U.P.L. 1940 - DRAFT III

INTERNATIONAL INSTITUTE AT ROME FOR THE UNIFICATION OF PRIVATE LAW

- - -

PRELIMINARY DRAFT

OF A UNIFORM LAW ON ARBITRATION IN RESPECT OF INTERNATIONAL RELATIONS OF PRIVATE LAW

- - -

Rome, 1940

PRELIMINARY OBSERVATIONS

The differences now existing among systems of arbitration law cause serious difficulties to persons concerned therewith, especially in international relations. Sometimes a particular solution embodied in some law constitutes an obstacle to the normal development of arbitration, but more often the difficulty arises from the fact that the law applicable to a particular case is illdefined. The validity of an arbitration agreement is constantly in danger of being put in doubt, and its effects are often unsettled and uncertain. If an award has been given, the execution of it may often be hindered, or rendered more difficult by reason of its being considered a foreign award in the country where it is to be executed.

The unification of laws relating to arbitration should, therefore, be of considerable value for business. This is particularly so, since the inconvenience resulting from a diversity of laws is such that it can only be eliminated in a very imperfect fashion by the action of the interested parties themselves. Associations are able to give information as to the law which prevails in any particular State, and the rules of institutions for arbitration may well limit particular laws and extend an autonomous system of rules, but the possibilities of such action are limited, and parties cannot regulate, according to their own desires, either the question of execution of awards, or the equally essential matter of the appeals which may be brought against awards in law courts. It is true therefore to say that a uniform system of arbitration pre-supposes a uniform law of arbitration.

The above arguments may serve to explain the interest which commercial associations and legal bodies, such as the International Law Association, have for many years shown in the problem of unifying the law of arbitration.

The League of Nations has already intervened on two occasions, in the hope of getting rid of the obstacles which diversity of laws

puts in the way of international arbitrations. The two conventions signed under its auspices, have considerably improved the position. The Geneva Protocol of 1923 recognised, in principle, the validity of the arbitration clause. The Convention of 1927 has established uniform principles concerning the execution of awards in those countries that have ratified it. These results are far from being negligible; but even according to the belief of those who elaborated these conventions, it is certain that the work done at Geneva is still far from complete; it can only be regarded as the first step on the road towards the unification of the laws relating to arbitration, which is still ill-defined and strewn with obstacles.

Since its foundation the Institute has studied the question in order to find out if more progress might be made and if the road towards unification might be traced still further. For this purpose the compilation of a report on the comparative law aspect of the problem was entrusted to Mr. David (1). After having considered this report, the Governing Board of the Institute decided in 1932 that an attempt at unification might well be made, and a committee nominated by the Board, after holding a number of meetings, agreed on the text of the draft.

This draft is intended to form the basis of a law which, in the opinion of the Committee, should be put into effect in different countries, according to the provisions of an international convention, signed and ratified by such countries. The Committee has not however thought it necessary, for the present, to consider either the means of putting the law into operation or to elaborate the text of a convention according to which the draft would receive the force of law.

One last preliminary observation concerns the relationship of the draft law with the various sets of rules of arbitration now in force. The draft does not propose the substitution of its provisions for those of such rules, which will continue to govern the

---

(1) RENE DAVID, Rapport sur l'Arbitrage conventionnel en droit privé. Etude de droit comparé. U.D.P. - Etudes: III - S.d.N. 1932 - C.D. 1932.

relations of parties after the uniform law has come into force just as they did before that date, and as they now do under different national laws at present existing. The relation between the draft law and rules of arbitration has been clearly set out in the draft itself, which expressly reserves the effect of the agreement of parties wherever it is useful. Article 40 makes it clear that the words "arbitration agreement", or "agreement of the parties", include any provisions of the rules of arbitration to which parties may have made reference.

The scope of application of the present draft law and its contents will appear from its 40 articles which are analysed below.

SECTION I

THE SCOPE OF THE LAW

(Article 1 - 2)

Article 1. - The present law shall apply when, at the time an arbitration agreement is concluded, the parties thereto have their respective habitual residences in different countries where the present law is in force. This law shall apply in such a case wherever the parties happen to have their habitual residences at the time a dispute arises.

If one of the parties is a corporation or a partnership firm its habitual residence shall be deemed to be the place of the situation of the establishment that has made the arbitration agreement, even if such establishment is only a branch.

The nationality of the parties shall not be taken into consideration.

The present law shall also apply whenever the parties have so provided.

Article 2. - The parties to an arbitration agreement may exclude the application of the present law.

The Committee did not think that, under present day conditions, the uniform law could apply to all arbitrations without distinction and therefore the first article has had to set out the cases in which the uniform law applies. They are two: the parties to the

arbitral agreement must either have their habitual residences in different countries where the uniform law is in force, or the parties must have stipulated for the application of the uniform law. In the cases where the uniform law does not apply, the relations of the parties will, before and after the introduction of the law, be regulated according to the present day position as it is settled by different laws and international conventions. Such will also be the position when the parties have excluded the application of the uniform law, as they are authorised to do by Article 2 of the draft.

The first case where the uniform law will apply, set out in Article 1 of the draft, is where the parties have their habitual residences in different countries in which the law is in force. In this case, the uniform law is applicable whether the arbitration is of a commercial nature or not. Following the modern tendency the words "habitual residence" have been preferred to the word "domicile", since the interpretation of this last expression is not the same in every country.

The adoption of the criterion of habitual residence, however, made it necessary to consider several problems.

First of all, it became proper to settle at what moment the residence of the parties had to be considered, since, especially in the case of an arbitration clause, it may happen that a person changes his habitual residence between the moment when the arbitration agreement was concluded and the moment when the dispute arises and the arbitrators assume their duties. The choice of the decisive time, in this connection, would appear to be bound up with the view one takes of arbitration: is the submission of a dispute to arbitrators an event which effects the very basis of the law upon which one arbitrates ? Or does it merely concern the putting into operation of that law and merely remain a matter of procedure ? Upon this delicate question neither the teorists nor the practitioners of any country have been able to agree, at least this appears to be so judging from the recent controversies in France and the United States in connexion with the retroactivity or non-retroactivity of

laws admitting the validity of the arbitration clause.

The Committee did not consider the theoretical value of the opposing views but, adopting a purely practival point of view, thought it to be its duty to prefer the rule which, in Article 1 (1), adopts the habitual residence of the parties at the moment when the arbitration agreement is signed. It is essential that from this moment the parties should know by which law the arbitration of their difficulties will be conducted and, more particularly, whether or not their arbitrators will have the powers of free adjusters of differences (amiables compositeurs), and whether or not an appeal to the courts against the award of the arbitrators will be possible; the form of the agreement and even its existence may depend upon this.

The solution so adopted is therefore based on essentially practical considerations, rather than on considerations of a theoretical nature. Moreover one would not be justified in assuming from this that the uniform law adopts the principle of non-retroactivity. The question of the retroactivity of the uniform law has not been settled, either directly or indirectly, by the authors of the draft who have left to the Conference, which will be called to discuss their suggestions, the opportunity of providing the necessary provisions on the subject, if it deems them necessary.

On the other hand, the criterion of habitual residence has made it necessary to formulate in the draft an express provision dealing with corporations, or other parties to an arbitration agreement, to whom this criterion may be difficult to apply. Such was the object of Article 1 (2). By the words "corporation", or "partnership firm", it is intended to include any group, whether or not it be a legal person according to the law that governs it; these expressions include both the partnership with a collective name of German law, and the partnership of English law. In the provisions dealing with these collectivities, the decisive place is that where the establishment which has concluded the arbitral agreement is situated. This solution was thought preferable to adopting the registered office;

it is, too, more in harmony with the criterion of habitual residence, as contrasted with that of domicile, and it avoids the difficulty created by the fact that certain collectivities which we have included, have no registered office (siège social).

Article 1 (3) needs no comment, and has only been provided for the purpose of making the text provided in the draft more precise.

Article 1 (4) sets out the second case where the application of the uniform law is provided for, and this is independent of the former one. It occurs when the parties have agreed that the law shall apply and, in this case, the uniform law will be applicable in those countries which have adopted it, even if at the time the parties made their agreement they had their habitual residence in the same country, or, if they were then resident in different countries where the uniform law had not been introduced. It is sufficient that the parties should have manifested their intention to have their arbitration regulated by the uniform law, for it to become applicable in the eyes of legislatures which adopt the law.

Seeing that the draft does not distinguish between an express (and detailed) agreement, and a submission to a set of rules of arbitration, it will be sufficient to make the uniform law applicable, for parties to have referred to a set of arbitration rules that include the uniform law. Institutions and associations that have published sets of rules of arbitration should, consequently, be able to enlarge the sphere of application of the uniform law, if it satisfies the requirements of practice, and they will thereby have the power to make way for the abolition of a legislatory dualism regarding arbitration, which is not without its inconveniences, but which for the moment the Committee have not thought it possible to avoid.

The Committee is conscious of objections of a theoretical nature which may be brought against Article 1 (4) of the draft, but believes it to be nevertheless opportune to provide this provision for the reason explained above, so as to extend the possible application of the law. Criticisms that have been raised against the theory of the autonomy of the will, lose their force here, since it

is difficult to understand how the public policy of one country might be affected by the fact that certain parties habitually resident therein, have eliminated its ordinary internal law of arbitration to apply the uniform law in their mutual relations, when the uniform law is also one of the internal laws of that same country.

Doubtless it might have been possible to make the provision of Article 1 (4) optional. The committee considered a proposal on this point which would have drafted Article 1 (4) as follows: "The present law shall also be applicable whenever the parties have agreed that it shall be applied, unless such an agreement would be contrary to the law of a country, where one of the parties has his habitual residence".

The committee did not adopt this proposal, since it seemed inopportune to insert such a reservation in the text of the uniform law. Nevertheless, a state might well, when it decides to introduce the uniform law into its legislation, consider whether such a reservation might or might not be opportune.

The basis of the draft would not be changed if Article 1 (4) were deleted; in such a case the field, in which the law applies, would be restricted but the basis of the law would not be changed.

Article 2 of the draft is complementary to Article 1 (4) and stipulates that parties may exclude the application of the uniform law from their dealings; it was not thought necessary that Article 2 should set out the consequences of such a provision. It will be for the judges of different countries to deduce what are the legal consequences of this article, after considering the principle of private international law.

SECTION II

THE ARBITRATION AGREEMENT

(Articles 3-6)

Article 3. - Any person may submit to arbitration any right which he is competent to dispose of.

An arbitration agreement respecting future differences shall only be valid if it relates to disputes arising out of a determinate legal relationship or contract.

Article 4. - An arbitration agreement or any modification thereof must be proved by documents demonstrating directly or indirectly the intention of the parties to submit their differences to arbitration.

Article 5. - If a party to an arbitration agreement submits a dispute covered thereby to the determination of a court of justice or if a party refuses to carry out some necessary act or actsfor the organization of the arbitration, or if a party claims not to be bound by the arbitration agreement, then in any such case the other party may either insist on the fulfilment of the arbitration agreement, or may consider the agreement void so far as regards the dispute in question.

The fact of claiming in a court of justice interim measures of protection shall not prevent an arbitration agreement from being relied on.

Article 6. - An arbitration agreement shall not be valid if it gives one of the parties thereto a privileged position with regard to the appointment of arbitrators.

The scope of the application of the uniform law being so determined, unlike the Geneva Conventions of 1923 and 1927, it does not provide for one aspect only of arbitration, but, when it is applicable, covers, subject to certain reserves, the whole of arbitration, from the creation of the arbitration agreement to the execution of the award.

Article 3 to 6 of the draft, deal with the arbitration agreement, the matters to which it may relate, its proof, its legal effects and its annulment.

In general one may submit to arbitration any rights which one is competent to dispose of. This principle, which follows

Article 1003 of the French Code, is set out by Article 3 (1); this article is however conveived in very general terms which may be expanded by the various national legislatures, for example, it is for the separate law of each country to set forth whether an infant, a lunatic, or a married woman may or may not bind themselves by an arbitral agreement and, if so, under what conditions, and what legal consequences follow therefrom. By using the expression "any person" the draft did not intend to decide these points.

On the other hand, different laws of each country ought to determine what rights a given person should be considered to be competent to dispose of; and this point has not been settled in any way by the uniform law.

Indeed, individual laws may, without restraining the power to dispose of a right in the strict sense of the term, exclude the power of submitting that right to arbitration, or may impose special rules for certain types of arbitration. At one time the Committee thought of settling this point in express terms, by adding a paragraph to Article 3, but in the end this was not done in view of the terms of Article 26 (1), and Article 28 (2) which make the position obvious; further it seemed to be bad policy to mention expressly in the draft only one of the different cases where a gap in the uniform law will have to be filled in by reference to the separate legal system.

Article 3 (2), following the Geneva Protocol of 1923, recognises the validity of the arbitration clause. This validity is admitted both as regards civil and commercial matters, and whether or not a difference arises from a contract or other legal relationship. But, following the example of most present day legislation the draft only admits the validity of the arbitral clause if it relates to differences arising from a determinate legal relationship. This constitutes a limitation upon the arbitration clause as understood in English law, but one which has not much practical effect; it is made necessary by the fact that the draft has not retained the

discretionary power which is now accorded to a judge in England, to refrain from giving effect to a legally valid arbitration agreement.

The draft does not make the validity of the arbitral convention depend upon any set form, and an arbitral agreement will therefore be valid, even if it arises out of a verbal agreement between the parties, and an award made under such an agreement would be a valid award. The application of these principles is however considerably limited by Article 4 of the draft dealing with the proof of the arbitral agreement.

Article 4 of the draft requires that the proof of an arbitration agreement shall be made from documents. In drafting this article, the committee adopted a clause suggested by the International Chamber of Commerce, and the word "documents", which is a non-technical term, has been employed advisedly. The expression "proved by writing" has been avoided because in certain countries it might have seemed to be a reference to technical rules of law current there, and for that reason might have been interpreted differently in different countries.

By using the word "documents" the committee has clearly expressed its mind. It is not necessary that some document signed by the parties should be expressly prepared in order to make the arbitration agreement formally valid. The proof of an arbitration agreement may result, not only from such a formal document, but also from any piece of writing, even though it be not signed, emanating from the party against whom the agreement is set up and from which it appears that such a party has expressly or impliedly submitted to the jurisdiction of the arbitrators.

The word "document", used in Article 4, does not necessarily refer to some writing emanating from one of the parties, a document by which the existence of an arbitration agreement may be proved, this may be the minutes of the arbitrators, or the award itself. This observation is, however, of less importance in the case where

no written arbitration agreement exists, than in the case where such an agreement does exist, but where the arbitrators, with the consent of the parties, have outrun the limits of the jurisdiction assigned to them by the written agreement, by examining some question closely connected therewith, which is not covered, or which is only doubtfully covered by the terms of the agreement. In such a case a party who had consented to the enlarging of the competence of the arbitrators, and had taken part in the proceeding before the arbitral tribunal, ought not to be permitted to benefit from the fact that there is no writing which enables the whole agreement to be proved, and to use this as a pretext for attacking the award.

In order that an arbitration agreement may be proved against any party thereto in respect of any particular difference, it is not sufficient that such party should merely have appeared before the arbitrators; it is necessary that his conduct should amount to a renunciation of his right to rely upon the cause for nullity. It is necessary that such a circumstance should either arise from the minutes of the arbitrators, or from their award, that is to say, from documents which indirectly at any rate, evidence that the parties desire to settle their differences by arbitration.

Parties may of course, by a new agreement, put an end to any earlier agreement that they have made. It was not thought necessary to mention this obvious truth in the draft. Article 5 refers to another case of a less evident and a more practical nature, that of the tacit renunciationof the benefit of an arbitral agreement. If, disregarding such an agreement, a party engages in litigation, such party, by that fact alone, and with regard to the particular litigation started, loses the right to dispute the competence of the court which he has thereby seized, by later setting up the arbitral agreement. The adversary of such a party must, if he intends to rely upon the agreement, do so without delay, and establish before the court itself its own incompetence. On the

other hand, if the party upon whom the duty falls to nominate an arbitrator, does not do so in the required time, the other party, instead of applying to the court to obtain the nomination of arbitrator, as he has the right to do under Article 9,may be authorised, in appropriate circumstances, to interpret the conduct of his opponent as a tacit renunciation of the arbitration agreement, and he may, in consequence, submit the disputeto the court. Finally, if arbitrators have been designated and one of the parties alleges that they are incompetent to decide a particular question, the other party may note this attitude and put the question before the court; in such a case his adversary may not then go back on his opinion, and contest the competence of the court, by alleging that the arbitrarors would have been competent to deal with the dispute. In the three cases above mentioned, the arbitral agreement will become void but only so far as regards the particular dispute submitted to the arbitrators. Tacit renunciation of the right to invoke the agreement has only a limited effect, and the agreement will remain valid in respect of disputes that it covers which may arise in the future.

Article 5 (2) does not limit, but merely makes Paragraph 1 thereof somewhat clearer. It appeared to be useful to insert this clause in view of certain doubts raised by American case law, and in order to mark the fact that the existence of an arbitration agreement, relating to a particular dispute, should not prevent the parties to that agreement from having recourse to the courts in case of need, in order to obtain interim measures of protection, (saisie-arrêt, appointment of receiver, etc.). An arbitration agreement ousts the jurisdiction of the courts to settle a dispute, but it does not dispose of their competence to order such measures, which the arbitral tribunal, even if it were already constituted, would generally be unable to direct.

At first, the Committee used a wider formula in Article 6, one which would have declared an agreement to be void, without further ado, in all the cases where it put the parties in a position

of legal inequality. But in order to avoid any possible misinterpretation, Article 6 was given its present form and it only deals with the avoidance of an arbitration agreement in a more practical case, that is where the equal rights of the parties have been interfered with in the clearest possible way: where one party has been given greater rights with regard to the constitution of the arbitral tribunal than his opponent, for example, where one party has the right to nominate two arbitrators and his opponent has the right to nominate.

So drafted, Article 6 is limited to expressing the rule which already prevails in most countries; there is no question of it interfering with existing arbitral institutions, since the rules of such institutions nowadays always confer equal rights on parties with regard to the nomination of arbitrators.

Such being the position, it is important to stress that Article 6 of the draft is quite different, in its intention, from Article 1925 (2) of the German law. In order to find out whether an agreement is void or not, according to Article 6, it is sufficient to examine the stipulation itself, without going into the question as to whether or not the party with the lesser right has entered into the agreement by constraint, or because of some social or economic inferiority. The terms of Article 6 do not in any way raise the question of lack of consent; this question has not at any time been considered by the creators of the draft, who have left it for the ruling of individual legal systems.

SECTION III

THE ARBITRAL TRIBUNAL

(Articles 7-14)

Article 7. - The arbitrator or arbitrators may be appointed either by the arbitration agreement itself or after it has been entered into.

If the agreement does not state the number or manner of appointment of the arbitrators each party shall appoint one arbitrator.

Unless otherwise agreed, when there is an even number of arbitrators appointed by an agreement or under the provisions of the preceding paragraph, they shall, before entering on the reference, appoint another arbitrator who shall, as of right, be president of the arbitral tribunal; when an odd number of arbitrators has been appointed they shall appoint one of themselves to act as president of the arbitral tribunal. In case the arbitrators cannot agree thereon, such appointment shall be made by the court at the request of one of the parties.

Article 8. - If need be the party who invokes an arbitration agreement shall state the difference he proposes to submit and shall appoint his arbitrators. Notice thereof shall be given to the other party, and if need be, to the person who by virtue of the arbitration agreement should appoint an arbitrator. Such notices may be given by registered letter.

Article 9. - If the party who has received notice to appoint an arbitrator, or if the person invited to appoint, shall not have done so within 30 clear days, the court shall appoint such arbitrator. If notice is given by registered letter, time shall run from the day when the letter arrived at its destination. The arbitration agreement may modify the rules contained in this article.

Article 10. - If an arbitrator shall die or become incapable of acting, or shall resign, he shall be replaced, in the same manner as that in which he was appointed, in accordance with Article 7 to 9 inclusive hereof; if an arbitrator has been disqualified, or if his appointment is revoked, a new arbitrator shall be appointed by the court.

If, however, the arbitrator was appointed by name in the arbitration agreement, and the parties to the arbitration agreement cannot agree upon a substitute, then, the arbitration agreement shall be inoperative. It shall, however, remain valid in so far as it relates to future differences, provided that, as and when such differences occur, the arbitrator shall no longer be unable to act.

The provisions of this article may be modified by agreement between the parties.

Article 11. - Unless otherwise agreed, any person may be appointed as arbitrator. The nationality of an arbitrator shall not be taken into account.

An arbitrator shall not be discharged by the death of the party who has appointed him, unless the parties to the arbitration agreement have so provided.

Article 12. - An arbitrator may be disqualified from acting when he has not attained his majority or when, owing to conviction of a crime or mental incapacity, illness, absence or other cause whatsoever he is unable to fulfil his office satisfactorily, or cannot fulfil it within a reasonable time.

The arbitrator appointed by agreement of the parties, or by the court, or by other arbitrators, or by a third party, may further be disqualified from acting if any circumstances exist capable of casting doubt on his impartiality or independence. The president of the arbitral tribunal may also be disqualified from acting for such reasons.

In the absence of an agreement to the contrary, a party may not challenge an arbitrator appointed by him except for some cause that has arisen after the appointment or of which such party can prove he was not aware until after the appointment.

Article 13. - A challenge on the ground of disqualification must be addressed by a party to the arbitral tribunal before the award is made, and as soon as such party has become aware of the ground for his challenge. The parties may agree that any challenge shall be adressed to some other authority.

An appeal lies to the court from the decision of the arbitral tribunal refusing to give effect to a challenge; such appeal must be made in ten days time.

Article 14. - If an arbitrator, having accepted his office, shall unduly delay to fulfil it, the authority settled by the agreement of the parties, or in default of such agreement, the court may, at the request of one of the parties, remove such arbitrator.

Articles 7 to 14 of the draft concern the setting up of the arbitral tribunal, as well as any changes that may come about in its composition. Most of the rules set out by these provisions are of an optional nature, and it is open to the parties to refrain from adopting them either by creating other express provisions, or by making reference to the provisions of an existing set of rules of arbitration. The draftsmen made this incapable of dispute by inserting the words "unless otherwise agreed", in all the articles that may be altered by the agreement of the parties. There is a contrary agreement however when, as set out in Article 40, the

parties have incorporated in their agreement a set of arbitration rules the terms of which are then substituted for those of uniform law.

Article 7 indicates the rules to be followed when, by their agreement, parties have not made contrary provisions.

Paragraph I of this article has the object of finally getting rid of the requirement of certain legal systems that the arbitrators should be named in the arbitration agreement itself.

Paragraphs 2 and 3 determine the composition of the arbitral tribunal and the manner of its constitution when the parties have not either directly or indirectly agreed upon other arrangements. In this case, as a general rule, each party appoints an arbitrator in accordance with paragraph 2, and such arbitrators themselves appoint, in accordance with paragraph 3, either a new arbitrator or one of themselves to be the president of the tribunal.

Article 7 (3) in general only applies when the parties have made provisions concerning the composition and constitution of the arbitral tribunal. Even in this case the agreement of the parties should, as a general rule, be completed by applying the provision of Article 3, so that there is an odd number of arbitrators and so that the arbitral tribunal has a president. The draft does not absolutely prohibit arbitral tribunals consisting of an even number of arbitrators, but it has tried to make this quite exceptional and, in order that such tribunal may be created , the parties must not only have agreed to nominate an even number of arbitrators, but also have expressly excluded the application of Article 7 (3) which provides for the nomination in such a case of a further arbitrator either by the arbitrators already nominated or by the court.

The institution of a president of the arbitral tribunal has been borrowed from Swedish law; his functions are set out in Article 16. The name "president of the arbitral tribunal" has been preferred by the Committee to that of third arbitrator (umpire, Obmann), not only because the arbitrator who is given those functions

may not be the third arbitrator, but also and above all, because, unlike the position now existing in several legal systems, a president of the arbitratral tribunal must be designated, according to the draft law, even if there exists an odd number of arbitrators; he is to start work at the same time as the other arbitrators, at the commencement of the proceedings, and moreover he is not bound to adopt the opinion of any one of his coarbitrators.

The designation of the president of the arbitral tribunal before the arbitrators start work, follows the tendency recently observable in English law ((Arbitration Act, 1934, section 5 (1) (b))). The competent court to effect this designation, when the arbitrators cannot agree, is set out in Article 36 of the draft.

Articles 8 and 9 of the drafts are provisions which put into operation Article 7 (2), that is to say these articles apply when the parties have not already arranged how the arbitrators shall be appointed; Articles 8 and 9 may also be brought into operation when incomplete or insufficient provisions are contained in the arbitral agreement. The notification referred to in these articles will normally be made in accordance with the forms of the country where it is effected (See Article 38); the draft however allows that in every case it is sufficient to send a registered letter, whatever be the formalities otherwise required in any country. The time mentioned in Article 9 may be modified by the agreement of the parties. The tribunal mentioned is, following Article 36, the same as that before referred to in Article 7.

The nomination of an arbitrator by the Court, referred to in Article 7 and Artile 9, appeared to the Committee to be the logically necessary corollary of the validity of the arbitral clause admitted in Article 3 (2). The draft, following the provisions of most present day legislation allows a new arbitration agreement to be constituted, in certain circumstances, through the intervention of the court in spite of the opposition or obstruction of one of the parties, or in spite of the disagreement of the arbitrators.

We may here recall that, according to the provision of Article 5 of the draft, there is another possible solution: when one of the parties refuses or fails to accomplish acts which it is duty to undertake with regard to the construction of the arbitral tribunal, the arbitral agreement may be held to be void. The person who asks for the arbitral tribunal to be set up has the choice, when faced with an objection by his adversary, either to have the arbitrator designated by the court instead of by such adversary, or to permit the judicial authority to deal with the dispute, treating the arbitral convention as inoperative so far as it regards that particular difference.

Article 10 deals with the case where one of the members of the arbitral tribunal becomes unable to act. Two cases are differentiated in the two paragraphs of that article.

In the case where the arbitrator, who is unable to act, has been designated by name in the arbitral agreement, the opinion of the Committee was found to be divided. Some were not prepared to admit that the arbitration agreement should, in all circumstances, become void; they were only prepared for such an avoidance in the case where the arbitrator who was unable to act, had been nominated because of his personal qualities. This expression, by the way, referred expressly to his individual qualifications as an expert in the subject matter of the dispute. If, on the other hand, an arbitrator designated by name, had been so designated in his capacity of president or secretary of a given organisation, it might have been possible not to hold that the agreement should become void in the case where an arbitrator, so named, happened to be unable to act; this view might certainly have been taken in cases where apparently the parties would have been equally well satisfied to see the arbitration conducted by such a person's successor. Having regard however, to a resolution of the International Chamber of Commerce, the committee definitely accepted a more radical point of view. As soon as an arbitrator has been appointed by name, in

an arbitration agreement, his failure to act, subject to an express agreement to the contrary by the parties, will always involve the avoidance of the arbitration agreement; so that it is not necessary to discuss whether or not he was designated by reason of some qualification, personal to him alone. The agreement becomes void, at any rate so far as regards the particular dispute at issue, because if any new dispute covered by the arbitration agreement, arises at a later date, an arbitrator chosen by the parties should know whether or not his incapacity to act has come to an end.

Article 10, in fine, especially sets out this reservation.

On the other hand, so far as regards an arbitrator who has not been designated by name in the arbitration agreement, it seemed to the committee that the arbitration agreement should not become inoperative in case such an arbitrator became unable to act.

Consequently, paragraph I of Article 10 has provided for the replacing of such arbitrator, subject only to a contrary agreement. In the main, the arbitrator, who becomes incapable, will then be replaced in the same way as he was nominated in the first place. Articles 7 and 9 will come into play here. However, if the reason for which the arbitrator has become incapable is that he has been successfully challenged, or his appointment has been revoked, the Committee decided that the nomination of his successor should be made by the court, even if such arbitrator has been nominated by one only of the parties; by this means it was hoped to prevent one party from indefinitely prolonging an arbitration by successfully nominating a series of arbitrators unsuitable for their function or having no intention of carrying it out. The court, before coming to a decision, must hear the party whose arbitrator has been challenged or revoked. It may, therefore, take into consideration the views expressed by that party, whose interests could in no way be prejudiced by the solution adopted in the draft.

The capacity to act as an arbitrator is not limited by the draft which, subject to the possibility of challenging certain arbitrators, admits that anyone may exercise the function of an

arbitrator and, in particular, adopting a suggestion made at the Pan-American Congress at Montevideo in December 1933, the draft makes it clear in Article 11 that the nationality of an arbitrator is a matter of indifference; anyone may be an arbitrator, no matter what his nationality may be.

Anyone may be an arbitrator, but naturally it is open to parties by their agreement to limit their choice of arbitrators that they may have to nominate on a later occasion. In this way the parties may stipulate that they shall choose their arbitrators among persons having this or that qualification, or that they will choose them from persons included in a list drawn up by some particular organisation. Article 11 makes it clear, in its first paragraph, that such stipulations are valid.

Article 11 (2) has a different object. It sets out an opinion universally recommended by practice, and which is at present admitted by most legal systems (Compare Section I (2) of the English Arbitration Act 1934): that the death of a party, in the absence of an agreement to the contrary, does not put an end to the function of an arbitrator that such party has nominated. The powers of an arbitrator (a fortiori) do not cease if the party who has nominated him becomes incapable, for example, by a legal judgment by interdiction (where such procedure exists). The draft does not deal with the case of bankruptcy for the effect of which reference will still have to be made to the different provisions of the separate legal systems. Article 12, which cannot be contracted out of by the parties, lays down the cases in which an arbitrator may be challenged.

If a minor is designated as an arbitrator, he may be challenged for this reason alone, without it being necessary for the judge dealing with the challenge to examine whether he has or not, or to what extent he has, come to the use of reason. The draft leaves it to private international law to determine the law applicable in order to find out whether a person has or has not attained his majority. On the other hand, in the other cases, the judge dealing

with the challenge to an arbitrator will have to exercise his discretion and enjoys a latitude in this respect. Article 12 leaves him considerable discretion, since it has not appeared possible to set out exhaustively the various cases where it is desirable to allow an arbitrator to be challenged.

A special case is set out in the second paragraph of the article and hence is excluded from the scope of the application of the first paragraph, in spite of the generality of the words "or other case", which are therein used. This special case exists whenever there are some circumstances capable of casting doubt upon the impartiality or the independence of the arbitrator. The draft does not admit this cause for challenge in respect of all the arbitrators. The only arbitrator who may be so challenged is the arbitrator designated by agreement between the parties, by the court, by the other arbitrators, or by a third person.

On the other hand, the arbitrator nominated by one of the parties may not be challenged because of some doubt with regard to his impartiality, except in the case where such arbitrator has become the president of the arbitral tribunal. The distinction thus admitted in the draft constitutes in theory a big change having regard to certain existing legal systems; but it did not seem desirable to the members of the Committee to confine themselves to a theoretical point of view and it was not possible to ignore the universal, however unsatisfactory practice, according to which arbitrators nominated by the parties generally tend to conduct themselves as advocates for the parties which have nominated them, the only really judicial function being, in truth, reserved for the third arbitrator. (Compare the Mc Kinnon Report). Following the view set out in Article 12, Article 29 does not make the partiality of one of the arbitrators a reason for annulling the award; at paragraph 4 it is insisted that in order to make the award annulable, the procedings should not have been conducted impartially; it is not sufficient that one of the arbitrators should have failed in his duty of impartiality.

The third paragraph of article 12 has the object of limiting possible attempts by any party to waste time.

No challenge on the party of a party who has nominated an arbitrator is admitted for any reason that has arisen before the appointment of such arbitrator, unless such party proves that at the moment when the arbitrator was appointed, that party was not aware of the reason for which it is now desired to make the challenge.

Article 13 settles the conditions for challenging arbitrators. The challenge must be addressed to the arbitrators as soon as the party making it is aware of the reason upon which it is based; if the award has already been made, no further challenge may be made, and the party may only make an appeal based on Article 29 (4); Article 29 (2) cannot then be invoked since the arbitral tribunal does not, merely by including an arbitrator liable to be challenged, become irregularly constituted.

The Committee has discussed, at length and on several occasions, the question as to whether the challenge should be made before the arbitral tribunal itself, or whether it was not preferable to admit that it should be made directly to the court which has to deal with the matter in the last resort. Finally, it seemed that the first of the resolutions was to be preferred, both from a theoretical and a practical point of view. It is more in keeping with the nature of arbitration not to apply to the courts after the arbitral agreement has been concluded, except in the most exceptional cases; and this consideration should particularly be stressed in international arbitrations. The practical inconveniences of the solution adopted in the text of Article 13 will be considerably reduced, by reason of the fact that the arbitration rules of different institutions actually provide, at the present day, that challenges should first be made to the special organisations provided for by those rules. The drafting of article 13 is designed to make it clear that the use of such rules remains possible. A challenge must then, first of all, be brought before the arbitrators themselves or, where the

parties have foreseen the case, before some special organ provided for the purpose (Court of Arbitration, etc.).

The arbitral tribunal, so provided, will accept or reject a challenge made against any one of the arbitrators. If the challenge is accepted, another arbitrator will have to be nominated according to the conditions laid down in the arbitration agreement or in Article 10. No appeal is possible against the decision of an arbitral tribunal that accepts a challenge; the Committee considered it is not desirable to see reconstituted, by a court of law, a tribunal of which one member has been subject of such a decision. On the other hand, if the arbitral tribunal refuses the challenge, there can be no such scruples; further, Article 13 admits, in such case, an appeal to the court against the decision of the arbitrators. The competent court is that laid down by Article 36 of the draft, and the appeal must be brought within a period of ten days. If, after such a period has expired, no appeal has been brought, it will not be possible to appeal against the sentence by complaining that the challenge of an arbitrator had been wrongly refused.

Article 29 (2) does not deal with this hypothesis as will be explained in dealing with this provision.

Finally, Article 14 deals with the removal of an arbitrator. This article is necessary because neither the last paragraph of Article 12, nor the first paragraph of that article envisages the case where the arbitrator, who has accepted his job, can, but will not, carry it out; the removal of the arbitrator will enable an award to be made within the period provided for the arbitration. The court competent to remove an arbitrator is, according to Article 36, the same as that competent to nominate a new arbitrator and this should result in time being gained.

SECTION IV

THE PROCEDURE IN THE ARBITRATION

(Articles 15-21)

Article 15. - The parties shall settle the place of the arbitration and the procedure to be followed by the arbitral tribunal, and if they have not done this before the arbitrators have accepted their appointment, the arbitral tribunal itself shall have the right to do so.

Article 16. - The president of the arbitral tribunal shall regulate the conduct of the hearings and control the course of the arguments. He shall provide for the issue of summons and shall deal with other formal procedural matters if such matters have not already been deputed to some other authority by the arbitration agreement.

Article 17. - If the arbitration agreement does not authorise the arbitral tribunal to determine the difference on written evidence only, the arbitral tribunal shall give each party the opportunity of appearing before it and proving his case. The parties may be summoned by registered letter. If, without legitimate excuse, any party fails to appear, the tribunal may nevertheless examine the difference and proceed to its award.

The arbitral tribunal may, notwithstanding any clause to the contrary in the arbitration agreement, admit the right of a party to be represented or assisted by others.

Article 18. - The arbitral tribunal, even if authorised to determine the difference solely on written evidence, may hear witnesses or experts for the purpose of obtaining information on the dispute.

Article 19. - If the arbitral tribunal cannot perform an act that it deems necessary, such act may be accomplished by the competent authority at the request of one of the parties to the arbitration agreement.

Article 20. - The arbitral tribunal may, according to the circumstances of the case, proceed with the conduct of the case and to the award, or adjourn the arbitration or the award, if one of the parties alleges that the arbitration ought not to take place, or that the arbitral proceedings should be suspended; and it may adjourn

the conduct of the case or the award even of its own accord if there be sufficient reason therefor.

Article 21. - An arbitration agreement shall become inoperative, as regards any particular difference referred to the arbitrators, if the award is not made within the period of two years from the date when the arbitration agreement was concluded. In the case of an arbitration agreement respecting future differences, time shall run from the day when the arbitration agreement was invoked.

Such period may be extended by the parties to the arbitration agreement, or, where there is some special reason, by the court at the request of one of the parties.

The provisions of this article may be modified by agreement between the parties.

The procedure of an arbitration is regulated by Article 15 to 21 of the draft.

The general principle is set out in Article 15 and conforms to most present day legislation: the parties shall settle the place of the arbitration and the procedure to be followed by the arbitral tribunal. The place of the arbitration has, in the draft, a particular importance, since it may, according to Articles 36 and 37, serve to determine what is the competent court in a certain number of cases.

The power of the parties to fix the place or the procedure to be followed in the arbitration, ceases as soon as the arbitrators have accepted their appointment; the independence of the arbitral tribunal requires this. From this moment, it is for the arbitrators to fill in any gaps left by the agreement of the parties. The Committee has ad no hesitation in accepting this solution. The precedents created by several laws, and the unequivocal support of practice, justify the solution adopted.

Article 16 settles the functions of the president of the arbitral tribunal following the Swedish law (paragraph 12 (.2)). The formal procedural matters referred to would include, for example, the hire of a place for the meetings of the arbitrators, the choice

of a secretary to draw up the minutes, and the carrying out of the necessary steps in order to communicate the award to the parties and to deposit it in the place agreed upon (article 24). When, on the other hand, the question affects the merits of the dispute itself, for example, if it is necessary to decide whether or not a particular witness should be heard, the question is outside the jurisdiction of the president and must be decided on by the whole arbitral tribunal.

When the arbitral tribunal is constituted by a single arbitrator, he will exercise the functions given by the draft law to the President. If the arbitral tribunal, even though composed of several arbitrators, has no president, the arbitrators will be considered jointly responsible for the duties which normally fall to the president. Lastly these obligations may be imposed on some other authority by agreement of the parties or by some collection of rules of arbitration to which their agreement refers; Article 16 makes it clear that such provisions are valid.

Article 17, by its first paragraph, obliges the arbitrators to call the parties before it, and for this purpose a registered letter is declared sufficient, as it is under Article 8. If one party, having been duly convoked, does not appear, his default does not prevent the arbitrators from conducting the arbitration and making their award; if, however, some legitimate excuse is alleged, the party must be given a fresh chance of stating his case. When one of the parties does not appear, the award is not necessarily bound to be in favour of the plaintiff, but the arbitrators must find out if the plaintiff's case is made out, and the award which they make must, as far as possible, be that which would have been made if the defendant had appeared and made his defence.

If the agreement of the parties provided that the arbitrators shall determine the difference solely on written evidence, this stipulation frees the arbitrators from the necessity of calling the parties before them and hearing them, but it does not forbid them to do so if they judge it opportune.

The second paragraph of Article 17 enlarges the powers of the arbitrators by establishing an exception to the general principle of freedom, set out in Article 15. The Committee here desired to take into account an equitable rule which has recently been introduced into German law (Article 1034 (1), modified by the law of 20th July 1933); unlike the German law, however, the draft does not annul the provision which forbids the parties to obtain the assistance of an advocate, it merely permits the arbitrators to free the parties from the need to observe such a stipulation.

The purely permissive and not imperative meaning which, by Article 17, is given to the clause that the parties shall determine the difference on written evidence only, is adopted in Article 18 which stipulates that arbitrators may hear witnesses or experts for the purpose of obtaining any information on the dispute. The insertion of this provisions in the draft, with reference to experts, was thought opportune in view of the English and American legal systems. The Committee were unanimous in thinking that the word "experts" could equally well be applied to lawyers in the case where the arbitrators, whether or not required to give their decision in accordance with law on pain of the award being void, might consider it useful to inform themselves on the legal aspect of the dispute submitted to them. The word "expert", on the other hand, cannot be applied to a court, consequently the procedure known to English law (Arbitration Act, 1934, section 9 (Ia), and to certain American laws, by which an arbitrator may in certain circumstances, ask the court during the arbitration proceedings to state its opinion on some point of law (special case), cannot be considered as envisaged in Article 18.

The possibility of adopting such a procedure is not admitted and it is therefore excluded from the draft. Should such a procedure be adopted, in spite of the serious objections both of a practical and speculative character raised against it by the Committee, the wording of Article 18 should be modified. Were it not consented to

abandon such a procedure, it seems that a reservation might take place on the part of the countries where it obtains.

Article 18 only deals with the right of the arbitrators, authorised to decide upon written evidence only, to hear witnesses or experts. Arbitrators may, a fortiori, hear the parties themselves.

The conduct of the case by the arbitrators may render it necessary that some act of procedure should be carried out, and it may happen that the arbitrators have no power to accomplish it, or, in certain circumstances, that they are not inclined to accomplish it. In this case Article 19 provides that if the act in question is deemed necessary by the arbitrators, it is to be accomplished by the competent authority upon the request of one of the parties.

Article 19 should be read with Article 38. For example, the questions of determining whether the arbitrators have the right to take evidence on oath, or to compel a witness to appear before them, are not dealt with in the draft; by Article 38 they are left to be settled by the competent national laws: if the competent law settles the question in the negative, Article 19 comes into operation. Article 19 does not state what authority is the competent authority and the determination of this authority, which is not necessarily a judicial authority, will be settled by each legal system according to Article 38. Article 19 stipulates that the competent authority must be informed by the action of one of the parties; this condition is justifiable when it is realised that the measures in question may often involve the parties in considerable expense. A limit is, moreover, put on the initiative of the parties in this sphere by the condition expressed in Article 19 that the act, which it is demanded shall be accomplished, must be an act judged necessary by the arbitral tribunal.

Article 19 does not only deal with acts which the arbitrators have not the authority to accomplish, but also with acts which the arbitrators are legally able to accomplish, and which, given the circumstances, they cannot effectively accomplish. This would be

the case, for example, if a witness, from whom evidence is desired, is in some country other than that in which the arbitration proceedings are taking place; in such a case evidence may be taken on commission by an authority in the place where the witness happens to be, in the conditions set forth by Article 19, provided only that there exists in the country in question some authority competent to do this: the various national laws mentioned in Article 38 will decide whether such an authority exists and which it is.

Article 20 is a provision borrowed from the German law (Article 1037), of which the practical utility is obvious. It prevents dilatory proceedings on the part of one of the parties by preventing constant groundless appeals to the courts from stopping the progress of the arbitration.

Article 20 will operate in a large number of cases: if after the arbitral tribunal has been set up one of the parties alleges that some particular point of a dispute is outside its competence, or if a party alleges that the arbitration agreement is void under Article 6, or if such party shows that the dispute submitted to the arbitrator is closely connected with some other dispute already pending before the court, or if a party alleges that the arbitral tribunal has been irregularly constituted, or that a challenge to an arbitrator has been wrongly refused. In all these cases the arbitrators may, according to the circumstances, continue the proceedings as far as the final award, or may adjourn the proceedings; the circumstances for them to take into consideration will be the seriousness of the objection raised by one of the parties, as well as the amount of the expenses necessitated by the arbitral proceedings of which the very foundation is attacked.

The decision by which the arbitrators decide in any given circumstances to continue with the arbitral proceedings or to adjourn them, may not be questioned by any party. If the arbitrators decide to continue the proceedings, the party, who asks for the adjournement thereof, may continue to take part in the arbitral proceedings

without thereby losing the right to bring forward the reason which, in his opinion, justifies the adjournment. Article 34 (2) is clear upon this point. The draft has, on the other hand, dealt with the case where the award of the arbitrators has been given, and the execution thereof demanded, before the court has had time to decide the question of the competency of any of the arbitrators or the arbitral proceedings raised by one of the parties: the combined effect of Articles 27 and 29 prevents an award given in such circumstances from being made executory whenever the objection so raised is more than a simply dilatory plea.

Article 21 is the only provision of the draft setting out a period of time in connection with the arbitration that it has been thought necessary to retain. The Committee has tried to keep the various rules as simple as possible and has expressly allowed the parties to alter them. The period during which an award must be made has been fixed at two years, and the date from which this time starts, to run has been fixed, not only for cases of submission to arbitration, but also in the case of an arbitral agreement regulating future disputes. If, after the expiration of the time fixed no award has been made, the arbitral agreement becomes void, so far as regards the particular dispute that has been raised, but it remains valid so far as regards any future differences that it may cover. The courts may be seized of the dispute and, if thereafter an award is made, the award must be annulled according to terms of Article 29 (5).

The period of two years fixed by Article 21 may be extended by the parties. The proof of any such extension must be made according to the terms of Article 4, regulating the proof of modifications made in respect of the arbitral agreement. The court referred to in Article 36 may also, if there is any special reason for doing so, grant extended time at the request of one of the parties and in spite of the opposition of the other party. If extended time is to be so granted, the original period must not have already expired. In the absence of an agreement to the contrary, arbitrators are not themselves entitled to extend the time of the arbitration, nor may they ask the court to do so.

A practical case where there will be a reason for extending the time will arise where the arbitrators using the power given to them by Article 20, have decided to adjourn the proceedings and the award. Such a decision by the arbitrators does not involve an automatic extension of the time for the arbitration, but it clearly constitutes a special reason for which the court may extend the time.

SECTION V

THE AWARD

(Articles 22-24)

Article 22. - The award shall be made by an absolute majority of votes after a session at which all the arbitrators must be present in person. If an absolute majority cannot be obtained, the president's vote shall prevail. If, however, the president is an arbitrator who has been appointed by one party only, the arbitration agreement shall, so far as that particular dispute is concerned, become inoperative. The same rule shall apply if the arbitral tribunal is composed of two arbitrators who fail to agree. The provisions of this paragraph may be modified by the arbitration agreement.

The award shall be reduced to writing and signed by the arbitrators. The signature of the majority or, in the case where no majority is obtainable, that of the president of the arbitral tribunal, shall suffice if the award sets forth the reasons why the signatures of the other arbitrators are lacking.

The award shall indicate the place where and date when it is given.

Article 23. - The arbitral tribunal may, if it can do so without prejudice to the parties of the arbitration agreement, make a partial award reserving some disputed questions for a further award.

Article 24. - Unless some other authority has been entrusted with the task by agreement of the parties, the president of the arbitral tribunal shall deposit the award in the place provided by the arbitration agreement, or, if no such place is indicated therein, at some place settled by the arbitral tribunal itself; he shall inform the parties of this fact, and communicate to them the operative provisions of the award. Any such communications may be made by registered letter.

The principle that the award is to be made by an absolute majority of votes and that it does not require the unanimous assent of the arbitrators, has been admitted by the Committee without hesitation, following the rule of most of the legal systems now in existence. The case dealt with by the second sentence of the first paragraph is obviously the one most likely to happen; the two arbitrators nominated by the parties have probably acted as their advocates, and the third arbitrator elected by them will have to settle their conflicting opinions, his preponderating vote deciding the award. The same position will obtain, where the two parties have each nominated two arbitrators and a fifth arbitrator, elected by his four colleagues, has presided over the arbitral tribunal.

The preponderating vote of the president would, on the other hand, have been inadmissible in the case where three interested parties have taken part in the arbitration, and one of the arbitrators has been elected president of the arbitral tribunal, and the third sentence of Article 22 (1) makes it clear that, contrary to the present French system (Article 1018), the third arbitrator envisaged in the system of the draft is not bound to adopt the opinion of any of the arbitrators. The last sentence of that paragraph allows the parties to alter these provisions.

The award must be given after a meeting at which all the arbitrators should be present in person. The committee raised the question as to whether or not it would be sufficient to insist that the arbitrators should be properly convoked to the meeting in question; indeed it was felt that an arbitrator might make it impossible to make an award by not appearing. In spite of this, the existing draft text was preferred; it seemed necessary that the parties should be assured of the guarantee of the effective presence of the arbitrators, and should not be satisfied by merely having sent out proper notices to them. The question of deciding whether an arbitrator has or has not been given due notice, or of deciding whether an arbitrator who has received proper notice, has had

a legitimate excuse for not attending, might have raised innumerable suits contrary to the essential nature of arbitration. In the scheme of the draft, the situation is as follows: if an arbitrator, who has received proper notice, does not attend the meeting, the award cannot be made; in such a case, the remedy would be to call for the removal of the arbitrator in accordance with Article 14 and, if necessary, to sue him for damages in accordance with the ordinary principles of the different national systems of law.

Paragraph 2 of Article 22 settles the manner in which the award is to be made; it makes it imperative that the award should be drawn up in writing and signed by the arbitrators, and this provision is sanctioned by Article 29 (6), which avoids awards not so signed and reduced to writing. On the other hand, the provision which requires the award to mention the place it is given and its date, is a "lex imperfecta", which has no sanction.

Article 23 of the draft, contrary to certain existing laws, allows the arbitrators to settle the differences by several awards, if this can be done without prejudice to the parties. The case dealt with by Article 23 is that where the arbitrators knowing that their award does not finally determine the difference, intend at some later date to give a supplementary award. In such a case the arbitrators continue to be competent to make a supplementary award. On the other hand, if the arbitrators wrongly believe that their award puts an end to their jurisdiction, it is not Article 23 which is applicable, but Article 31 and, when arbitrators have found out their mistake, they cannot give a supplementary award. Article 23 does not, moreover, deal with the case of Section 9 (I) (b), of the Arbitration Act 1934, where the arbitrators, called upon to determine a difference, content themselves with settling the facts of the case and ask the court to determine the legal consequences arising thereout; this procedure has been envisaged only by Article 39 of the draft, and then only in the case where the parties have expressly authorised the arbitrators to adopt it.

In the case of Article 23 leave may be given and proceedings may be taken to enforce the partial award, in accordance with Articles 25 to 28 of the draft, and such award may also be annulled according to Articles 29 to 34 of the draft. Besides the reasons for annulling awards, there is a special reason, which exists for annulling partial awards, set out in Article 29 (7). A partial award may be annulled if it cannot be made "without prejudice to the parties", as Article 23 requires. This expression does not mean that the award must not be prejudicial to any of the parties; this would be absurd. It merely means that when the arbitrators have exhausted their jurisdiction by a series of partial awards, the situation of the parties should be the same as if a difference had been settled by a single award.

Finally, Article 24 deals with the deposit of the award and the notification thereof to the parties.

The place where the award is to be deposited will be fixed by the agreement of the parties, and, if there be no such agreement, by the arbitral tribunal. Various national laws may decide the place where awards made on their territory should be deposited, but they cannot prescribe that such a deposit must be made in a particular place or within a certain time, on pain of nullity: the validity of the award, according to the system of the draft, is independent of its being deposited at a given place.

It is not sufficient merely for the award to be deposited in some place; it is necessary that the parties should be informed that the award has been made, so that they may obtain full knowledge thereof. With this object Article 24 imposes on the president of the arbitral tribunal the duty to inform the parties at what place the award has been deposited. Moreover, the president of the arbitral tribunal or the authority determined by the agreement of the parties will further communicate to the parties the operative provisions of the award; the draft does not impose upon him the further obligation of communicating the reasons for the award, if any have been given, but it is obvious that in those cases the full text of

the award will be communicated to the parties. The obligation to inform the parties of the operative part of the award carries no sanction, but the time within which the award may be attacked, at the instances of any party, in accordance with the provisions of Article 33 of the draft, only from the day when such party received the communication of the operative part of the award addressed to him. This communication may be made by registered letter; it is not necessary that it should be carried out according to the formalities for the giving of notice of judicial orders and decisions.

SECTION VI

THE ENFORCEMENT OF THE AWARD

(Articles 25-28)

Article 25.- An award may only be enforced when it has been declared executory by a judicial authority. Any judicial authority from whom leave to issue execution is claimed, shall, before making its decision, give the parties the opportunity of being heard.

Article 26. - A judicial authority shall, of its own accord, refuse leave to issue execution, if the award is contrary to public policy or if the arbitrators have decided some question that was not capable of being submitted to arbitration according to the law of the place where leave to issue execution has been claimed.

A judicial authority shall also refuse leave to issue execution if, in a country where the present law is in force, leave has already been given to issue execution to the award, or if the authority concerned in one of such countries has adjourned its decision in accordance with Article 27 hereof.

Article 27. - A judicial authority may adjourn the granting of leave to issue execution if a party cited to appear shows that he has a "prima facie" case for setting aside the award.

If, when a reason for setting aside an award has been invoked, a judicial authority nevertheless gives

leave to issue execution, it may require the party claiming execution to give security, pending proceedings for setting aside the award.

Article 28. - When leave has been given to issue execution of an award by a judicial authority of one of the countries in which the present law is in force, the award may be the subject of proceedings for enforcement in any one of such countries.

Enforcement shall nevertheless be refused if the award is contrary to public policy in the country where execution is claimed or if it has been made in respect of some matter which the law of such country does not permit to be submitted to arbitration.

Articles 25 to 28 which deal with the execution of the award, constitute without any doubt the greatest innovation and the boldest part of the draft.

Article 25 sets forth the principle that the award of the arbitrators is not "ipso jure" a document entitling a person to execution. The award only becomes executory after having been declared such, not by the arbitrators themselves, as is a present the case in Austria and in many other countries, but after having been declared such by a public authority. The draft makes it clear that such authority is a judicial authority and this requirement, which is in accordance with the solutions already adopted in the majority of countries, may well be justified when it is realized what control the authority will have to exercise, and the manner in which it will be exercised, over the award.

Leave to issue execution (exequatur), is a judicial and not a purely administrative formality. By the terms of the draft it is this characteristic of it that explains the second sentence of Article 25 which makes it necessary that the parties be given a chance to be heard before a decision on the question of leave to issue execution is taken. The draft leaves the manner in which the parties are to be heard to be determined by each legal system. The draft does not make it necessary for the parties to have the right to appear in person.

Article 26 sets out the cases in which leave to issue execution must be refused. The first paragraph of this article requires no explanation. The second paragraph of the article should be read with reference to Article 28 of the draft: the international effect which this article accords to leave to issue execution given in any country where the draft has become law, makes it unnecessary to ask for new leave to issue execution in any other of such countries; indeed, such proceedings could only result in fresh expense being incurred by the losing party, and Article 26 (2) prevents this. On the other hand, if leave to issue execution has been refused in one country in respect of an award, application for it may still be made in some other country, since it may well be that the refusal of leave to issue execution is to be explained by the existence of some rule peculiar to the first country, or by some consideration of public policy effective only in that country.

Article 26 of the draft sets out the reasons for which leave to issue execution of an award must be refused,by the court of its own accord. Article 27 (1) sets out, in general words, the other cases in which leave to issue execution on an award may be withheld. If a party, against whom leave to issue execution is demanded, proves that he has some reason for annulling the award, the authority dealing with the request to issue execution is bound to adjourn the granting of such leave, provided the objection raised to the award presents a sufficiently serious "prima facie" case, and if, of course, the person raising the case for annulling the award, is acting within the legal period of time in which he is allowed to raise such a question. Proceedings to issue execution so adjourned, may be taken up again as soon as it is no longer possible to have the award declared void, either because no claim has been made within the legale time therefor, or because a claim has been rejected definitely as unfounded by the competent court.

The application of Article 27 (1), would be facilitated if the authority required to pronounce upon a request for leave to issue

execution were in every country the same as that called upon to pronounce upon the avoidance of the award. This co-ordination could be obtained if, in the first place, or by way of appeal, the judge dealing with leave to issue execution, and the court dealing with a claim to annul the award, were the same authority. The Committee considers that it is most desirable that proceedings for annulling an award should be connected with the proceedings for leave to issue execution in one or other of these ways. The question, however, concerns the judicial organisation and the legal procedure of each country too intimately to be capable of being settled uniformly by the draft. The draft, therefore, merely attempts to facilitate this solution by leaving the separate law of each country to determine the appeals which will lie against any claim to obtain leave to issue execution, and by providing that the avoidance of the award should be demanded in the place where leave to issue execution of the award has been claimed (article 37).

Whenever a party has made out a prima facie case, in his claim to have the award annulled, the authority dealing with the request for leave to issue execution must necessarily adjourn the granting of such leave. On the other hand, if the reason invoked for annulling the award does not appear to be prima facie of a serious nature, leave to issue execution must be granted. Article 27 (2) however permits, in a proper case, leave to issue execution to be given, subject to security, in a case where the court would admit the request to annul the award to have been out.

Article 28 (1) is a decisive part of the draft. It recognises that leave to issue execution has a universal effect when given in one of the countries where the uniform law has been adopted; leave to issue execution given in one of such countries will be sufficient in every other country where the uniform law is in force. The system thus adopted is not the same as that of the Geneva Convention: but it had been thought of at the date of that convention and the efforts made to adopt it only failed because of the marked differences

that existed between different laws regulating arbitration. These differences having been considerably reduced, if not eliminated, by the draft, the Committee believe that the moment has come to realise the great step forward that had to be renounced in 1927.

An award, in respect of which leave to issue execution has been given in one of the countries where the uniform law is in force, constitutes, according to the proposals in the draft, leave to issue execution in every country that has adopted the uniform law. Consequently no new leave to issue execution is necessary, or even possible (compare Article 26) in any one of these countries. The party against whom the award is invoked, may no longer ask for execution to be suspended, Article 27 deals only with proceedings for leave to issue execution and not with the carrying out of execution as a result of leave to issue execution. According to Article 28 (2) the party against whom the award has been made may only raise the following objections: on the one hand he may say that the award is contrary to public policy, and on the other hand he may say that the award has been given in respect of some matter which, in the country where the award is being invoked, does not admit of arbitration. Even these objections themselves do not admit of new proceedings for leave to issue execution, they merely constitute incidents in the actual procedure for issuing execution by virtue of leave to issue execution that has been given abroad. It will be for each separate law, according to Article 38, to say by what authority and in what way such cases are to be dealt with.

SECTION VII

SETTING ASIDE THE AWARD

(Articles 29-34)

Article 29. - The award shall be set aside in any of the following cases:

1) If there is no valid arbitration agreement;

2) If the award has been made by an irregularly constituted arbitral tribunal, or a challenge to an arbitrator has been wrongly disallowed by the arbitral tribunal;

3) If the arbitral tribunal has exceeded its jurisdiction or its powers; in such a case, however, the setting aside may be merely partial;

4) If the parties have not been given the opportunity of putting forward their cases, or if the proceedings have not been conducted impartially, or if, in the arbitral proceedings, some grave fault has been committed that has influenced the disposal of the difference;

5) If the award has been made after the expiration of the period laid dow, by Article 21 hereof;

6) If the award has not been signed in accordance with the terms of Article 22 (2);

7) If one of the parties has been prejudiced by reason of the award being only a partial one;

8) If no reasons have been given for the award when the parties to the arbitration agreement have agreed that the award should contain such reasons.

Article 30. - The award shall also be set aside if the arbitrators have not observed the rules of law when the parties have expressly agreed that the arbitrators should observe the rules of law, on pain of the award being set aside.

Arbitrators are free from the obligation of applying the rules of law and may decide ex aequo et bono if the parties have expressly given them the powers " amiables compositeurs ".

Article 31. - An award may also be set aside if the arbitral tribunal has failed to give a decision on one of the questions submitted to it. If the court upholds the award, in such a case, it shall be competent to determine the questions left unsettled by the arbitral tribunal if the question is ripe for such determination and one of the parties makes an application for this purpose.

The court may also, at the request of one of the parties to the arbitration agreement, remit the award to the arbitral tribunal, in order that it may, in a period fixed by the court, make a supplementary award.

A purely clerical error in an award may be corrected by the court.

Article 32. - The award shall be set aside if it has been obtained by the fraud of one of the parties to the submission, or if it is based on evidence which has been proved false, or if it has been made in ignorance of some document that is of decisive importance and which the person claiming to set aside the award was unable to produce before the award was given.

Article 33. -An application to set aside an award must be made within a period of sixty clear days from the date that the party making the application shall have received notice from the arbitral tribunal of the operative provisions of the award. If the notice is given by registered letter, time shall run from the day when the letter has arrived at its destination.

In the case dealt with by Article 32, an application to set aside an award must be made within a period of 60 clear days from the date of the discovery of the fraud or false evidence or new documents; it may also not be claimed later that three years from the date of the award.

Article 34.-The award cannot be set aside at the request of a party if, by his conduct, he must be deemed to have waived his right to plead any cause upon which he relies to set aside the award.

If at the time such cause arose, he expressly reserved his rights, a party may rely on such cause, even if he has taken part in the subsequent arbitral proceedings.

The appointment of an arbitrator by a party shall not take away his right to allege the incompetence of the arbitral tribunal.

The heading "setting aside the award" comprises Article 29 to 34 of the draft. According to the system envisaged in the draft, the decision annulling an award given in a country where the uniform law is in force, will have effect in every country where the uniform law is in force, the universal effect of judicial decisions annulling awards, constitutes a logical pendant to the universal effect given by Article 28 to judicial decisions declaring awards executory.

The cases in which an award may be annulled are set out in Articles 29 to 32 of the draft. This decision may not be the subject of any appeal whatever outside the cases set out by the draft itself.

The cases set out in Article 29 require little explanation, since they constitute the sanction in respect of the various provisions of the draft which we have already commented upon.

With regard to paragraph 1, it is sufficient merely to note that an award may not be annulled merely because, in the country of the judge dealing with the request for leave to issue execution, the differences could not have been submitted to arbitrators, or because the award is contrary to public policy. The annulment of the award is possible only if the arbitral agreement is not valid according to the particular law governing it, this law is determined by the principles of private international law, and it may be foreign law, so far as regards the judge dealing with the request for leave to issue execution. The fact that the award is contrary to public policy in a given country, permits execution to be refused; it does not, however, authorise a judge of that country to pronounce the award void, provided that in other respects it would be founded upon an arbitral agreement which is valid according to the law which governs it. It was necessary for the draftsmen of this law to accept this solution which, incidentally, has no practical inconvenience, in order to be able to recognise in every case the universal effect of a decision setting an award aside.

Paragraph 2 is aimed in particular at the case where the arbitral tribunal has wrongly refused to accept a challenge to an arbitrator (Article 13); it presupposes that the arbitrators have refused to accept a challenge and that they have immediately given a decision on the matter in dispute and have made their award and that the party who has made the challenge, being still within the period for making an appeal against the challenge thereof, but instead of doing this, such a party will directly attack the award pleading for this purpose his ground for the challenge in accordance with

Article 29 (2). Upon this point, the system envisaged in the draft conforms to many different legal systems, which leave to the courts the final duty of deciding the validity or otherwise of the basis of a challenge brought by a party against an arbitrator.

Paragraph 3 makes it possible to have a partial setting aside of the award, in the circumstances therein set out; this provision, which is new to many legal systems, has been inspired by its practical value; it is rounded off by the provision off Article 31.

The award may also be set aside if, according to Paragraph 4, the arbitrators have been seriously at fault in their conduct of the arbitration proceedings and if such fault has influenced the final award. Such would be the case in particular if, contrary to Article 17, the arbitrators have not heard the parties, or have lacked in impartiality in the way they have conducted the proceedings. Paragraph 4 of Article 29 is concerned solely with the principles of the administration of the justice. The Committee has deliberately avoided using in this article any too general formula, so as to make it clear that in no case may there be any fundamental revision by the courts of the award.

At paragraph 5 of Article 29, it is clear that if any time has been fixed by the parties, such time excludes any other time fixed, as a general rule, by the uniform law.

Paragraph 8 deals with the case where the award does not include the reasons for which it has been given. The absence of reasons is not, in principle, a cause for the setting aside of an award; it only becomes such if the parties have agreed that the arbitral tribunal should give reasons for their award. This provision therefore respects both the practice in Anglo-Saxon countries, which is to give such reasons. Arbitrators will, in fact, continue in such last mentioned countries to give reasons for their awards, even though failure to give reasons is no longer sanctioned by the nullity of the award, except where provision has been made to the contrary.

If the parties wish to guard against possible mistakes of law by their arbitrators, and if they wish to be sure that the general principles of law will be respected in the settling of their difference, they must stipulate for this expressly. Article 30 becones applicable in such a case, and allows the award to be set aside. The parties must similarly make such a special agreement if they desire to reserve the right to attack an award as being founded upon evidence that the arbitrators had no right to receive, or which they have irregularly received.

A second provision is laid down in Article 30 (2), namely, that by which parties may give their arbitrators the powers of " amiables compositeurs"; in such a case, the arbitrators may ignore the rules of law and they have the power of settling the disputes by referring merely to the principles of natural equity.

Finally, according to the plan of the draft, three different positions may arise with regard to the obligations and powers of arbitrators in connection with the settling of a dispute.

The first position is that where there is "amiable composition" (Article 30 (2)); arbitrators will then decide according to the principles of natural equity. They will settle the dispute according to the their own ideas, they may deliberately refuse to apply a rule of law, they may refuse, for example, to take into account any rule of the Statute of Limitation. No appeal will be possible against their decision; the party against whom the decision goes, cannot raise the point that the arbitrators have not applied the law, nor can he say that they have decided against natural equity, equity being in this connection, especially a matter of individual taste. In order that this situation may arise, it is essential that the parties should have desired it, and should have expressly stipulated for it: cf. clause 3 annexed to this draft.

The second position is where the arbitration takes place under strict law, thereby allowing an appeal under Article 30 (1). The position is exactly opposite to the preceding one. Arbitrators must

conduct the proceedings and decide according to a given law. If they contravene the provisions of such law, if they admit evidence which the judge of the country the law of which is applicable would not have admitted, or if they wrongly interpret the rules of such law, their award may be set aside. The word "appeal" is not used in the draft, but the position in fact is, that an appeal is possible against such awards. This is the position which at present arises under French law, for example. In order that such a position may arise, it is necessary however that the parties must have desired it and that they should have made their wishes clear and unequivocal by an express provision: cf. clause 2 annexed to the draft. If the parties have merely said that their arbitrators shall apply such and such a system of law and they have not laid it down that they shall apply it on pain of the award being rendered void, it will be taken that they have desired to authorise such an appeal and that will bring them within the rules of the third position.

The third position is that where the arbitration is under strict law, but does not allow of an appeal. This position will be the general rule but will apply whenever the parties have not expressly said that they desire the first or the second of the positions we have just explained. The general plan underlying the draft, that which applied where there is no contrary stipulation, is that the arbitrators are bound to observe the law and that they are at fault if they refuse to apply a given rule of law. This obligation on the part of the arbitrators, however, is as a general rule, without any underlying sanction: no appeal is possible against the award even if the award is not well founded in law, and even if it appears on the face of it that the arbitrators have made a mistake of law, the award given by them will be valid and will not be capable of being attacked. This is the system at present in force under German and under Swedish law in particular. The difference between this and arbitration according to strict law which today constitutes the rule under French law is clear: there is no appeal

against the award. The difference between this and "amiables composition" is at first sight less clear, but it is real: it consists in the fact the arbitrator cannot deliberately, under the pretence of doing natural equity, put aside a given rule of law. The arbitrator is bound to give his decision according to law and this obligation of which he is familiar, naturally influences the idea he has of his function and the way in which he is to accomplish it.

Though the plan of the draft may constitute an important theoretical innovation so far as certain legal systems are concerned, it seems to correspond in fact with the desires of commercial men. In international arbitration, to which the uniform law will in the first place be applied, it is wellkown that a clause providing for "amiable composition" in countries where such a procedure is known, is a usual clause, but this clause does not well express what the parties mean when they provide for it. By providing for such a clause, the parties do not desire that their dispute should be settled according to natural equity which may be a vague and fleeting notion; they desire, on the one hand, to exclude the possibility of an appeal and, on the other hand, that the arbitrators shall be able to settle the difference rapidly and without publicity, without being obstructed by the complicated and detailed forms which they would be subject under strict law. The general plan of the draft which relieves arbitrators from the need to observe such forms and which excludes the possibility on any appeal, while at the same time maintaining the obligation of arbitrators to decide according to law (lex imperfecta) seems to correspond to the needs of international practice.

The system adopted by the draft is, on the other hand, in harmony with the Anglo-Saxon type of legislation, in the sense that it frees arbitrators from the duty of giving reasons for the award, except where there is a contrary agreement by the parties. But this type of legislation is departed from by the fact that the draft does not admit the principle of allowing any appeal based

on a mistake of law made by the arbitrators, even though such mistake appears from the reading of the award. A mistake of law committed by the arbitrators only permits the award to be set aside if the parties have expressly stipulated this in their agreement.

Article 31 deals separately with the special case of the setting aside of the award: that where the arbitrators have wrongly believed they have exhausted their jurisdiction, but when, in fact, they have not decided one of the points which has been submitted to them. The case settled by Article 31 is not the same as that of Article 23, where the parties know, when making their award, that it is a partial award and they reserve their jurisdiction; Article 29 (7) and not Article 31, is provided for this case under the heading "setting aside of the award". Article 31 deals with the case where the arbitrators believed that their award settled the difference. This being so, the arbitrators have finished with the case and cannot, on principle, make a new award. In most of the present day systems of legislation, the award which they have made in such a case is capable of being set aside; Article 31 of the draft has not admitted such a rigid solution and bearing in mind the requirements of practice, and following, in particular, the provisions of the English and Italian laws, it provides for a series of possibilities.

The award will be set aside when that part of the difference, in respect of which an award has been made by the arbitrators, and the point upon which the arbitrators have failed to come to a decision, are either inseparable or are clearly connected. But setting aside the award is an optional matter and the court may, in proper circumstances, maintain the award. In this case, the jurisdiction of the arbitrators does not automatically revive, to permit them to make a supplementary award; but if one of the parties so desires it, the tribunal may revive jurisdiction of the arbitrators for a time which it shall fix. If the court decides to uphold a partial award given by the arbitrators, it is not

obliged to revive their jurisdiction in order to make a supplementary award; indeed in certain cases it may be impossible to do this (for example the case where an arbitrator has died). If the jurisdiction of the arbitrators has not been revived, that part of the dispute which has not been settled by them will normally be settled by that court which, failing an express agreement by the parties, would have had to deal with the whole dispute; but to this solution, the second sentence of Article 31 (1) makes one exception: "if the question is ripe for such determination, that is to say if it is capable of being immediately settled without further proceedings and, if one of the parties makes an application for this purpose, the court, in which it has been claimed to set aside the award and which has rejected such claim, itself becomes competent to decide that pary of the dispute which the arbitrators have failed to settle. This provision of Article 31, which is borrowed in substance of Article 33 of the Italian code of procedure, will help to avoid the costs and the delays incident to the multiplication of procedure.

The last paragraph of Article 31, does not raise any difficulties. The case set out therein is that where a slip of the pen, or a mistake in calculation is accindentally made when the award is being drawn up. The court alone, and not the arbitrators, will in such a case be qualified to correct such a formal mistake. It seemed useful to insert this provision in order to dissipate any hesitation or doubt which may exist in different legal systems.

With Article 32 the draft returns to the case where the setting aside of the award is compulsory, when the facts upon which the setting aside is based are proved. This case has been set out separately, since the circumstances, in which a party may rely upon it according to Article 33, are different from those in which other reasons for setting aside the award may be relied on. The fraud of a person who represents a party must, of course, be regarded as on the same footing as the fraud of the party himself, and the

fraud of a party would also include the case where a party has corrupted one of the arbitrators. By "evidence which has been proved to be false", is meant evidence which has been declared false by a judicial decision. The word "document" is to be applied merely to a written document, and does not include other evidence which may have been taken down by the arbitrators. The word "plantiff" obviously refers to the person who asks for the setting aside of the award and not to the person who asked for the constitution of the arbitral tribunal.

Article 33 lays down the conditions in which an action for setting aside the award may be brought. The Committee fixed the times within which action under these different provisions must be taken, according to what seemed reasonable, but of course any observation, upon the somewhat arbitrary periods of time chosen that may be called forth from practical circles, will obtain special attention.

Article 34 closes the chapter dealing with the setting aside of the award. The first paragraph of this Article will cut down many objections that a party, having lost his case, might then be tempted to raise against the award; in particular the jurisdiction of the arbitrators may be contested if the parties have reserved any question for discussion before the arbitral tribunal, without formulating any reservation. The waiver mentioned in Paragraph I means a valid waiver of the right to rely upon some objection; Article 34 would not therefore be applicable, if the objection in respect of which a party waived his right, were one of public policy.

The second paragraph of Article 34 allows the parties to reserve their rights and to prevent paragraph 1 of the Article from operating against them. In particular, parties may continue the arbitration without apprehension in the cases dealt with in Article 20.

Paragraph 3 of this Article merely clarifies paragraph 1 and is considered useful in view of the American case law.

SECTION VIII

COST, EXPENSES AND FEES

(Article 35)

Article 35. - Unless otherwise agreed, the costs and expenses of the arbitration and the fees of the arbitrators and the incidence thereof, shall be settled in the award. The arbitral tribunal may, however, remit the settling of the fees of the arbitrators to the court.

The parties shall be jointly and severally liable for the payment of the fees and expenses of the arbitrators. The decision relating to the amount of such costs, expenses and fees may be attacked by any party, independently of the rest of the award, in the time fixed by the first paragraph of Article 33.

Article 35 of the draft, relating to the costs of arbitration and the fees of the arbitrators, is a purely optional provision. The parties may supplant it, either by special clause, or by submitting to some private set of rules, which include clauses of this nature.

If the agreement of the parties has neither directly or indirectly made any other stipulation, it is for the arbitrators to settle the costs and expenses of the arbitration and their own fees. The word "cost and expenses of the arbitration" have a very wide meaning; they include the costs necessitated by the holding of meetings of the arbitrators, the expenses of arbitrators, and those of witnesses and other procedural expenses, also the costs that are to be paid by the parties, to those who represent them or their advocates; the arbitral tribunal has full discretion to determine the incidence of these costs and expenses, and to say which of the parties, or to what extent each party must pay them. If the arbitrators fail to determine these points, the position will be regulated by Article 31. In any case, this article ceases to be applicable in the special case provided for by the second sentence of Article 35 (1), and in this case the court mentioned in Article 36

must settle the question that is remitted to it for decision; it may neither set aside the award of the arbitrators, nor ask those persons to decide the question which has been remitted to it for its decision and which the arbitrators themselves have not wished to settle.

The second paragraph of Article 35 embodies a provision at present generally adopted in various legal systems. The second sentence of that paragraph allows an award as to fees and expenses of the arbitrators to be separately attacked; it is justified by the fact that the arbitrators are, in this matter, judges of their own cause. On the other hand the decision of the arbitrators relating to the other expenses of the arbitration will follow the rest of the award. The same position obtains with regard to a decision by which the arbitrators settle that their fees costs or expenses shall be paid by one party or the other.

The draft has not settled the question of whether the arbitrators have or have not the right to retain their award until payment of their fees and expenses. The settling of the question has been intentionally left by the Committee to the decision of the various national laws. The same position obtains with regard to whether or not the arbitrators have a right to an indemnity when their award is set aside by the court. Nor does the draft settle the question as to how the arbitrators are to obtain their fees and expenses when none of the parties asks for the execution of the award, or when leave to issue execution has been refused in respect of the award. Similarly with regard to the question of the liability that arbitrators may incur in respect of their work; it seemed to the Committee that the solution of these different questions would not have been proper in a law wholly dealing with arbitration.

SECTION IX

THE COMPETENT COURT

(Articles 36-37)

Article 36. - Any court agreed on by the parties to the arbitration agreement shall be competent to deal with the appointment, the challenging or the removal of an arbitrator or president of an arbitral tribunal, the extension of the period of the arbitration, or the fees and expenses of the arbitrators. In default of such an agreement, the competent court shall be that of the place of the arbitration. If the place of the arbitration shall not have been agreed on, the competent court shall be that of the place where the person, against whom a claim is made, has his habitual residence.

In these matters no appeal will lie from the decisions of the court.

Article 57. - An application for leave to issue execution on an award must be made in the place agreed on by the parties. In default of such an agreement, it shall be made in the place where the person against whom a claim is made has his habitual residence; or, if such person has no habitual residence, it may be claimed in any other place where the defendant possesses property capable of being the subject of execution.

An application to set aside an award must be made in the place where leave to issue execution has been claimed. If leave to issue execution has not been claimed, the court competent to deal with the setting aside of the award shall be that agreed on by the parties, or, if no such place has been agreed on, the court of the place where the party, against whom the claim is made, has his habitual residence.

National laws shall govern the question of recourse against decisions made in the national territory with regard to leave to issue execution or the setting aside of awards.

The draft uniform law provides in various of its articles for the intervention of the court and of a judicial authority without further details. It was necessary, in the draft, following various different laws, the provide special provisions to fix, in all these

cases, the competent court or authority. Articles 36 and 37 have this object.

Article 36 states the competent court referred to in Articles 7, 9, 10, 13, 14, 21 and 35. It is provided in paragraph 2 of that article, that no appeal may be brought against the decision of the court in these matters.

Article 37 (1) determines the place of the judicial authority competent to deal with the question of leave to issue execution; (Articles 25 to 28). Paragraph 2 of Article 37 determines the competent court to pronounce upon the setting aside of an award (Articles 29-34). The rule of this last paragraph has already been explained, it is justified by the desire to bring together before the same authority both the request for leave to issue execution and that for setting aside the award; it will be for the separate national legislations to perfect here the cohesion that the uniform law has not been able fully to realise. Paragraph 3 of the Article requires no explanation.

Articles 36 and 37 state which is the court or the authority, which is competent in all cases where there may be some doubt in the matter. By the words "the person against whom the claim is made", used in these articles, is meant the defendant in the particular proceedings with which the court is dealing; these words do not refer to the party against whom it has been sought to apply the arbitration agreement.

There remains certain articles in which either the court or the authority referred to therein are not settled by Article 36 or 37. In Article 19 the competent authority is, "ratione loci", that which according to the circumnstances is the best suited to carry out the particular act mentioned. It is the same, necessarily somewhat vaguely defined authority, that is referred to in Article 5, where paragraph 2 of that Article speaks of interim measures of protection.

SECTION X

SUPPLEMENTARY PROVISIONS

(Articles 38-40)

Article 38. - When the form of any procedure has not been settled by this law, it shall be carried out according to the law of the place where it is performed.

Article 39. - The provisions of this law shall be applied as far as possible when, by virtue of the arbitration agreement, the duty of the arbitrator is only to settle questions of fact, without deciding the legal consequences thereof.

Article 40. - The words "arbitration agreement" or "agreement of the parties" shall, in the present law, include any set of arbitration rules which may have been incorporated by reference in such agreement.

The word "court" includes any judicial authority competent to act under the law of a country.

The draft is completed by these three supplementary articles. Article 38 leaves it to the various separate legal systems to determine the form of acts of procedure whenever the draft has referred to them without making it clear how they are to be carried out. For example, at Article 18 the draft speaks of hearing witnesses without specifying if these witnesses should take an oath, or by whom the oath should be administered: the various laws of the countries where the arbitration proceedings take place will be able to settle these points in so far as they do not constitute "procedure in the arbitration" remitted by Article 15 to the determination of the arbitrators. Likewise, as the form in which the application to obtain leave for the execution of the award and the list of documents to be attached thereto are not specified in the draft, such questions shall be settled by the particular laws.

Article 39 has quite a different object from Article 38. Its object is to extend the provisions of the uniform law, so far as they may be applicable, to a case which certain present day legal

systems distinguish from arbitration properly so called, that where the arbitrator is not authorised to give judgment against anyone, where his function is merely to fix certain definite points, the parties thereafter being under the obligation of establishing their rights themselves, or having them established by a court upon the basis of the findings of the arbitrators. In such a case there could obviously be no question of leave to issue execution in respect of the decision of the arbitrators, which does not give judgment against anyone. It appeared, however, that the work of the person asked to act in such a case was in fact very similar to the work of an arbitrator, and it was proper for that reason to provide for the same guarantees, and to submit the finding which resulted from it, to the same system with regard to appeals as that governing arbitral awards. This method is the more recommendable since, as practice has shown, the cases here referred to are often difficult to distinguish from arbitration properly so called. The assimilation referred to in Article 39 has already been brought about in many countries, and in other countries has obtained a backing of text writers.

Article 39 has only the object referred to, and is not drawn with the object of adopting the present English practice according to which an arbitrator may, without any express agreement of the parties, confine himself to finding points of fact and asking the court to extract the legal consequences from his finding. This practice, as we have said earlier on, is not adopted by the draft uniform law and it will not be possible to apply Article 39 outside the case where such a power has been expressly conferred on the arbitrators by agreement of the parties, and where the particular national law referred to permitted such an agreement to be given effect to.

We have already explained that the object of the last article of the draft, Article 40, was to make quite clear the relation existing between the uniform law and the sets of rules published

by arbitral institution. These sets of rules, after as before the uniform law comes into operation, will govern all the matters in which the agreement of the parties is permitted to stand.

The provisions of Paragraph 2 of this article, originates in a recommendation of the International Chamber of Commerce and calls for no commentary.

A N N E X I

FORMS OF ARBITRATION CLAUSES(1)

First form.

All differences arising from the present contract shall be settled by arbitrators in accordance with the provisions of the uniform law. The arbitrators shall apply the national law (of for instance England, France, Sweden) including also the rules of such law for the determination of conflicts of laws.

Second form.

All differences arising from the present contract shall be settled by arbitrators in accordance with the provisions of the uniform law. The arbitrators shall apply the national law (of for instance England, France, Sweden) including the rules of such law for the settlement of conflicts of laws. Failure to apply such a law shall make the award void.

Third form.

All differences arising from the present contract shall be settled by arbitrators in accordance with the provisions of the uniform law. The arbitrators shall have the powers of conciliators (amiables compositeurs).

(1) The above clauses are not intended in any way to be obligatory. They are merely given by way of example and they serve two purposes. First when one of the above formulas has been employed, it will be indisputable in any country that the parties have agreed to arbitration; it is certain that the suggested clauses are, from the formal point of view, sufficient to establish the competence of the arbitrators. Secondly, the proposed clauses have the advantage, of making clear the different possible situations that may arise with regard to the obligation of arbitrators to decide according to law and the sanction, if any, which governs such obligation.

A N N E X II

REGISTRATION OF THE AWARD

The award shall be subjected to a single fixed registration fee. Once this fee has been paid and leave to enforce the award has been granted in any given country, no further fee shall be payable if the award has to be invoked in some other country.

A provision embodying these principles shall be set forth in an International Convention dealing with the draft uniform law.

- - - -

In the first annex to the draft uniform law, the committee has set out the text of three arbitration clauses by which the parties thereto may stipulate for arbitration. The clauses set out are not of an obligatory character and parties may perfectly well agree on an arbitration that shall be governed by the provisions of uniform law by using other clauses or by modifying the clauses drafted by the committee.

For example, the parties may modify the first sentence of the clauses by saying, "all differences arising from present contract shall be settled by arbitrators according to the uniform law in accordance with the provisions of such and such a collection of arbitration rules" (e.g. the rules of the International Chamber of Commerce, or the London Court of Arbitration, or the American Arbitration Association). The effect of such a provision, following Article 40 of the draft, will be that all the provisions of the rules referred to, will take precedence over the provisions of the uniform law and will exclude them in so far as the rules of the law are not of an imperative character and are capable of being altered by agreement of the parties, a collection of rules relating to arbitration being assimilated to such an agreement.

It is equally evident that the clauses suggested by the committee may be and generally will be rendered complete by further provisions relating for example, to the manner in which arbitrators

are to be appointed, the place of arbitration, the period in which the award shall be given, and the competent court, within the terms of Articles 36 and 37.

In settling the clauses contained in the annex to the draft, the Committee has had a double end in view: in the first place it will be indisputable in any country that when one of these clauses has been used the parties have submitted to arbitration; subject only to the question of the validity of the consent given to the contract, it will be quite certain that the suggested clauses are from the point of view of form, sufficient to establish the arbitrator's jurisdiction. Secondly, in the opinion of the Committee, the clauses have the advantage of clearly establishing the different possible positions so far as regards the obligation of arbitrators to decide according to law and the sanction which underlies them.

The terms of reference governing the draftsmen of the draft law forbade them to make decisions concerning the fiscal side of arbitration. But it was not possible for the Committee itself to disregard this aspect of the problem, to which the draftsmen think it desirable to draw the attention of Government organisations and interested persons to whom the draft will be submitted on this point. The Committee considered it most desirable that there should be an international convention relating to the fiscal laws governing arbitral awards; and it has drawn up a form of resolution embodying the suggestions which appear desirable if arbitration is going to play the full part in international relations, which one has the right to expect.

No general provisions in the draft settle the principles according to which a judge should decide a case which comes before him in a matter not dealt with by the uniform law. The Committee did not think it essential to deal with this matter in a special article, although they were unanimous in believing the judge, in such a case, should decide in accordance with the general principles of uniform law. According to the opinion of the Committee, it would be desirable for the Permanent Court of International Justice to be given power to settle differences of interpretation that might arise out of the uniform law.