally not proceed with the appointment or confirmation of an arbitrator until the secretariat of the ICC has enquired of the parties whether any related disputes exist.\(^{20}\) If there is a controversy as to the existence of a binding agreement for ICC multi-party arbitration, the ICC Court of Arbitration may apply article 8(3) of the ICC Rules.\(^{21}\)

20. Regarding the constitution of the arbitral tribunal, the parties to the multi-party arbitration have the right to appoint the arbitral tribunal by common agreement. If the parties have not appointed the arbitral tribunal within the prescribed period of time, the ICC Court of Arbitration will either extend the period or appoint the arbitral tribunal.\(^{22}\)

\(^{13}\)ICC Document No. 420/276, annex I.
\(^{14}\)Ibid., annex II.
\(^{15}\)Ibid., annex I, no. II, “Definitions and basic rules”.
\(^{16}\)Ibid., no. III, “Request for multi-party arbitration”.
\(^{17}\)Ibid., no. IV, “Organisation of a multi-party arbitration by the ICC Court”.
\(^{18}\)Ibid.; article 8(3) of the ICC Rules provides: “Should one of the parties raise one or more pleas concerning the existence or validity of the agreement to arbitrate, and should the Court be satisfied of the prima facie existence of such an agreement, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case any decision as to the arbitrator’s jurisdiction shall be taken by the arbitrator himself.”
\(^{19}\)Ibid.; article 8(3) of the ICC Rules provides: “In the event of disputes concerning the existence or validity of an agreement to arbitrate, the Court may, without prejudice to the admissibility or merits of the plea or pleas, decide that the arbitration shall proceed. In such a case, any decision as to the arbitrator’s jurisdiction shall be taken by the arbitrator himself.”
21. The draft guidelines advise parties to limit the number of parties who may participate in an ICC multi-party arbitration, either by indicating a maximum number of parties, or by identifying the parties who may participate in such an arbitration. Unless all the parties to an ICC multi-party arbitration have specifically agreed otherwise, the draft guidelines provide that there may be no more than four parties to the arbitration.  

22. It is further provided that the disputes to be settled in an ICC multi-party arbitration must be connected to each other, and in each dispute there must be one party who is also a party to every other dispute to be settled in that multi-party arbitration. Furthermore, after the arbitral tribunal has been appointed, no new party may join or intervene in the multi-party arbitration unless all the parties and the arbitral tribunal unanimously consent thereto.

23. As to the conduct of multi-party arbitral proceedings, the draft guidelines provide that, whatever procedural rules govern the proceedings in an ICC multi-party arbitration, the arbitral tribunal must ensure equal treatment of all the parties. In that context, provision is made, for example, for the right of each party to be heard, to consider documents on the file, to participate in hearings, and to be represented or assisted by counsel of its choice.

24. The draft guidelines further advise prospective users of the ICC multi-party arbitration services to consult professional counsel as to the suitability of the standard ICC multi-party arbitration clause, since the circumstances of each case may render it desirable or essential to vary the terms of the clause. The standard clause may need to be varied, in particular, with regard to matters dealt with in the 1981 ICC Guide on Multi-party arbitration such as the appointment of arbitrators, or specifying contracts which fall within (or outside) the scope of a multi-party arbitration.

25. Where the ICC Court of Arbitration or (after receiving the file) the arbitral tribunal is satisfied that a multi-party arbitration would not be practicable or that the interests of a party might be prejudicially affected by it, the ICC Court of Arbitration or the arbitral tribunal, as the case may be, is empowered by the draft guidelines to decide on a severance of the proceedings. In such an event, the ICC Court of Arbitration would either appoint the arbitrator or arbitrators already appointed in the multi-party arbitration as arbitrator or arbitrators in the separate arbitration, or appoint another person or persons to act in the separate arbitration. The separate arbitration would then proceed and be decided as if it had never been subject to the multi-party arbitration procedure.

26. The latest draft of the ICC multi-party arbitration clause reads as follows:

"1. All disputes arising in connection with the present contract shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.

"2. The parties to the present clause agree that:

"(a) If any such dispute raises issues which are the same as or are connected with issues raised in a related dispute arising in connection with a contract between a party to this contract and a third party and provided that such related dispute is to be or has been submitted to arbitration under the ICC Rules,

"(b) and if the parties to such related dispute have themselves agreed, in their original arbitration agreement or any subsequent agreement, that such related dispute shall be finally settled in an ICC Multi-Party Arbitration together with any dispute which might arise under a connected contract,

"(c) and provided that one or other of the parties to this contract also requires or accepts the same after learning of the said connected dispute,

"then such dispute hereunder and such related dispute shall be finally settled by the same arbitrator or arbitrators who shall be appointed by common agreement amongst all the parties to the arbitration combined in this way, or by the Court of Arbitration of the ICC in accordance with the Guidelines for ICC Multi-Party Arbitration.

"The ICC Court of Arbitration shall decide whether a dispute is prima facie to be settled in an ICC Multi-Party Arbitration, but the final decision shall be made by the arbitrator or arbitrators."

II. Taking of evidence in arbitral proceedings

A. International Council for Commercial Arbitration

27. Questions of evidence in international commercial arbitration were considered by a working party of the Vth International Arbitration Congress organized by the International Council for Commercial Arbitration. The introductory report to the working party, noting that legal writing on issues of evidence in international commercial arbitration was scarce, largely based its analysis on a 1974 international symposium which considered the way of presenting evidence in arbitration from the point of view...
of different legal systems. Referring to that symposium, the report noted that, despite many important differences in the law and practice in the field of evidence in international commercial arbitration, there existed some possibilities for international harmonization and rapprochement in that respect. On the basis of that report, the working party discussed practices which might be commonly acceptable for presenting evidence in international arbitral proceedings.

28. As a result of those discussions, the working party made, and the Congress supported, the following recommendations:

"1. It is desirable to formulate, for the benefit of parties and arbitrators, guidelines for presenting evidence in international commercial arbitration.

"2. It is suggested that ICCA undertake the task of framing such guidelines, which should be consonant with the UNCITRAL Arbitration Rules in the form finally adopted.

"3. In framing the guidelines, consideration should be given to such matters as distinguishing between different types of evidence, collection of evidence, methods of introducing and receiving evidence, including modes of examining witnesses and presenting expert opinions.

"4. In framing the guidelines consideration should be given to the problems arising out of the refusal by a party to the arbitration to produce evidence on grounds of State security, confidentiality, professional privilege, etc."

With respect to the recommendations, the Congress was "confident that potential areas of fundamental agreement can be found and that effective guidelines can be established."

29. At the VIIIth International Arbitration Congress of ICCA, to be held from 6 to 9 May 1986 in New York, one of the two working groups will be devoted to comparative arbitration practice. The discussions on practical questions of procedure, including issues of evidence, will be based on a hypothetical case commented upon from the point of view of different legal systems.

B. International Bar Association

30. The Council of the International Bar Association adopted on 28 May 1983 the Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration. The initiative to prepare such rules arose from discussions in Committee D (Procedures for Settling Disputes) of the Section on Business Law of the International Bar Association. The preparatory work for the Rules was done by a subcommittee formed by Committee D.

31. The subcommittee considered that it would be fruitless to make yet a further attempt at a complete set of arbitration rules, since a variety of well-known rules existed already and were in international circulation, and were most unlikely to be replaced by yet a further set of rules. It was therefore decided that the rules to be prepared should be confined to the mechanics of presenting or receiving evidence in a commercial arbitration. The largest problem encountered by the subcommittee in its work was "the well-known difference between the Common Law adversarial approach to the laying out of a case for judicial consideration and the Civil Law's inquisitorial system". As a result, the subcommittee "tried to go through the sort of negotiations that would be carried out in practice if lawyers and arbitrators from Common Law and Civil Law systems actually had to sit down together and agree upon a procedure for an actual arbitration between parties of a Civil Law and of a Common Law country."

32. In an introduction to the Rules, the International Bar Association presents the Rules in the following way:

"These Supplementary Rules are the product of a working party of Committee D (Procedures for Settling Disputes) of the Section on Business Law of the International Bar Association.

"They are solely concerned with the presentation and reception of evidence in arbitrations and are recommended by the International Bar Association for incorporation in, or adoption together with, institutional and other general rules or procedures governing international commercial arbitrations.

"Even if not specifically adopted by agreement between the parties, they can serve as a guide to arbitrators conducting such arbitrations when the parties in contention come from law areas having rules of procedures derived from different systems.

"They may be referred to as the I.B.A. Rules of Evidence.

36Ibid., pp. 146–147.
37Ibid., p. 147.
38Ibid., p. 147."
"It is recommended that when the parties desire to adopt the I.B.A. Rules of Evidence as supplementary to the general rules applicable to a particular arbitration, the following additional clause be adopted:

"The I.B.A. Rules of Evidence shall apply together with the General Rules governing any submission to arbitration incorporated in this Contract. Where they are inconsistent with the aforesaid General Rules, these I.B.A. Rules of Evidence shall prevail but solely as regards the presentation and reception of evidence."

33. The conduct of taking evidence in arbitral proceedings is dealt with in the I.B.A Rules by general clauses and by special rules on particular means of evidence. In so far as the I.B.A Rules and the general arbitration rules are silent, the arbitral tribunal may conduct the taking of evidence as it thinks fit (art. 1(2)). Another general clause confers upon the arbitral tribunal, in addition to the powers available under the applicable procedural law and the general arbitration rules, a number of further powers, including the authority to exercise all the powers it deems necessary to make the arbitration effective and its conduct efficient as regards the taking of evidence (art. 7, in particular (h)).

34. With respect to particular means of evidence, the Rules provide that each party is required to list the documents on which it desires to rely, to exchange such list with every other party, and to deliver the list to the arbitral tribunal. Unless a document has been so listed it may not be produced at the hearing without the consent of the arbitral tribunal. Furthermore, the Rules oblige each party to provide the arbitral tribunal with a copy of each document in its list. A party is entitled to a copy of any document listed by another party upon offer of payment of the reasonable copying charge (art. 4(1), (2) and (3)).

35. As to the duty to produce a document, the Rules give each party a right to request any other party to produce any document relevant to the dispute. A condition for such a request is that the requested document passed between the requested party and a third party who is not a party to the arbitration. The Rules empower the arbitral tribunal, upon application by one of the parties or of its own volition, to order a party to produce any relevant document within the party's possession, custody or control. If a party fails to comply with such an order, the arbitral tribunal will draw its conclusions from that failure (art. 4(4), (5) and (6)).

36. With respect to evidence by witnesses, article 5 of the Rules provides that, prior to the hearing of a witness, the testimony must normally be presented in the form of a written statement signed by the witness. This written statement must include, inter alia, (a) a description of any connection of the witness with any of the parties; (b) a description of his background, qualifications, training and experience if these are relevant to the dispute or the testimony; (c) a full statement of the evidence desired to be presented through the testimony of that witness; (d) a reference as to whether the witness is a witness of fact or an expert, and whether the witness is testifying from his knowledge, observation or experience, or from information and belief, and, if the latter, the source of the knowledge. In this context it may be noted that it is considered to be proper for a party to interview a witness or a potential witness.

37. After the statement has been presented, the witness would testify orally if both parties agree to it or if the arbitral tribunal so decides. The witness will first be examined by the arbitral tribunal and then by the party presenting the witness, whereupon other parties may cross-examine the witness. However, the arbitral tribunal is given complete control over the procedure relating to examining a witness, including the right to limit or deny the right of a party to examine, cross-examine or re-examine the witness. Moreover, the Rules empower the arbitral tribunal to call a witness, whether the parties agree thereto or not.

38. As to the role of the arbitral tribunal regarding expert evidence, article 7(e), (f) and (g) provides that the arbitral tribunal has the right to rely on its own expert knowledge, to appoint experts to assist the arbitral tribunal or to give expert evidence or reports in the arbitration, to regulate the right of the parties to call expert witnesses, and to make provisions with regard to their activities and the presentation of their evidence.

III. International court assistance in taking evidence in arbitral proceedings

Hague Conference on Private International Law


40. It may be recalled that in those discussions the prevailing view was, at first, that if court assistance in arbitral proceedings were to be regulated at all in the Model Law, a provision on international court assistance would be useful. Later, however, the view prevailed that it was not feasible for a model law on arbitration to

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regulate a complex matter such as unilateral obligations of domestic courts to give assistance to foreign arbitral tribunals. In support of that latter view it was noted, in particular, that international court assistance in taking evidence was an issue which fell within the domain of international co-operation between States and that such international co-operation could only be achieved in a satisfactory way by international instruments such as conventions or bilateral treaties.41

41. The precise issue raised by the Permanent Bureau before the Special Commission was whether the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters could be extended in order to permit arbitrators to forward requests for the taking of evidence directly to courts or authorities in a place other than that where the arbitration proceedings were taking place.42 No decision was taken by the Special Commission as to the substance of the issue, and the Permanent Bureau was requested to prepare a note on the desirability of such an extension of the 1970 Hague Convention.43

42. In a note prepared subsequently, the Permanent Bureau discussed the question whether it would be useful and desirable for the Hague Conference to undertake work on the subject of international court assistance in taking evidence in arbitral proceedings.44 With respect to that question, the Permanent Bureau stated the following:

"It seems indeed that in practice the recourse to a proceeding for the taking of evidence abroad is not very frequent, since most often the parties to the arbitration are the ones who arrange for the necessary proof in support of their arguments to be presented to the arbitration tribunal. What seems to happen most often is that, when a person refuses to testify, the party who has an interest in having him heard does not insist at any cost in obtaining his statement, but rather prefers to do without testimony which might be unfavourable to him. However, there may be cases in which a procedure for taking of evidence would turn out to be useful, for example when witnesses do not refuse to testify but are prevented for financial or physical reasons from appearing before the arbitral tribunal. In addition, the examination of physical evidence in a country which is very distant from the place of arbitration may turn out to be less costly by the way of assistance from the national courts of that country than by the travel of the arbitral tribunal itself.

Before submitting the problem examined in this note to the Member States of the Conference, the Permanent Bureau made contact unofficially with certain international arbiters known by it to have had long practical experience in this field. The questions were whether, during the long period of activity in international arbitration of the persons contacted, they had encountered practical problems raised by the impossibility of obtaining testimony or examining physical evidence, and what in fact happens when an arbitral tribunal in order to make its award must absolutely hear a witness who refused to appear.

"The replies of the arbiters contacted, with only one exception, were rather discouraging; in fact, there do not seem to be serious problems, since the parties to the arbitration proceedings seem always to make arrangements among themselves, or if not, then prefer to do without the testimony.

"However, the arbiters contacted did not deny that it could be useful for an international treaty to deal with the question. Although the philosophy which underlies arbitration is opposed to recourse to national authorities (except naturally in the stage of enforcement of the award), an international treaty which would give the possibility for an arbitral tribunal or a party to an arbitration, where the need was felt, to obtain the deposition of a witness or to gather physical proof could seem very useful in practice and bring assistance to the smooth functioning of arbitral justice."45

43. On the basis of a decision of the Fifteenth Session of the Hague Conference on Private International Law,46 the question of using the 1970 Hague Convention for the taking of evidence in arbitral proceedings was referred to a Special Commission of the Hague Conference, which was convened for the purpose of considering the technical operation of the 1970 Hague Convention. Concerning the desirability of using the 1970 Convention for that purpose, a number of experts in the Special Commission expressed the view that there was little need for such a facility in practice. Certain experts thought that arbitrators or litigants in arbitral proceedings might use the Convention as it stood by making their request through the courts in the countries where the arbitral tribunal sat. In particular, the experts from the Nordic countries and the United States pointed out that under domestic law courts may render assistance for the production of evidence abroad in the context of arbitral proceedings.47

44. As to the technical aspects of extending the Convention for use in the context of arbitral proceedings, the Special Commission reached the following conclusions:

"1. Opinion was divided as to whether any possible protocol to the Convention should provide that appli-
cations (letters of request) for the taking of evidence abroad should be made through a forwarding Central Authority in the State where the arbitral tribunal sat, or should provide that such application could be made directly to the Central Authority in the State where the evidence was to be taken.

2. It was generally agreed that any such protocol should provide an option for the taking of evidence abroad by commissioners (cf. article 17 of the Convention). [46]

3. There was a consensus that it would be difficult, if not impossible, to distinguish in establishing the scope of such a protocol among the differing types of arbitral tribunals which exist in practice, such as tribunals operating under the auspices of arbitration institutes or tribunals which apply or do not apply the UNCITRAL rules. [49]

45. The Hague Conference on Private International Law has not yet made a final decision on whether or not to continue work on the issue of international court assistance in taking evidence in arbitral proceedings.

IV. Law applicable to arbitration agreements

Hague Conference on Private International Law

46. The Hague Conference on Private International Law decided in 1980 to include in its agenda of future work the question of the law applicable to arbitration clauses. [50] That decision was considered by a Special Commission on General Matters and Policy of the Hague Conference, which was convened in 1984 for the purpose of examining the Conference’s work in progress and of preparing the decisions to be taken concerning future work. The Special Commission determined, with respect to the question whether there was a need for a convention on the law applicable to arbitration clauses, that it was too early to decide that question and that it was necessary to await the conclusions of an expert consulted by the Permanent Bureau of the Conference. [51] It was therefore concluded not to propose the deletion of that topic from the agenda, and that close contacts with UNCITRAL, which was dealing with more general questions concerning arbitration, should be maintained. [52]

47. As to the work of UNCITRAL to which reference is made in the foregoing conclusion, it may be recalled that the Working Group on International Contract Practices discussed the question whether any general conflict of laws rules should be prepared as part of the Model Law on International Commercial Arbitration. [53] That discussion should be seen against the following background.

48. The draft model law, as it was discussed by the Working Group at its seventh session, provided, in the context of setting aside an award and in the context of recognition and enforcement of an award, a rule on the law governing the validity of arbitration agreements. In both contexts, the primarily applicable law was the one to which the parties had subjected the arbitration agreement. Where there was no indication of a choice of law by the parties, in the context of setting aside the applicable law was the law of the court which was to decide the issue of setting aside (art. 34(2)(a)(i)), and in the context of recognition and enforcement it was the law of the country where the award had been made (art. 36(1)(a)(i)). In both contexts, the applicable law was the same since under the prevailing view in the Working Group, [54] which was later adopted by the Commission, [55] the place of arbitration was the exclusive determining factor for the applicability of article 34, and, under article 31(3), [56] the award was deemed to have been made at the place of arbitration.

49. The rules contained in articles 34(2)(a)(i) and 36(1)(a)(i) could not be regarded as general and complete conflict of laws provisions. First, they provided an express solution only in the context of setting aside and recognition or enforcement while a solution for the time before the making of the award or even before the commencement of arbitral proceedings was to be arrived at by interpretation. Second, they provided no solution for the cases where the parties had not subjected the arbitration agreement to a particular law and it could not be ascertained where the arbitral award was to be made.

50. The view of the Working Group during its discussions in 1984 was that harmonization of conflict of laws rules relating to arbitration was desirable but that it was not appropriate to envisage inclusion of general conflict of laws rules on arbitration agreements in the model law, which the Commission was expected to adopt in 1985. It was understood that the Commission might wish to consider the matter and decide on its possible future course of action, in particular, as regards the co-ordina—

[46] Article 17 of the Convention reads:

"In a civil or commercial matter, a person duly appointed as a commissioner for the purpose may, without compulsion, take evidence in the territory of a Contracting State in aid of proceedings commenced in the courts of another Contracting State if —

(a) a competent authority designated by the State where the evidence is to be taken has given its permission either generally or in the particular case; and

(b) he comply with the conditions which the competent authority has specified in the permission.

"A Contracting State may declare that evidence may be taken under this Article without its prior permission."


[50] Ibid., p. 7.


[52] Ibid., paras. 167 and 171.


tion of work between it and the Hague Conference on Private International Law, which was considering the preparation of a convention on the law applicable to the validity of arbitration clauses.57

51. The Commission, at its eighteenth session in 1985, discussed merely the question whether the rule on the validity of the arbitration agreement contained in article 34(2)(a)(i) was an appropriate one. The discussion was prompted by the proposal

"to substitute the words 'or there is no valid arbitration agreement' for the words '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 this State'. It was pointed out that the conflict of laws rule contained in that latter wording, which was taken from the 1958 New York Convention [art. V(1)(a)], was inappropriate in that it declared as applicable, failing a choice of law by the parties, the law of the place of arbitration. The place of arbitration, however, was not necessarily connected with the subject-matter of the dispute. It was unjustified to let the law of that State determine the issue with global effect, which would be the effect of a setting aside by virtue of article 36(1)(a)(v) of the model law or article V(1)(e) of the 1958 New York Convention; it was also said that such a result would be in conflict with a modern trend to determine the issue in accordance with the law of the main contract.

"It was stated in reply that it was preferable to retain the present text not simply because it was the wording of the 1958 New York Convention but also because the rule was in substance a sound one. It was pointed out that the rule recognized party autonomy, which was important in view of the fact that some legal systems applied the lex fori. Furthermore, to use the place of arbitration as a secondary criterion was beneficial in that it provided the parties with a degree of certainty which was lacking under the proposed formula. There were also doubts as to whether in fact a trend could be discerned in favour of determining the question of the validity of the arbitration agreement according to the law of the main contract."58

52. The Commission, after deliberation, decided to retain the conflict of laws rule on the validity of the arbitration agreement as contained in article 34(2)(a)(i) of the Model Law.59

53. When the Fifteenth Session of the Hague Conference (1984) discussed the question of a unification of conflict of laws rules dealing with arbitration agreements, it was decided to delete that question from the working programme of the Hague Conference.60 In connection

with that decision, it was stressed by the Chairman of the Session

"that deletion of this question would in no way exclude cooperation with UNCTRAL in the future, even in this field. Furthermore, deletion would not prevent the matter from being taken up again at a later date if this were to be felt necessary."61

V. Adaptation or supplementation of contracts by third persons

A. International Council for Commercial Arbitration

54. Questions pertaining to adaptation and supplementation were a subject of the Vth and the VIIth International Arbitration Congresses organized by the International Council for Commercial Arbitration (ICCA).62,63

55. On these questions, the Vth International Arbitration Congress adopted the following resolution:

"[The Congress:]  "Strongly re-affirms the great value of arbitration, not only for traditional types of disputes arising in international trade, but also in connection with long-term contracts of the type which are now so often used to implement international commercial transactions for scientific, technical and industrial development. Such long-term transactions are becoming increasingly important in world trade and are also a significant factor in establishing conditions which assist in maintaining world progress.

"Notes that one of the principal problems in connection with long-term contracts is the question of whether arbitrators have the power to fill gaps and resolve deadlocks which may arise during the life of the agreement. Such gaps may occur when parties postpone specific agreement on certain points because of lack of complete information when a contract is first formed; when unforeseen or unforeseeable events occur due to changes in economic, technical or political conditions; when inevitably vague expressions are used in the contract and when parties to joint ventures disagree on the conduct of their joint enterprise. Reports received by the Congress indicate that the power of arbitrators to fill such gaps in a binding manner varies in different nations and under different legal systems. Such differences may be minimised by overcoming the stress on theoretical speculation and dogmatic construction and getting closer to reality.

61Ibid.
62The Vth International Arbitration Congress was held from 7 to 10 January 1975 in New Delhi; the reports and discussions of that Congress are published in Proceedings of the Vth International Arbitration Congress. (New Delhi, Indian Council of Arbitration, 1975). 63The VIIth International Arbitration Congress was held from 7 to 11 June 1982 in Hamburg; the reports and discussions of that Congress are published in International Council for Commercial Arbitration, New Trends in the Development of International Commercial Arbitration and the Role of Arbitral and other Institutions, ICCA Congress series No.1, Pieter Sanders, ed. (Deverent, Kluwer, 1983).
“Recognises that agreement by the parties to widen the scope of arbitration to fill such gaps and break such deadlocks can be of great practical assistance in forming and performing long-term contracts. Such agreement must be expressed by a drafting technique which is appropriate to meet difficulties that may arise under different national laws.

“..."

C. The Working Group noted that, in order to provide improved procedures for resolving disputes involving adaptation of contracts, an arbitral organization has established new rules in this regard.\(^6\)

### B. International Chamber of Commerce

57. The International Chamber of Commerce adopted in 1978 the Rules on the Regulation of Contractual Relations, which provide a procedure for adaptation or supplementation of contracts.\(^5\) The purpose of this procedure is to enable parties to call upon a third person to intervene in the case where the parties cannot agree on how to adapt or supplement their contract. The parties may have an interest in such an intervention of the third person, for example, in the following situations: (a) where the parties deferred the insertion of a particular provision in their contract; (b) where the parties agreed that their contract would be adapted if the economic equilibrium of the contract were affected by a change of circumstances; (c) where the parties agreed that certain decisions relating to the implementation of the contract would be made jointly.\(^5\)

58. The third person fulfills his task by either formulating a recommendation or taking a decision, depending on the choice of the parties (art. 11(1)). When the third person makes a recommendation, the Rules provide that the parties must consider it in good faith (art. 11(2)). When the third person takes a decision, that decision is binding on the parties to the same extent as the contract in which it is deemed to be incorporated, and the parties are to give effect to such a decision as if it were the expression of their own will (art. 11(3)).

59. In connection with the ICC Rules, a model clause is provided for parties to use in agreeing on the procedure under the Rules. According to the model clause, in the event that the parties are unable to agree to apply all or any of the provisions of a specified article of their contract, they should apply to the ICC Standing Committee for the Regulation of Contractual Relations. The Standing Committee will administer the proceedings in which a third person (or a board of three persons if the parties so agree) appointed in accordance with the Rules will carry out the task assigned by the parties.

60. The functions of the ICC Standing Committee in administering the proceedings under the Rules include the following: (a) the confirmation of the third person whom the parties are to nominate by agreement, or the appointment of the third person in the absence of such agreed nomination; (b) in a case where the tasks under the Rules are to be performed by a board of three members, the confirmation of two members of whom


\(^{6}\) *New Trends in the development ...*, p. 269.


56. Adaptation and supplementation of contracts was a subject discussed by a working group of the VIIth International Arbitration Congress which adopted the following resolution:

“A. The Working Group received reports which focused attention on the problems of adaptation of contracts.

Such problems may arise in three types of instances:

1. application of hardship or revision clauses;

2. contracts in which certain points have been left open;

3. cases in which one of the parties contends that unforeseen circumstances should lead to a revision of the contract, in spite of it not containing any revision clause.

“B. The Working Group considers that the best way of solving those problems is by mutual agreement of the parties revising or completing their contractual arrangements.

Lacking such agreement, the following solutions are to be considered:

1. If there is a hardship or revision clause, the same should be applied through arbitration.

2. Where certain points have been left open in the contract, arbitrators, in many countries, do not have the power to complete it but, in such countries, may be able to determine the prejudice resulting from the refusal to negotiate in good faith, if any, and allow damages in compensation of such prejudice.

3. In case of unforeseen circumstances and if the contract does not contain a revision clause, the arbitrators should not modify the contract, except if the law applicable to the contract allows it and if the parties have expressly granted such a power to the arbitrators.

each is nominated by a party, and the appointment of the chairman of the board; (e) the challenge or replacement of the third person; (d) the fixing of the amount of deposit to cover the costs of the proceedings; (e) the extension or shortening of the period of time for carrying out the task of the third person; (f) approval as to form of a recommendation or decision made by the third person; (g) determining the place where the third person's recommendation or decision is deemed to have been issued; (h) fixing of costs of proceedings.

61. The procedure to be followed by the third person in carrying out his task is dealt with in article 9 of the ICC Rules as follows:

"1. Within the limits arising from the applicable contract clause and from any other agreement arrived at between the parties and included in their written memoranda, the third person is empowered to make any decision intended to resolve the questions concerned.

"2. The third person may obtain any information which he deems necessary in order to carry out his mission.

"3. The parties undertake to provide the third person with every facility for the carrying out of his mission and to communicate to him any information or document which he may require to that end.

"4. In the execution of his mission the third person shall afford each party equal treatment in all respects and equal opportunity to present its views, and to reply to the comments of the other party.

"5. The third person shall hear the parties orally either on his initiative or upon the request of one of the parties.

"6. Any person intervening within the framework of these Rules undertakes to respect the confidential nature of the proceedings."

62. As to the effect of proceedings under the ICC Rules, article 10 of the Rules prescribes that, unless otherwise provided by the parties, the action of bringing a case before the Standing Committee does not of itself have any effect on the contract until the third person has made his recommendation or taken his decision.

63. With respect to the formulation of a recommendation or a decision by the third person under the ICC Rules, it is provided, inter alia, that (a) unless otherwise provided by the parties, the third person must give reasons for his recommendation or decision (art. 12(2)); (b) where a board of three members is to make a recommendation or a decision it will be made by a majority of votes; (c) failing a majority of votes, the chairman of the board will formulate the recommendation or take the decision alone (art. 12(3)); (d) the third person's recommendation or decision is deemed to be issued at the place agreed upon by the parties or, failing such agreement, as determined by the Standing Committee (art. 12(4)).

64. It should be noted that the procedure under the ICC Rules is conceived and characterized not as one of arbitration but as being "clearly of a contractual nature".68 This concept was chosen, in particular, for legal reasons, namely the disparity between national laws as regards the powers of arbitrators to adapt contracts or to fill gaps.

65. This disparity, which had prompted the search for practical solutions by the participants of the above ICCA Congresses, and the extent to which mechanisms of a contractual nature were available under legal systems, were important factors in the considerations of the UNCITRAL Working Group on International Contract Practices on the question whether a provision on adaptation and supplementation of contracts should be included in the draft model law:

"19. The Working Group recognized the usefulness of procedures to which parties, in particular parties to long-term contracts, might resort in order to have their contracts adapted or supplemented and also recognized that procedural safeguards contained in such procedures would enhance legal certainty in international trade. For this reason some support was expressed for a provision in the model law granting the power to the arbitral tribunal to adapt and supplement contracts. Since some legal systems already granted such power to arbitral tribunals, unification of rules on this power was considered desirable. It was also felt that, once rules on the power of arbitral tribunals to adapt and supplement contracts had been internationally agreed in a model law, such rules would be more acceptable to States which had no provisions on or did not allow adaptation and supplementation of contracts in the framework of arbitration.

"20. However, after extensive discussion, the view prevailed that adaptation and supplementation of contracts should not be dealt with in the model law. It was pointed out that there was no need for regulating this question in the model law since many legal systems already provided, outside the domain of arbitration, mechanisms for third party assistance in adapting and supplementing contracts. Also, there were great difficulties in unifying arbitral procedures on adaptation and supplementation of contracts.

"21. It was further noted that in adaptation and supplementation of contracts it was difficult to separate questions pertaining to procedural law and questions pertaining to substantive law and that, therefore, the model law, as a system of procedural rules, should not contain rules which may touch upon substantive rights of the parties. This difficulty in separating procedural and substantive questions would cause problems in interpretation of such rules. However, while recognizing this difficulty, it was noted by others that it should

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68 Ibid., p. 8.
and could be made clear in the model law that only procedural aspects were regulated without regulating substantive conditions for adapting or supplementing a contract.

"22. In regard of the practical effects of a rule on adaptation and supplementation of contracts it was also observed that in international trade suppliers of equipment and large industrial works were often economically stronger than buyers and that procedures for adaptation and supplementation of contracts might be used to the advantage of suppliers.

"23. There was general agreement that the discussion in the Working Group was useful because it revealed the complexity of problems relating to adaptation and supplementation of contracts and possible solutions to these problems. This might prompt national legislators to adopt rules on adaptation and supplementation of contracts or improve existing rules taking into account the needs of modern international trade. Once national rules in this field and practice on the basis of such rules would be more developed, a harmonization might be achieved more easily."

VI. Code of ethics for arbitrators in international commercial arbitration

International Bar Association

66. A draft of a code of ethics for arbitrators was discussed at the Seventh Conference of the International Bar Association held in Singapore from 30 September to 4 October 1985. On the basis of the discussions at that Conference, a new draft text was drawn up for consideration by a working party established by a decision of the Singapore Conference. It is expected that a draft text to be prepared by the working party will be discussed at the next conference of the International Bar Association, which is to be held in New York in September 1986.

67. The proposal to discuss such a code was prompted by the fact that the duty of the arbitrators to maintain the attitude of independence and impartiality was prominently reflected in important international arbitration rules, such as the UNCITRAL Arbitration Rules, the Arbitration Rules of the International Centre for Settlement of Investment Disputes, the Rules of Conciliation and Arbitration of the International Chamber of Commerce, or the Rules of the London Court of International Arbitration, and that, nevertheless, none of those rules provided definitions of the concept of impartiality and independence.72

68. A related consideration was that there existed no internationally agreed standards or guidelines, and that, as a result, the arbitrators, parties and courts involved in international commercial arbitration were referred to national criteria as to what was to be considered proper conduct in such arbitration. Those national criteria, however, might not provide coherent guidance in an international case inasmuch as they might be based on case law arising from isolated instances or might be influenced by concepts which were not appropriate for general application.73

69. The purpose of the code would be to establish the manner in which the abstract qualities required of the arbitrators, namely impartiality, independence, competence, diligence and discreetness, may be assessed in practice. For that purpose, the code would deal in detail, for example, with the following issues:

(a) The fundamental duty of the arbitrators to proceed diligently and efficiently to provide the parties with a just and effective resolution of their disputes, and their duty to be and remain free from bias;

(b) The duties of a prospective arbitrator when accepting the appointment, in particular as regards the question whether he is able to discharge his duties without bias, whether he is competent to determine the issues in dispute, whether he is familiar with the procedure to be applied and has an adequate knowledge of the language of the arbitration, and whether he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect;

(c) The considerations relating to actual or to apparent bias, and in this context the code would deal with the situations that may give rise to the appearance of bias, including current and past business relationships between an arbitrator and a party or a potentially important witness, or certain social or professional relationships between those persons, or any previously expressed opinion of an arbitrator on a question which may be relevant to the dispute;

(d) Facts or circumstances that should be disclosed by a prospective or appointed arbitrator, e.g. past or present relationships between an arbitrator and a party, the extent of any prior knowledge an arbitrator had of a party, any other fact or matter that might affect the standing or impartiality of the arbitrator.


73With respect to a need for a set of internationally acceptable guidelines for arbitrators it was noted that, in the domestic context, there was one such set of guidelines already in existence, namely the 1977 Code of Ethics for Arbitrators in Commercial Disputes prepared jointly by the American Arbitration Association and the American Bar Association. However, it was noted that, while the Code contained many features that were also useful and appropriate for international arbitration, it was developed in reaction to a number of judicial decisions that were applicable solely in the United States of America (Hunter and Paulsson, loc. cit.).
may have of the dispute, the nature of any previous relationship with any fellow arbitrator, including prior joint service as an arbitrator, the extent of any prior commitments which may interfere with the discharge of his duties as an arbitrator; other issues are the addressee and form of disclosure, and a deemed waiver as a result of a failure by a party to make objection to an arbitrator in relation to matters disclosed prior to participation of that party in a further stage of the proceedings;

\( e \) Communications of the arbitrators with the parties, including the question to what extent it is proper for an arbitrator to be in contact with only one party, or the question how an arbitrator should react if he learns of an improper communication between another arbitrator and a party; and in this connection the draft code raises the question whether a distinction should be made between an arbitrator appointed unilaterally by a party and an arbitrator appointed by both parties or by a third person or institution;

\( f \) Discussions between the arbitrators and the parties regarding fees and expenses of the arbitrators;

\( g \) The duty of the arbitrators to devote such time and attention to the arbitration as the parties may reasonably require and their duty to conduct the arbitration in such a manner that costs do not rise to an unreasonable proportion of the interests at stake;

\( h \) Restrictions regarding the discussions between an arbitrator and a party of a settlement proposal and consequences of such a discussion, and the position of the arbitral tribunal as a whole or of the presiding arbitrator regarding settlement proposals;

\( i \) The right of a dissenting arbitrator to make known to the parties his dissent and the reasons therefore, or his right to disclose any fundamental procedural irregularity or fraud to the parties, and the relation of these rights to the duty of the arbitrator to avoid a breach of the confidentiality of the deliberations of the arbitral tribunal.

The normal sanction for breach of an ethical duty should be removal from office, with consequent loss of entitlement to remuneration.79

71. In this context, the Commission may wish to recall that the idea of preparing a code of ethics was mentioned during the early discussion of possible features of a model law on international commercial arbitration. In conjunction with the decision not to deal with questions of liability of arbitrators for any misconduct or error in arbitral proceedings, the agreement of the Working Group on International Contract Practices was not to attempt the preparation of a code of ethics for arbitrators.76

CONCLUSIONS

72. The Commission, in addition to taking note of this report, may wish to consider whether any of the issues of arbitration presented herein warrant further examination. If so, it may request the secretariat to submit to a future session a study which may be prepared in consultation with the organization whose text or draft text the Commission wished to examine more closely. Such a study would present the complete text of any selected rules, guide, guidelines, code or clause, together with detailed comments by the secretariat on that text. It could further include general considerations concerning the desirability and feasibility of efforts on a global level and some suggestions as to any possible future course of action of the Commission.

73. In this respect, various approaches and options might be studied depending on the nature of the chosen issue and the orientation of the organization or the text concerned. For example, if the I.B.A. Rules of Evidence were to be selected by the Commission, the secretariat could include comments on their universal applicability and acceptability so as to assist the Commission in determining later whether, for instance, to recommend their use, or to envisage the preparation of an amended text, or to formulate similar supplementary rules specifically geared to the UNCITRAL Arbitration Rules.

74. The last mentioned possibility would probably feature among the more viable options in the area of multiparty arbitration, if the Commission were to select that area for closer examination. Any study, based on the draft texts prepared by the ICC, could thus include, in its considerations on the desirability and feasibility of a guide or a model clause, the suggestion to tailor such a text to the UNCITRAL Arbitration Rules, including the functions of an appointing authority acting under the Rules. Another approach worthy of study could be to envisage a text without any link to a given set of

70. As to the legal nature of the code, the introductory note mentions that the code could not be directly binding either on arbitrators or on the parties, unless the code was adopted by agreement. Whilst the International Bar Association hopes that arbitral institutions would take it into account when considering challenges to arbitrators, it has emphasized that the code would not be intended to create grounds for the setting aside of awards by national courts. A further positive position taken in this regard is that international arbitrators should in principle be granted immunity from suit under national laws, except in extreme cases of willful or reckless disregard of their legal obligations. Accordingly, the International Bar Association wishes to make it clear that it would not be the intention of the code to create opportunities for aggrieved parties to sue international arbitrators in national courts.

71Ibid.
arbitration rules. At any rate, it seems clear that a possible later involvement of the Commission would aim at a text which had a global scope of application and was not tied to one particular arbitral institution.

75. Further points to be included in a study might relate to the level of statutory law. For example, the secretariat could prepare a survey of national laws on such questions as court involvement in consolidating arbitral proceedings or in deciding certain issues (e.g. appointment of arbitrator) left open by parties adhering to a basic multi-party arrangement. The secretariat might also be requested to monitor legal developments in this area, and possibly in the area of adaptation and supplementation of contracts, and to suggest at an appropriate time consideration of a harmonization effort by way of model provisions of law.