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Arbitration procedure in respect of international relations of private law

Report[1]
Committee on Legal Affairs and Human Rights
Rapporteur: Mr Eduard WAHL, Germany

1. 1957 - 9th Session - Third part

A. Draft Recommendation presented by the Legal Committee with a request for urgent procedure

The Assembly,

Considering that the Committee of Ministers, in its Special Message of 20th May 1954, announced its intention of studying ways and means of unifying and harmonising the legislation of Member States, declaring that it would welcome suggestions from the Assembly on this matter (Doc. 238, paragraph 87);

Recalling that, in reply to tha t Special Message, the Assembly stated in paragraphs 32 and 33 of its Opinion No. 12 of 24th September 1954, that arbitration procedure in respect of international relations of private law was of sufficient interest for a study to be undertaken at once, with a view to determining whether the laws of the Members of the Council on this matter could be unified;

Having carried out a detailed examination of the question in the light of the " Draft-Uniform Law on Arbitration in respect of International Relations of Private Law", prepared by the International Institute for the Unification of Private Law;

Believing that unification of the relevant laws is both feasible and highly desirable;

Whereas the aim of the Council of Europe is to achieve greater unity between its Members and that this aim is to be pursued, among other things, in accordance with Article 1 of the Statute, by common action in legal matters ;

Having studied the work done in this field by the United Nations and its Economic Commission for Europe;

Recalling that the Committee of Ministers had advocated special action at European level in cases where useful action would not otherwise be possible[2] ;

After considering the report of its Legal Committee (Doc. 769),

Recommends to the Committee of Ministers :

1. that a Committee of governmental experts be appointed to draft a European Convention on Arbitration in respect of International Relations of Private Law, based on the draft by the International Institute for the Unification of Private Law in Rome, as amended by the Legal Committee in its report;
2. that the draft Convention thus prepared be communicated to the Assembly for an opinion before being finally approved by the Committee of Ministers

2. Doc. 238, para. 17.

B. Explanatory Memorandum

1. A. Introduction

1. The Committee of Ministers, in its Special Message of 20th May 1954 announced its intention of studying ways and means of unifying and harmonising the legislation of Member States, declaring that it would welcome the Assembly's proposals in this matter (Doc. 238, paragraph 87).

2. The Assembly, in reply to that Message, informed the Committee of Ministers, in paragraphs 32 and 33 of its Opinion No. 12 of 24th September 1954, that " arbitration procedure in respect of international relations of private law " was of sufficient interest for a study to be undertaken at once with a view to determining whether the laws of Members of the Council of Europe on this matter could be unified, on the basis of the draft uniform law prepared by the International Institute for the Unification of Private Law in Rome. The Assembly further considered that it would be complying with the wishes of the Committee of Ministers if it invited its Legal Committee to undertake this study forthwith.

3. To this end, the Legal Committee set up a Sub-committee which took as the basis for its work the draft Uniform Law on arbitration prepared by the Rome Institute in 1954 [Doc. AS/JA VII (6) 2 of 23rd February 1955]. The Sub-committee held its first meeting at the Rome Institute and four others at the Seat of the Council of Europe. It is happy to place on record the valuable co-operation afforded it by the experts from the Institute who attended its first three meetings. The Legal Committee reviewed the work of its Sub-committee at its meeting held from 7th to 9th December 1957 at the headquarters of the Institute in Rome. A representative of this Institute also took part in this meeting.

2. B. General

4. One of the principal aims of the Legal Committee was to avoid duplicating the work of the United Nations and the Economic Commission for Europe, which are also dealing with this question from a particular aspect (see paragraphs 5 to 7 below).

5. The United Nations has convened, for May 1958, a Conference of Plenipotentiaries instructed to draft a convention on the recognition and enforcement of foreign arbitral awards. [The United Nations draft is reproduced in Document AS/JA VII (7) 1 of 11th October 1955].

Since the draft prepared by the Rome Institute covers, on the one hand, arbitration procedure and, on the other, the recognition and enforcement of arbitral awards (Article 28 of the Rome draft), prima facie duplication of work with the United Nations might have arisen in connection with the latter subject. The Legal Committee has, however, concluded that this would not in fact be t h e case, for reasons which will be set forth hereafter.

6. In view of the work now in progress in the United Nations, the Sub-committee was faced with two possible solutions :

(a) Solution No. 1. — In order to avoid overlapping with the work of the United Nations, the problem of the recognition and enforcement of foreign arbitral awards might have been left to one side. In that case, the Council of Europe would have confined itself to drafting clauses of a domestic nature relating to arbitration procedure, that is to say to the regulations governing arbitration in the country where the award was made—and more particularly the enforcement and setting aside of the award in the country of origin. This solution might have appeared the more attractive of the two since the United Nations draft—which is restricted to that very question of recognition and enforcement of foreign arbitral awards, t h a t is to say to the grant of leave to issue execution in a country other than t h a t in which the award was made—might then have been regarded as following on from the Council of Europe draft.

However, the Legal Committee did not favour this alternative for the following reasons :

> *According to Article 1 of the Rome Institute's draft, arbitration rules apply only when the parties have their respective habitual residences in different countries. What purpose, then, is served by an arbitral award which is operative in only one of these countries?*
>
> *The problem of the recognition and enforcement of an arbitral award in a country other than the country where it is intended to be executed is far more important than the question of arbitration procedure, which may well be dealt with by any of the numerous existing arbitration bodies in various countries. Moreover, if the unification of the rules of procedure in domestic law in respect of international disputes*

is to have any intrinsic value, it must be accompanied by measures to facilitate the compulsory execution, in all countries which have adopted the Uniform Law, of arbitral awards made under t h a t law.

The United Nations draft is not satisfactory (see paragraph 26 below).

(b) Solution No. 2. — The alternative, which your Committee has preferred, was to take up in all frankness the matter of the recognition and enforcement of foreign arbitral awards. The United Nations has in fact to solve the problem of obtaining leave to issue execution of arbitral awards made under different systems of law, t h a t is to say, without previous unification of the rules of procedure. The Council of Europe, whose aim is a different one, does not require to do this, since the idea is that, first of all, a uniform law should be established in respect of arbitration procedure. There can therefore be no overlapping in the work of the two organisations so far as results are concerned, and it need not be emphasised that the Council of Europe must go further towards solving the problem than the United Nations. It also seemed inadvisable for the Council to lose precious time while awaiting the outcome of the United Nations work, which may be protracted.

7. The Economic Commission for Europe of the United Nations has set up a special Working Party on arbitration, which intends to publish a compendium, in the form of summaries of the Statutes and Regulations of national and international institutions working in the field of international commercial arbitration. Over and above this the Working Party considered itself able to study the possibility of concluding a European arbitration convention. Its preliminary conclusions will be found in Document AS/Jur VII (9) 1.

There is no reason to fear overlapping with this body, because :

the Working Party's studies are still in the preliminary stage and it will not meet again until September 1958;

the conclusions so far reached by the Working Party show that it is confining itself to commercial arbitration, whereas the Rome draft covers inter alia arbitration in civil matters;

Twenty countries (viz : Austria, Belgium, Bulgaria, Czechoslovakia, Denmark, France, the Democratic Republic of Germany, the Federal Republic of Germany, Hungary, Italy, the Netherlands, Poland, Rumania, Spain, Sweden, Switzerland, the United Kingdom, the United States, the U. S. S. R. and Yugoslavia) are participating in this work, and it is obvious t h a t they cannot go as far as the member countries of the Council of Europe alone.

8. The Council of Europe . is therefore justified, in accordance with the Special Message of the Committee of Ministers, paragraph 17, in concerning itself with this problem, even though it is " of a technical nature ", since its solution " might promote greater unity among its Members " ; and " it follows that it may, at the European level, study matters which are the concern of larger or more specialised international institutions, if such a study might result in useful intergovernmental action which would not otherwise be possible ". Such was the original statement of the Committee of Ministers.

9. In the light of the foregoing remarks, the draft prepared by the Rome Institute (AS/JA VII (6) 2) has been examined article by article. Only those articles to which amendments were proposed will be commented upon below.

3. C. Comments on those Articles of the Rome Institute's draft to which amendments are proposed

The Rome Institute's draft, as amended by the Committee, is appended to the present Report. The amendments are printed in italics.

10. Article 1

This Article makes the Uniform Law applicable whether or not commercial arbitration is concerned i. e., it is equally applicable to disputes arising out of civil law.

However, since arbitration is essentially an institution of commercial law, it is felt that States should be allowed to limit the application of the Uniform Law to disputes arising out of contracts considered as commercial under their national law.

It is therefore suggested that the following new paragraph 4 be added at the end of the Article :

" Each party may, at the time of signature or ratification, make a declaration to the Secretary-General of the Council of Europe of its intention to apply the provisions of the law only to disputes arising out of contracts considered as commercial under its national law ".

This clause has an optional character, since it affects only certain States; Anglo- Saxon law, for example, makes no distinction between commercial and non-commercial disputes

11. Article 2

It is suggested that in the French text the words " à une convention arbitrale " be inserted after the words " parties " in order to bring the French version into line with the English.

13. Article 3, Paragraph 1

The text of the Rome Institute reads :

" Any person may submit to arbitration any right which he is competent to dispose of. "

It is suggested that for the sake of clarity this paragraph be amended to read :

" Any person may submit any right to arbitration in so far as he is competent to dispose of such right ".

13. Article 4

The Rome Institute's draft is worded as follows :

" An arbitration agreement or any modification thereof must be proved by documents demonstrating the intention of the parties to submit their disputes to arbitration in conformity with the provisions of this law. "

The expression " documents demonst r a t i ng the intention of the parties ", implies that there is no need for a special agreement to be drawn up in writing to prove the arbitration agreement. This may be done by such an agreement, but also by any other document, even unsigned, showing that the party has submitted the dispute, either explicitly, or implicitly, to arbitration.

It is felt that this definition is too wide and could lead to abuse. It is therefore proposed t h a t the French text should reintroduce the traditional term " un écrit " and should replace the words " de documents " by the words " d'un acte écrit contenu soit dans une convention spéciale, soit dans une clause compromissoire figurant dans un contrat, et".

It was decided that the words " acte écrit " should be translated " written instrument or instruments ", in order to show explicitly t h a t an exchange of letters, for example, is included in the definition. The French text does not require such precision because the term " acte écrit " does not necessarily refer to a single act.

14. Article 5

Under this Article, when a party to an arbitration agreement submits a dispute to a court of justice instead of to arbitration, the other party may insist that the dispute be submitted to arbitration in fulfilment of the agreement. It is not, however, stated what should be the attitude of the court in such circumstances. In the view of the Legal Committee, the court should deny that it has jurisdiction, unless the arbitration agreement is void.

It is therefore proposed that the following sentence be added to the first paragraph :

" If the latter party insists on the fulfilment of the arbitration agreement, the court shall declare that it is not competent to decide the said dispute unless the arbitration agreement is void ".

15. Article 7, paragraph 3

In the draft Uniform Law this paragraph reads as follows :

" 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. "

According to the second part of this text, when there is an odd number of arbitrators they shall appoint one of themselves to act as president of the arbitral tribunal. This procedure is considered injudicious, since it is absolutely essential that the president shall have no direct interest in the dispute and his impartiality must be assured; it is therefore inadvisable to appoint as president an arbit r a t o r nominated by one of the parties.

It is consequently suggested that this paragraph be amended to read as follows :

" Unless otherwise agreed, the arbitrators appointed by an agreement or under the provisions of the preceding paragraph shall, before considering the case, appoint another arbitrator who shall, as of right, be president of the tribunal. If the arbitrators cannot agree thereon, such appointment shall be made by the court at the request of one of the parties. "

16. Article 8, first sentence

In the Rome Institute's draft this sentence reads:

" If need be the party who invokes an arbitration agreement shall state the difference he proposes to submit and shall appoint his arbitrators... "

This clause applies when the party concerned has not yet appointed his arbitrator. The words " If need be " are badly placed, and may lead to confusion. It is therefore proposed t h a t they should be inserted before the word " appoint ". The text would then read : " The party who... and shall, if need be, appoint his arbitrator... " (N. B. : The word " arbitrator " should be in the singular.)

17. Article 10

The word " disqualified " should be replaced by the words " challenged for cause shown ". This is merely a drafting amendment.

18. Article 12, paragraph 1

The term " disqualified from acting " should be replaced by the expression " challenged for cause. " This, too, is only a drafting amendment.

Article 12, paragraph 2

The Rome Institute's draft reads as follows :

" 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. "

Under this clause, only the arbitrator appointed by agreement of the parties, or by the court, or by other arbitrators, or by a third party, may be challenged. On the other hand, an arbitrator appointed by one of the parties without the agreement of the other party may not be challenged by the latter on the ground of partiality, except where such arbitrator has become president of the tribunal (final sentence of the text quoted above).

This solution has not been adopted, for it is held that it should be possible to challenge an arbitrator in all cases. It is therefore proposed that the words : " The arbitrator appointed by agreement of the parties, or by the court, or by other arbitrators, or by a third party " be replaced by the words " an arbitrator ".

It is suggested that the English text be amended to read " an arbitrator may, moreover, be challenged if any circumstances exist... "

19. Article 17, paragraph 1

It is proposed that , in the French text, the words " comparaître et de faire valoir leur cause " be replaced by the words " comparaître pour faire valoir leur cause ". In the English text the words " written evidence " should be replaced by " documentary evidence ". These are drafting amendments.

20. Article 18

It is suggested that the following sentence be added at the end of the Article :

" The parties shall be invited to be present when witnesses and experts are heard ". The object is to afford the parties an opportunity of being present, sot h a t the arguments of both sides may be heard.

The object is to afford the parties an opportunity of being present, so t h a t the arguments of both sides may be heard.

" Written evidence ", in the second line, should be amended to read " documentary evidence ". This is a drafting amendment.

21. Article 20, first sentence

The text of the Rome Institute's draft reads as follows :

" 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 tha t the arbitration ought not to take place, or that the arbitral proceedings should be suspended ".

For reasons of clarity it is suggested t h a t the order of the words should be changed to read as follows :

" If one of the parties alleges that the arbitration ought not to take place or that the arbitral proceedings should be suspended, the arbitral tribunal may, according to the circumstances of the case, proceed... "

22. Article 21, first paragraph, first sentence

This states that an arbitration agreement becomes inoperative if the award is not made within the period of two years from the date when the arbitration agreement was concluded. However, it is considered that this should not he the case when the dispute has been submitted to a court, and it is therefore proposed that the phrase " unless the dispute has been submitted to a court " be added, after the words " was concluded ".

23. Article 22, first paragraph

The Rome Institute's draft reads as follows :

" The award shall be made by an absolute majority of votes after a session in which all the arbitrators must take part. If an absolute majority cannot be obtained, the president shall have the casting vote. If, however, the president is an arbitrator who has been appointed by one party only, the arbitration agreement shall, so far as t h a t 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".

In view of the proposed amendment to Article 7 (see paragraph 15 above) to prohibit the choice of one of the arbitrators as president, the third sentence of the above text should be deleted and the fourth sentence amended to read :

" Nevertheless, if the arbitral tribunal is composed of two arbitrators who fail to agree, the arbitration agreement shall become inoperative so far as that particular dispute is concerned ".

24. Article 25

The Sub-committee originally considered this Article should stipulate that an arbitral award may only be recognised and enforced in another country when it has been declared final and executory in the country where it was made. It had therefore proposed that the Legal Committee should add a further paragraph, reading as follows :

" The award may not be subject to execution in any country other than that where it was made unless it has been given executive force in the country where it was made and no stay of execution has been granted ".

This proposal implied the deletion of the first paragraph of Article 37 of the draft of the Rome Institute (see No. 31 below).

However, at the meeting of the Legal Committee, objections were raised concerning the above text, for it was considered more normal and realistic that the application for leave to issue execution should be made in the place agreed upon by the parties, or in the place where the person against whom a claim is made has his habitual residence. Consequently, the Legal Committee, in agreement with the members of the Sub-committee, did not adopt the proposed text but decided to leave t h e first paragraph of Article 37 unchanged.

25. Article 28

The Rome Institute's draft reads as follows :

" 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 procedure by way of forced execution 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 i t has been made in respect of some matter which the law of such country does not permit to be submitted to arbitration. "

It is this Article, in particular, which was thought likely to cause overlapping with the work of the United Nations. This cannot occur, however, for reasons given in paragraphs 5 and 6 above. It is also pertinent to repeat—as mentioned in paragraph 6—that the United Nations has to solve the problem of obtaining leave to issue execution of arbitral awards made under different systems of legislation, i. e. without previous unification of the rules of procedure, whereas the Council's aim is different, since it advocates the establishment, in advance, of a uniform law on arbitration procedure. Obviously, then, the Council of Europe can go further than the United Nations as regards enforcement of arbitral awards.

26. Moreover, a comparison between Articles 28 and 37 of the Rome Institute's text and Article III of the United Nations draft shows that, under the former, leave to issue execution is requested in only one country and no further application for such leave in the strict sense need be made for execution of the award in another country, since execution in this case follows automatically. The United Nations draft, on the other hand, requires that leave to issue execution be obtained both in the country where the award was made and in the country where the award is to be executed.

It is further stipulated in Article II of the United Nations draft that the execution of a foreign arbitral award shall be enforced " in accordance with the rules of procedure of the territory where the award is relied upon ". Reference is thus made to national legislation, a solution not considered satisfactory any more than is the double requirement of leave to issue execution.

It is therefore felt that Article 28 of the Rome Institute's draft could and should be accepted between member countries of the Council of Europe, at least in principle, since arbitration regulations, as mentioned in paragraph 6 (a) (i) above, apply only to parties whose respective residences are in different countries. When concluding an arbitration agreement, these parties are well aware of the obligations involved. According to the suggestion in regard to Article 4 above, such an agreement must be proved in writing. It is difficult to see, however, how an arbitral award made in one country can be ipso facto operative in another country, t h a t is to say, how a creditor can secure execution of the award in respect of a debtor without a minimum of formality. For this reason it is suggested that the following words be added to the end of paragraph 1 and the beginning of paragraph 2 of Article 28 of the Rome Institute's draft :

...upon application being made to the court of the place of execution. The party against whom the award has been declared operative shall be notified by the said court of the confirmation of the award.

At the request of this latter party,...

27. " Confirmation " means that the court (which, according to Article 40 of the draft, includes any judicial authority competent to act under the law of a country) grants to the foreign arbitral award, which has been rendered executory by a court in another country, the necessary executive authority to make it enforceable in its own country. This is a simple formality which is essential for practical reasons, and clearly the arbitral award, together with leave to issue execution, should be accompanied where necessary by a certified true translation. These were, however, details into which the Committee did not deem it necessary to go further.

28. It must be recognised, however, that the proposed text confers upon a foreign arbitral award, in respect of which leave to issue execution has been obtained in a country, a value and executive force not granted to foreign court judgments. There is nothing unusual in this situation, since the parties to arbitration procedure voluntarily submit to it in full knowledge of the facts. They thus by-pass the courts of justice and enter the province of the law of contract, and in so doing agree to bona fide execution of the decision.

After much hesitation and mature consideration, your Committee decided to support the Rome Institute's text as amended. This would seem to be the fairest and most realistic solution among countries of similar outlook which, in a spirit of mutual trust, have pledged themselves to achieve greater unity.

29. Your Rapporteur wishes to add, in a personal capacity, that he has a further reason to support this proposal, in so far as he has asked the Assembly to include in its Agenda the question of setting up a European court to investigate, at the request of individuals, alleged violations of European Conventions (Doc. 737). The creation of such a court would provide individuals of one Contracting Party with a guarantee t h a t the courts of the other Contracting Parties would interpret and apply European conventions in accordance with commonly accepted principles, rather than purely national criteria.

30. Article 36

The deletion is proposed of paragraph 2, reading as follows :

" In these matters no appeal shall lie from the decisions of the Court. "

It is considered that an appeal should always be possible.

31. Article 37, paragraph 1

The text drafted by the Rome Institute reads :

" 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. "

The Sub-committee had originally proposed that this paragraph be deleted, as mentioned in paragraph 24 above, concerning Article 25. Finally, however, this text was retained for the reasons set out in paragraph 24 above.

32. The present Report was unanimously approved by the Committee at its meeting held in Rome from 7th to 9th December 1957;

Appendix APPENDIX

Draft Uniform Law on Arbitration in respect of International Relations of Private Law prepared by the International Institute for the Unification of Private Laio and amended by the Legal Committee [3]

The scope of the Law - 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.

Each party may, at the time of signature or ratification, make a declaration to the Secretary- General of the Council of Europe of its intention to apply the provisions of the uniform law only to disputes arising out of contracts considered as commercial under its national law.

ARTICLE 2

The parties to an arbitration agreement may, by explicit statement, exclude the application of the present law.

The arbitration agreement - ARTICLE 3

Any person may submit any right to arbitration, insofar as he is competent to dispose of such right.

An arbitration agreement respecting future disputes 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 a written instrument or instruments embodied either in a special agreement or in an arbitration clause included in a contract, and demonstrating the intention of the parties to submit their disputes to arbitration in conformity with the provisions of this law.

ARTICLE 5

If a party to an arbitration agreement submits a dispute covered thereby to the determinnation of a court of justice or if a party refuses to carry out some necessary act or acts for the organisation 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. If the latter party insists on the fulfilment of the arbitration agreement, the court shall declare itself not competent to decide the said dispute unless the arbitration agreement is void.

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 arbitral tribunal - ARTICLE 7

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

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3. Words printed in italics aro amendments proposed by tho Legal Committee.

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

Unless otherwise agreed, the arbitrators appointed by an agreement or under the provisions of the preceeding paragraph shall, before considering the case, appoint another arbitrator who shall, as of right, be president of the tribunal. If the arbitrators cannot agree thereon such appointment shall be made by the court at the request of one of the parties.

ARTICLE 8

The party who invokes an arbitration agreement shall state the difference he proposes to submit and shall, if need be, appoint his arbitrator. 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 Articles 7 to 9 inclusive hereof; if an arbitrator has been challenged for cause shown, 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 disputes, provided that, as and when such disputes occur, the arbitrator is no longer unable to act.

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

ARTICLE 11

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 challenged for cause when he has not attained his majority or when, owing to conviction of a crime or mental incapacity, illness, absence or other causes whatsoever he is unable to fulfil his office satisfactorily, or cannot fulfil it within a reasonable time.

An arbitrator may, moreover, be challenged if any circumstances exist capable of casting doubt on his impartiality or independence. The president of the arbitral tribunal may also be challenged 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 addressed 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, shalll 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.

The procedure in the arbitration - 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 documentary 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 documentary evidence, may hear witnesses or experts for the purpose of obtaining information on the dispute. The parties shall be invited to be present when witnesses and experts are heard.

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

If one of the parties alleges that the arbitration ought not to lake place, or that the arbitral proceedings should be suspended, 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 of the award; 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 dispute 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, u/dess the dispute has been submitted to a court. In the case of an arbitration agreement respecting future disputes, time shall run from the day when the arbitration agreement was invoiced.

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 award - ARTICLE 22

The award shall be made by an absolute majority of votes after a session in which all the arbitrators must take part. If an absolute majority cannot be obtained, the president shall have the casting vote. Nevertheless, if the arbitral tribunal is composed of two arbitrators who fail to agree, the arbitration agreement shall become inoperative so far as that particular dispute is concerned. 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

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 enforcement of the award - 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, ex officio, 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.

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 and he has started proceedings to do so.

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 procedure by way of forced execution in any one of such countries upon application being made to the court of the place of execution. The party against whom the award has been declared operative shall be notified by the said court of the confirmation of the award.

At the request of the latter party, enforcement, shall nevertheless he 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.

Setting aside the award - 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 down, 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 el bono if the parties have expressly given them the powers of conciliators (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 unsetpar tied 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 awa-d. If the notice is given by registered lette-, time shall "un 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 sixty clear days from the date of the discovery of the fraud or false evidence or new documents; it may also not be claimed later than 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 pa-ty 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.

Costs, expenses and fees - ARTICLE 35

Unless otherwise agreed, the cost 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, para. 1.

The competent court - 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.

ARTICLE 37

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 boon 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.

Supplementary provisions - 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.