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is the essential condition not only of the original obligation to have recourse to arbitration, but also of the continuation and the effectiveness of arbitration proceedings at every stage. The second conception, which prevailed in the draft as adopted and which may be described as judicial arbitration, was based on the necessity of provision being made for safeguarding the efficacy of the obligation to arbitrate in all cases in which, after the conclusion of the arbitration agreement, the attitude of the parties threatens to render nugatory the original undertaking.

DRAFT ON ARBITRAL PROCEDURE

CHAPTER I

The Undertaking to Arbitrate

Article 1

1. An undertaking to have recourse to arbitration may apply to existing disputes or to disputes arising in the future.

2. The undertaking shall result from a written instrument.

3. The undertaking constitutes a legal obligation which must be carried out in good faith, whatever the nature of the agreement from which it results.

Comment

(1) This article, which is based on article 39 of The Hague Convention for the Pacific Settlement of International Disputes of 1907, is not purely declaratory. Its purpose is to affirm the binding force of the undertaking to arbitrate, even when unaccompanied by any provision on procedure. The term *clause compromissoire* (arbitration clause) which is sometimes used in French as equivalent to *engagement arbitral* (undertaking to arbitrate) has not been adopted by the Commission, as it might be confused with the *compromis* referred to in Article 9.

(2) In view of the fundamental importance of the undertaking to arbitrate, paragraph 2 of this article implies that the undertaking may not be based on a mere verbal agreement. The paragraph does not mean, however, that the undertaking to arbitrate requires the conclusion of a convention or intentional treaty in the strict sense of those terms. For instance, it would be sufficient for the parties concerned to accept a resolution of the Security Council recommending them to have recourse to arbitration for the settlement of a specific dispute. In such a case the official records of the United Nations would provide the authentic text of the undertaking.

Article 2

1. If, prior to the constitution of an arbitral tribunal, the parties to an undertaking to arbitrate disagree as to the existence of a dispute, or as to whether an existing dispute is within the scope of the obligation to have recourse to arbitration, the question may, in the absence of agreement between the parties upon another procedure, be brought before the International Court of Justice on an application by either party. The judgment rendered by the Court shall be final.

2. In its judgment on the question, the Court may prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

Comment

(1) This article constitutes an important innovation. It deals with the " arbitrability " of the dispute and is designed to ensure the effectiveness of the undertaking to arbitrate. It provides, in case of disagreement between the parties as to the existence of a dispute or as to whether a dispute between them is covered by a prior undertaking to arbitrate, for the intervention of an international organ competent to decide the question, whose decision shall be final. In accordance with the traditional nature of arbitration, the parties may themselves agree on the body to be called upon to decide the question of arbitrability. Only if they fail to reach agreement on this point does the International Court of Justice become competent to decide the question of arbitrability.

(2) This provision is not without precedents. The practice of the United States has provided for recourse to the constitution of commissions of inquiry for the same purpose, namely, to ensure the effectiveness of general arbitration treaties, but it has required a quasi-unanimous decision on arbitrability by the commissioners. The provision is calculated to remove the most frequent obstacle to the effectiveness of an original arbitration clause, an obstacle that has, in the past, proved difficult to overcome. In the view of the Commission, unless otherwise agreed by the parties, the International Court of Justice, and not the Chamber of Summary Procedure of that Court, is the suitable organ to decide this important matter.

(3) In paragraph 1 of this article, it is assumed that the dispute on arbitrability has arisen between the parties before they have constituted an arbitral tribunal. Otherwise, it is the tribunal which will be responsible for deciding the question of arbitrability.

(4) Paragraph 2 provides that, in its judgment, the Court may also prescribe the provisional measures to be taken for the protection of the respective interests of the parties pending the constitution of the arbitral tribunal.

CHAPTER II

Constitution of the Tribunal

Article 3

1. Within three months from the date of the request made for the submission of a dispute to arbitration, or from the date of the decision of the International Court of Justice in conformity with article 2, paragraph 1, the parties to an undertaking to arbitrate shall constitute an arbitral tribunal by mutual agreement. This may be done either in the *compromis* referred to in article 9, or in a special instrument.

2. If the appointment of the members of the tribunal is not made by the parties within the period of three months as provided in the preceding paragraph, the parties shall request a third State to make the necessary appointments.

3. If the parties are unable to agree on the selection of the third State within three months, each party shall designate a State, and the necessary appointments shall be made by the two States thus designated.

4. If either party fails to designate a State under the preceding paragraph within three months, or if the Governments of the two States designated fail to reach an agreement within three months, the necessary appointments shall be made by the President of the International Court of Justice at the request of either party. If the President is prevented from acting or is a national of one of the parties, the appointments shall be made by the Vice-President. If the Vice-President is prevented from acting or is a national of one of the parties, the appointments shall be made by the oldest member of the Court who is not a national of either party.

Comment

(1) The first paragraph of Article 3 deals with the second major difficulty that may arise when the undertaking to arbitrate has to be carried out. The choice of arbitrators rests with the parties and this is one of the essential features of arbitration which distinguishes it from proceedings in a court of law; but when it comes to choosing the arbitrators, governments, concerned as they are about the defence of their interests, sometimes hesitate, because they have doubts about the legal views or the personal character of the prospective nominees. Nevertheless, the choice of a single arbitrator or of an arbitral tribunal must be made. It is necessary if the international dispute is to be settled. Following the precedent of Article 23 of the Revised General Act for the Pacific Settlement of International Disputes, the Commission feels that where the choice is made by the parties, the tribunal should be constituted within a very short time, i.e., three months from the date when there is no further doubt as to the arbitrability of the dispute. The constitution of the tribunal may be provided for in a *compromis* or in a special immediate agreement between the parties. In either case it is a judicial body of the international community, constituted by the States parties to the dispute.

(2) The next question which arises is how the tribunal is to be constituted if the parties are unable to reach agreement. This is dealt with in paragraphs 2, 3 and 4. The time limits thus prescribed amount to a total of nine months, not including any period required for the intervention of the President, the Vice-President, or a member of the International Court of Justice.

Article 4

1. The parties having recourse to arbitration may act in whatever manner they deem most appropriate; they may refer the dispute to a tribunal consisting of a sole arbitrator or of two or more arbitrators as they think fit.

2. With due regard to the circumstances of the case, however, the sole arbitrator or the arbitrators should be chosen from among persons of recognized competence in international law.

Comment

(1) This article is generally applicable, whether the undertaking to have recourse to arbitration derives from the *compromis* or is anterior thereto.

(2) Paragraph 1 affirms the freedom of the parties in the composition of an arbitral tribunal. Thus an arbitral tribunal, sometimes referred to in this draft merely as " tribunal ", means either a single arbitrator or a body of several arbitrators.

(3) Paragraph 2 stipulates that the arbitrators should be persons of recognized competence in international law. This, however, is not an inflexible rule. The Commission does not wish to exclude cases in which the technical nature of the issues involved might lead the parties to choose arbitrators not exactly fulfilling that requirement. This is the sense of the words " with due regard to the circumstances of the case ".

(4) Similarly, the Commission does not wish to preclude the possibility of the appointment, as arbitrators, of heads of State or important political personages, although this practice is sometimes hardly calculated to enhance the judicial nature of arbitration.

(5) The article does not exclude the possibility of the arbitrators or the majority of the arbitrators being nationals of the parties to the dispute. The Commission does not wish to preclude the constitution of a tribunal consisting of two national arbitrators or of two national arbitrators and an umpire.

(6) For the same reason, the Commission does not consider it necessary to follow the precedent of article 22 of the Revised General Act for the Pacific Settlement of International Disputes, which requires the constitution of an arbitral tribunal of five members.

(7) Although precedence is given to the principle of full freedom of the parties in the choice of arbitrators, the Commission does not overlook the importance of emphasizing the judicial character of arbitration. It endeavours to pursue this object in many articles of the draft, such as Articles 5, 7 and 8 on the immutability of the tribunal; Articles 11, 12, 13, 17 and 21 on the powers of the tribunal; and finally in chapters VI and VII on revision and annulment.

Article 5

1. Once the tribunal has been constituted, its composition shall remain unchanged until the award has been rendered.

2. A party may, however, replace an arbitrator appointed by it, provided that the tribunal has not yet begun its proceedings. An arbitrator may not be replaced during the proceedings before the tribunal except by agreement between the parties.

Comment

(1) This article is based on the principle of " immutability " of the tribunal once it has been set up; this is a

corollary of the principle of judicial arbitration as distinguished from diplomatic or political arbitration.

(2) The principle laid down in paragraph 1 is, in fact, that once the dispute has been submitted to the tribunal, the composition of the latter should remain unchanged until the award has been rendered, so that the parties cannot, in view of the course taken by the proceedings, influence the final decision by changing the composition of the tribunal. Moreover, this precaution is linked with the concept of the arbitral tribunal as a common organ of the parties, that is, a judicial organ of the international community constituted by them.

(3) Paragraph 2, nevertheless, allows either party freely to replace an arbitrator appointed by it provided that the proceedings before the tribunal have not yet begun. Once the proceedings have begun, replacement of an arbitrator appointed by one party requires the consent of the other. Moreover, it is implicit in the text, although not actually stated, that an arbitrator appointed by an international authority, such as the International Court of Justice or its President, may in no circumstance be replaced either by one of the parties or by agreement between them.

(4) Nevertheless, where a tribunal is set up to settle not one but several disputes, this paragraph will permit adaptation of its composition to suit the technical requirements of each case.

(5) Where there is a single arbitrator, the parties remain free to appoint another up to the time the proceedings have begun, provided that the first arbitrator was appointed by them.

Article 6

Should a vacancy occur for reasons beyond the control of the parties, it shall be filled by the method laid down for the original appointment.

Comment

This article requires no comment.

Article 7

1. Once the proceedings before the tribunal have begun, an arbitrator may not withdraw, or be withdrawn by the government which has appointed him, save in exceptional cases and with the consent of the other members of the tribunal.

2. If, for any reason such as previous participation in the case, a member of the tribunal considers that he cannot take part in the proceedings, or if any doubt arises in this connexion within the tribunal, it may decide, on the unanimous vote of the other members, to request his replacement.

3. Should the withdrawal take place, the remaining members shall have power, upon the request of one of the parties, to continue the proceedings and render the award.

Comment

(1) This article reaffirms and supplements the principle of immutability of the tribunal. Paragraph 1 recalls the rule laid down in Article 5, but permits an exception to it by stating that in exceptional cases an arbitrator may withdraw or be withdrawn by the government which has appointed him, but that the unanimous consent of the other members of the tribunal is then required.

(2) Among the exceptional cases contemplated, paragraph 2 mentions withdrawal of an arbitrator owing to previous participation in the case. If any doubt arises in this connexion within the tribunal, the latter may decide to request his replacement. It may also decide, upon the request of one of the parties, to continue the proceedings and render the award with a reduced number of members.

Article 8

1. A party may propose the disqualification of one of the arbitrators on account of a fact arising subsequently to the constitution of the tribunal; it may propose the disqualification of one of the arbitrators on account of a fact arising prior to the constitution of the tribunal only if it can show that it was unaware of the fact or has been a victim of fraud. In either case, the decision shall be taken by the other members of the tribunal.

2. In the case of a sole arbitrator, the decision shall rest with the International Court of Justice.

Comment

(1) The composition of the tribunal may also be changed by disqualification of a member on the proposal of one of the parties. This is the object of article 8.

(2) These provisions are logically necessary. The arbitrators are jointly appointed by the two parties as a result of agreement between them. It is the duty of each of the parties to make sure that the conditions of appointment are fulfilled at the time when the tribunal is constituted. Hence, they cannot propose disqualification on account of a fact arising prior to such constitution, except in case of fraud or justifiable ignorance. Here, and in the case of disqualification proposed on account of a fact arising subsequently to the constitution of the tribunal, the decision rests with the other members of the tribunal.

(3) In the case of a single arbitrator, it is again necessary to appeal to a higher judicial body, namely, the International Court of Justice.

CHAPTER III

The Compromis

Article 9

Unless there are prior provisions on arbitration which suffice for the purpose, the parties having recourse to arbitration shall conclude a *compromis* which shall specify, in particular :

(*a*) The subject of the dispute, defined as precisely and as clearly as possible;

(*b*) The selection of arbitrators, in case the tribunal has not already been constituted;

(*c*) The appointment of agents and counsel;

(*d*) The procedure to be followed, or provisions for the tribunal to establish its own procedure;

(*e*) Without prejudice to the provisions of article 7, paragraph 3, if the tribunal has several members, the number of members constituting a quorum for the conduct of the proceedings;

(*f*) Without prejudice to the provisions of article 7, paragraph 3, the number of members constituting the majority required for an award of the tribunal;

(*g*) The law to be applied by the tribunal and the power, if any, to adjudicate *ex aequo et bono*;

(*h*) The time limit within which the award shall be rendered; the form of the award, any power of the tribunal to make recommendations to the parties; and any special provisions concerning the procedure for revision of the award and other legal remedies;

(*i*) The place where the tribunal shall meet, and the date of its first meeting;

(*j*) The languages to be employed in the proceedings before the tribunal;

(*k*) The manner in which the costs and expenses shall be divided.

Comment

(1) In the arrangement of chapter III, which begins with article 9, this draft is closer to the traditional concept of a code of arbitral procedure than it is in the preceding articles. Article 9 deals with the drafting of the *compromis* needed to give effect to any undertaking to arbitrate. This undertaking may constitute the basis and the main provisions of the *compromis*. It should be pointed out that the reason why this article is not inserted earlier than in chapter III, as at present, is that it is advisable to remove all the preliminary obstacles which might prevent the conclusion of the *compromis*. Its conclusion is now ensured, since if the parties fail to agree on the provisions to be included, the *compromis* may be drawn up by the tribunal itself.

(2) The eleven paragraphs of article 9 list the matters which in principle should be governed by the *compromis*. Obviously the parties are at liberty to introduce any number of others.

(3) Paragraphs (*a*), (*b*) and (*c*) require no explanation.

(4) Paragraph (*d*) allows the parties to settle the procedure or limit the competence of the tribunal on this point.

(5) Paragraphs (*e*) and (*f*) refer to article 7, paragraph 3, concerning the principle of immutability, and give otherwise the parties the right to fix the quorum and majority for decisions to be taken by the tribunal, including the final award.

(6) Paragraph (*g*) affirms that the parties may specify the rules of law to be applied by the tribunal, or empower it to adjudicate *ex aequo et bono*.

(7) Paragraph (*h*) gives the parties the power of fixing the time limit within which the award shall be rendered, even if the tribunal does not consider itself fully enlightened within that time.

(8) As regards the power to adjudicate *ex aequo et bono*, the text grants the tribunal this power only if the parties agree, as provided in Article 38 of the Statute of the International Court of Justice. The Commission takes the view that the arbitral tribunal is always entitled to adjudicate on the basis of general principles of law considered to be rules of positive law, but is not entitled to act as *amiable compositeur*, that is, to judge *contra legem*, without the consent of the parties. Strictly speaking, the latter procedure is not so much arbitration as conciliation or mediation, except that the settlement remains obligatory.

(9) As regards the provisions concerning the procedure for revision and annulment, the parties are bound by the general provisions of articles 29 to 32. Their freedom of action, provided for in paragraph (*h*), refers only to the procedures of revision and annulment.

Article 10

1. If the parties cannot agree on the contents of the *compromis*, they may request the good offices of a third State which shall appoint a person, or a body of persons, to draw up the *compromis*.

2. If the parties are bound by an undertaking to arbitrate, and when the tribunal has been constituted, then, in the event of the failure of the above procedure for drawing up the *compromis*, the tribunal shall draw up the *compromis* within a reasonable time which it shall itself determine.

Comment

This article deals with the case of an obligatory undertaking to arbitrate, when the parties cannot reach agreement on all or part of the contents of the *compromis*. Such a case has traditionally been provided for and been known as the " obligatory *compromis* ", from the adoption of the 1907 Hague Convention for the Pacific Settlement of International Disputes (articles 53 and 54) till the time of the Pact of Bogotá of 1948 (article 43). Since, under article 3, the tribunal may be constituted before the *compromis* is drawn up, there in no further obstacle to the application of the article.

CHAPTER IV

Powers of the Tribunal

Article 11

The tribunal, as the judge of its own competence, possesses the widest powers to interpret the *compromis*.

Comment

This article, which lays down a general principle, calls for no comment.

Article 12

1. In the absence of any agreement between the parties concerning the law to be applied, the tribunal shall be guided by Article 38, paragraph 1, of the Statute of the International Court of Justice.

2. The tribunal may not bring in a finding of *non liquet* on the ground of the silence or obscurity of international law or of the *compromis*.

Comment

(1) The effect of this article, in so far as it adopts the substance of paragraph 1 of Article 38 of the Statute of the International Court of Justice as the basis of the law to be applied by the arbitral tribunal, is to exclude the possibility of a *non liquet*.

(2) Paragraph 2 contains one of the most important stipulations in the whole draft. It corresponds to the general rule of law recognized in a large number of the juridical systems of the world according to which a judge may not refuse judgment on the ground of the silence or obscurity of the law. The Commission considers that the adoption of this principle would mark a great advance in the development of judicial arbitration.

Article 13

In the absence of any agreement between the parties concerning the procedure of the tribunal, the tribunal shall be competent to formulate its rules of procedure.

Comment

This article is a statement of a general principle, to apply where there is no agreement between the parties as to the procedure to be followed.

Article 14

The parties are equal in any proceedings before the tribunal.

Comment

The rule embodied in this article is deemed to be important enough to be made the subject of a separate article. It is a fundamental rule of procedure, non-observance of which would, under Article 30, paragraph (*c*), justify an application for the annulment of the award.

Article 15

1. The tribunal shall be the judge of the admissibility and the weight of the evidence presented to it.

2. The parties shall co-operate with one another and with the tribunal in the production of evidence and shall comply with the measures ordered by the tribunal for this purpose. The tribunal shall take note of the failure of any party to comply with its obligations under this paragraph.

3. The tribunal shall have the power at any stage of the proceedings to call for such evidence as it may deem necessary.

4. At the request of the parties, the tribunal may visit the scene with which the case before it is connected.

Comment

(1) Paragraph 1 affirms an incontrovertible principle of customary law.

(2) Paragraph 2 lays down essential powers of the tribunal. A party has no right to refuse to produce evidence in its possession when this is requested by the other party and ordered by the tribunal. The tribunal itself may take any action, with a view to the production of evidence, including steps to determine the meaning and scope of a rule of municipal law.

Article 16

For the purpose of securing a complete settlement of the dispute, the tribunal shall decide on any counter-claims or additional or incidental claims arising out of the subject-matter of the dispute.

Comment

The provision on counter-claims and additional or incidental claims is designed to enable the tribunal to rule on all questions bearing on the subject-matter of the dispute.

Article 17

The tribunal, or in case of urgency its president subject to confirmation by the tribunal, shall have the power to prescribe, if it considers that circumstances so require, any provisional measures to be taken for the protection of the respective interests of the parties.

Comment

The Commission considers that competence to prescribe provisional measures should be accorded not only to the tribunal itself, but, in cases of urgency, to its president subject to confirmation by the tribunal. The word " prescribe " implies an obligation on the parties to take the measures prescribed.

Article 18

When, subject to the control of the tribunal, the agents and counsel have completed their presentation of the case, the proceedings shall be formally declared closed.

Comment

This article requires no comment.

Article 19

1. The deliberations of the tribunal, which should be attended by all of its members, shall remain secret.

2. All questions shall be decided by a majority of the tribunal.

Comment

This article requires no comment.

Article 20

1. Whenever one of the parties does not appear before the tribunal, or fails to defend its case, the other party may call upon the tribunal to decide in favour of its claim.

2. In such case, the tribunal may give an award if it is satisfied that it has jurisdiction and that the claim is well founded in fact and in law.

Comment

The power of the tribunal to render an award by default was accepted by the Commission on analogy with Article 53 of the Statute of the International Court of Justice. The purpose of paragraph 2 is to ensure that no decisive importance would be attached by the tribunal to the fact of default and that the award must be based on a full examination of the jurisdiction of the tribunal and of the merits of the case. The adoption of the article would represent a step forward in the law of arbitral procedure.

Article 21

1. Discontinuance of proceedings by the claimant may not be accepted by the tribunal without the respondent's consent.

2. If the case is discontinued by agreement between the parties, the tribunal shall take note of the fact.

Article 22

The tribunal may take note of the conclusion of a settlement reached by the parties. At the request of the parties, it may embody the settlement in an award.

Comment

(1) Articles 21 and 22 are closely connected. Obviously the claimant cannot be allowed to dispose of the case and, by improperly discontinuing the proceedings, prevent its settlement, to the detriment of the respondent's interests. The case may be withdrawn only by agreement between the parties with a view, in particular, to adopting some other method of settlement.

(2) The parties may request the tribunal to record any settlement reached between them, in order to give it the authority of *res judicata*. In French procedure, this is know as a *jugement d'expédient* (settlement out of court). The use of the word " may " in article 22 is important, as it leaves the tribunal free to embody the settlement reached in an award or not. It is, in fact, necessary that the tribunal should be able to verify the legality and effective scope of the settlement. It cannot be compelled, even by an agreement between the parties, to give binding force to an illegal or a purely fictitious settlement.

CHAPTER V

The Award

Article 23

1. The award shall be rendered within the period fixed by the *compromis*, unless the parties consent to an extension of that period.

2. In case of disagreement between the parties on such an extension of the period, the tribunal may refrain from rendering an award.

Comment

(1) This article reaffirms the provision of article 9 that the time limit within which the award shall be rendered is fixed by the parties. It may be extended by them alone.

(2) Paragraph 2 provides that if the tribunal does not consider that it can render its award within this time limit, it may refrain from doing so. This second paragraph cannot, of course, be regarded as at variance with article 12, paragraph 2, which prohibits a finding of *non liquet*, since it does not refer to a refusal to render an award on the ground of silence or obscurity of the law.

Article 24

1. The award shall be drawn up in writing, and communicated to the parties. It shall be read in open court, the agents of the parties being present or duly summoned to appear.

2. The award shall include a full statement of reasons.

3. The award shall contain the names of the arbitrators and shall be signed by the president and the registrar or secretary of the tribunal.

Comment

This article is in conformity with traditional practice in the matter and its three paragraphs specify the essential requirements as to the content and form of the award.

Article 25

Subject to any contrary provision in the *compromis*, any member of the tribunal may attach his separate or dissenting opinion to the award.

Comment

This article is in accord with the traditional practice of the International Court of Justice, but permits the parties nevertheless to adopt the contrary system in the *compromis*.

Article 26

As long as the time limit set in the *compromis* has not expired, the tribunal shall be entitled to rectify mere typographical errors or mistakes in calculation in the award.

Comment

This article refers to mere typographical and arithmetical corrections which will not alter the meaning and scope of the award. It will be observed, however, that the Commission has implicitly decided the question whether the powers of the tribunal come to an end when the award is rendered or can be regarded as continuing until the expiry of the time limit for rendering the award set in the *compromis*. It follows, *e contrario*, that when this time limit has expired, such corrections are no longer permitted.

Article 27

The award is binding upon the parties when it is rendered, and it must be carried out in good faith.

Comment

(1) The Commission thought it necessary to specify that the award is binding when it is rendered and to assert that it must be carried out in good faith and forthwith.

(2) The award is binding only upon the parties. The Commission decided not to include in the draft any provisions concerning intervention — such as those in article 84 of the Convention of 1907 for the Pacific Settlement of International Disputes and in Articles 62 and 63 of the Statute of the International Court of Justice — according to which the intervention of a third party may in some cases result in the award becoming binding upon the intervening State.

Article 28

1. Unless the parties agree otherwise, any dispute between the parties as to the meaning and scope of the award may, at the request of either party, be submitted to the tribunal which rendered the award.

2. If, for any reason, it is impossible to submit the dispute to the tribunal which rendered the award, and if the parties have not agreed otherwise, the dispute may be referred to the International Court of Justice at the request of either party.

Comment

(1) This article incidentally raises the question of when the powers of the tribunal finally expire. If an application is made for interpretation, they are automatically prolonged beyond the period fixed for rendering the award. The Commission considers that if the tribunal could not be reconstituted in its original form when an application for interpretation is made, it is necessary to provide for recourse to the International Court of Justice, unless the parties should agree otherwise.

(2) The article provides no time limit for an application for interpretation.

CHAPTER VI

Revision

Article 29

1. An application for the revision of the award may be made by either party on the ground of the discovery of some fact of such a nature as to have a decisive influence on the award, provided that when the award was rendered that fact was unknown to the tribunal and to the party requesting revision and that such ignorance was not due to the negligence of the party requesting revision.

2. The application for revision must be made within six months of the discovery of the new fact.

3. The proceedings for revision shall be opened by a judgment of the tribunal recording the existence of such a new fact and ruling upon the admissibility of the application. The tribunal shall then proceed to revise the award.

4. The application for revision shall be made to the tribunal which rendered the award. If, for any reason, it is not possible to address the application to that tribunal, the application may, unless the parties agree otherwise, be made to the International Court of Justice.

Comment

(1) With regard to the remedies against the award, the Commission is in favour of allowing the award to be revised or an application to be made for its annulment (*cassation*), but rules out appeals on the ground of misapplication of the law. The Commission thus follows the traditional practice that an arbitral award should be final, subject, however, to the possibility of its revision or annulment.

(2) Revision, as laid down in Article 61 of the Statute of the International Court of Justice, is considered essential by the Commission. The sense of the Commission is that, with regard to both the revision and the annulment of the award, the provisions of this draft on the subject are of such importance as to prevent the parties from excluding recourse to these remedies, notwithstanding the discretion which article 9 (*h*) leaves to them in the matter of procedure for revision and annulment.

(3) The definition of " new fact ", which by now has become classic, has been inserted in paragraph 1.

(4) The application for revision must be made to the tribunal which rendered the original award, since revision does not imply any suggestion of wrong judgment. Here again, the Commission feels that if the tribunal could not be reconstituted with its original membership, recourse should be had to the International Court of Justice.

CHAPTER VII

Annulment of the Award

Article 30

The validity of an award may be challenged by either party on one or more of the following grounds :

(*a*) That the tribunal has exceeded its powers;

(*b*) That there was corruption on the part of a member of the tribunal;

(*c*) That there has been a serious departure from a fundamental rule of procedure.

Comment

The Commission recognizes only three causes justifying annulment : action *ultra vires*, corruption on the part of an arbitrator, and violation of a fundamental rule of procedure. However, since the draft deals solely with arbitral procedure, the Commission does not attempt to define what these various grounds of annulment might cover. Hence, the International Court of Justice is left with complete latitude in regard to the decision to be taken.

Article 31

1. The International Court of Justice shall be competent, on the application of either party, to declare the nullity of the award on any of the grounds set out in the preceding article.

2. In cases covered by paragraphs (*a*) and (*c*) of article 30, the application must be made within sixty days of the rendering of the award.

3. The application shall stay execution unless otherwise decided by the Court.

Article 32

If the award is declared invalid by the International Court of Justice, the dispute shall be submitted to a new tribunal to be constituted by agreement of the parties, or, failing such agreement, in the manner provided in article 3.

Comment

(1) The Commission is in favour of making the period of application by either party for annulment of the award a very short one. This very short period should, however, apply only to applications made on grounds stated in paragraphs (*a*) and (*c*) of article 30. Consequently, no time limit is prescribed for an application for annulment on the ground of corruption on the part of an arbitrator.

(2) It is the sense of the Commission that the parties would at all times be free, provided they are in agreement, not to proceed with the execution of the award.

Chapter III

NATIONALITY INCLUDING STATELESSNESS

25. The International Law Commission, at its first session in 1949, included " nationality including statelessness " in its list of topics of international law provisionally selected for codification.[5]

26. During its second session in 1950, the Commission was apprised of resolution 304 D (XI) of the Economic and Social Council, adopted on 17 July 1950, in which the Council :

" *Noting* the recommendation of the Commission on the Status of Women (fourth session) in regard to the nationality of married women (document E/1712, paragraph 37). . . .

" *Proposes* to the International Law Commission that it undertake as soon as possible the drafting of a convention to embody the principles recommended by the Commission on the Status of Women. . . ."

The International Law Commission, after considering the above-quoted resolution, adopted a decision declaring that it :

" *Deems* it appropriate to entertain the proposal of the Economic and Social Council in connexion with its contemplated work on the subject of nationality including statelessness.

" *Proposes* to initiate that work as soon as possible."

27. At its third session in 1951, the Commission was notified of another resolution of the Economic and Social Council, resolution 319 B III (XI) of 11 August 1950, in which the Council requested the Commission to :

" . . . prepare at the earliest possible date the necessary draft international convention or conventions for the elimination of statelessness."

This matter was deemed by the Commission to lie ' within the framework of the topic of ' nationality including statelessness ' ".[7]

28. At the same session, the Commission decided to initiate work on the topic of nationality including statelessness. It appointed one of its members, Mr. Manley O. Hudson, special rapporteur on this subject.[8]

29. The special rapporteur submitted a " Report on Nationality including Statelessness " (A/CN.4/50) to the Commission at its fourth session. Several documents prepared by the Secretariat were also made available to the Commission, including a consolidated report by the Secretary-General entitled " The Problem of Statelessness " (A/CN.4/56), " Nationality of Married Women " (E/CN.6/126/Rev.1 and E/CN.6/129/Rev.1) and " A Study of Statelessness " (E/1112 and Add.1). The Commission considered the topic at its 155th to 163rd, 172nd, 178th, 179th, 181st and 183rd meetings.

30. In his report, the special rapporteur made a survey of the subject of nationality in general (annex I) and presented two working papers for the consideration of the Commission. The first of these (annex II) contained a draft of a convention on nationality of married persons, which followed very closely the terms proposed by the Commission on the Status of Women and approved by the Economic and Social Council. The special rapporteur suggested that the International Law Commission should comply with the request to draft a convention embodying those terms, without expressing its own views. The Commission was of the opinion that the question of nationality of married women could not but be considered in the context, and as an integral part, of the whole subject of nationality including statelessness. Furthermore, it did not see fit to confine itself to the drafting of a text of a convention to embody principles which it had not itself studied and approved.

31. The second working paper (Annex III) dealt with statelessness. It listed nineteen points for discussion, under the rubrics of elimination of statelessness, reduction of presently existing statelessness, and reduction of statelessness arising in the future. The Commission took the view that a draft convention on elimination of statelessness and one or more draft conventions on the reduction of future statelessness should be prepared for consideration at its next session. The Commission also considered various suggestions as to the content of the

[5] A/925 (paragraph 16).
[6] A/1316 (paragraphs 19 and 20).
[7] A/1858 (paragraph 85).
[8] *Ibid.*