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Articles

UNCITRAL's Work Towards a Model Law on International Commercial Arbitration

GEROLD HERRMANN†

I. UNCITRAL and Dispute Settlement in International Commerce

The development of international commercial arbitration as a means of dispute settlement has been a major objective of the United Nations Commission on International Trade Law (UNCITRAL) since its inception in 1966.¹

A. *UNCITRAL Arbitration Rules (1976)*

The first major achievement in the field of dispute settlement was the adoption of the UNCITRAL Arbitration Rules in 1976.² These Rules which have been formulated in reference to various national legal and economic systems reflect modern commercial arbitration practice. Since the recommendation by the General Assembly that the Arbitration Rules be employed

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1. As to the most recent account of UNCITRAL's work in this field, see Fleischhauer, *UNCITRAL and International Dispute Settlement*, 38 *ARB. J.* 9 (Dec. 1983); as to the activities of UNCITRAL in this and other fields, see Herrman, *The Contribution of UNCITRAL to the Development of International Trade Law*, in 2 *THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS* 35 (N. Horn & C. Schmitthoff eds. 1982); Suy, *Achievements of the United Nations Commission on International Trade Law*, 15 *INT'L LAW.* 139 (1981).

2. UNCITRAL, Report of the Ninth Session, [1976] 7 *Y.B. COMM'N INT'L TRADE L.* 22, U.N. Doc. A/CN.9/SER.A/1976, reprinted in 2 *Y.B. COM. ARB.* 161 (Int'l Council for Com. Arb. (ICCA) 1977); see Sanders, *Commentary on UNCITRAL Arbitration Rules*, 2 *Y.B. COM. ARB.* 172 (ICCA 1977).

worldwide,³ these rules have been referred to in innumerable arbitration agreements.⁴ More importantly, they have been accepted or adopted, in a variety of ways, by a substantial number of arbitral institutions.⁵ In addition, a considerable number of established arbitral institutions or arbitration associations⁶ have declared their willingness to act as appointing authority and provide administrative services for cases conducted under the UNCITRAL Arbitration Rules, while others have offered to act solely as appointing authority.⁷ It is expected that many more institutions will provide such services, following UNCITRAL "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitrations under the UNCITRAL arbitration rules"⁸ which were sent, in 1983, to governments, arbitral institutions and chambers of commerce around the world.⁹

B. *UNCITRAL Conciliation Rules (1980)*

The second result of UNCITRAL's endeavours in the field of dispute settlement was the adoption of the UNCITRAL Conciliation Rules in 1980.¹⁰ These Rules, like the UNCITRAL Ar-

3. G.A. Res. 31/98, 31 U.N. GAOR Supp. (No. 39) (99th plen. mtg.) at 182, *reprinted in* [1977] 8 Y.B. COMM'N INT'L TRADE L. 7, U.N. Doc. A/CN.9/SER.A/1977. The Resolution "[r]equests the Secretary-General to arrange for the widest possible distribution of the Arbitration Rules."

4. *E.g.*, *Optional Arbitration Clause for Use in Contracts in USA-USSR Trade 1977*, *reprinted in* 3 J. WETTER, *THE INTERNATIONAL ARBITRAL PROCESS* 465-67 (1979); *see* Suy, *supra* note 1, at 142.

5. *E.g.*, Inter-American Commercial Arbitration Commission; Regional Arbitration Centre Kuala Lumpur; International Commercial Arbitration Centre Cairo; Spanish Court of Arbitration (international cases); Iran-United States Claims Tribunal at The Hague (more than 3000 cases pending).

6. *E.g.*, American Arbitration Association; Arbitration Court at the Bulgarian Chamber of Commerce and Industry; Canadian Arbitration, Conciliation and Amicable Composition Centre, Inc.; Indian Council of Arbitration; Stockholm Chamber of Commerce; Arbitral Centre of the Federal Economic Chamber Vienna; Foreign Trade Court of Arbitration attached to the Yugoslav Chamber of Commerce.

7. *E.g.*, International Chamber of Commerce; Netherlands Arbitration Institute; Zurich Chamber of Commerce.

8. UNCITRAL, Report of the Fifteenth Session, 37 U.N. GAOR Annex 1 (Agenda Item 6) at 36, U.N. Doc. A/CN.9/222 (1982).

9. UNCITRAL, Report of the Fifteenth Session, 37 U.N. GAOR Supp. (No. 17) at 19-20, U.N. Doc. A/37/17 (1982).

10. UNCITRAL, Report of the Thirteenth Session, 35 U.N. GAOR Supp. (No. 17)

bitration Rules, were prepared after extensive consultations with specialists and interested organizations.¹¹ They have been promulgated as a viable alternative to adversary proceedings and provide for a highly informal and flexible "procedure" which is conducive to the amicable settlement of commercial disputes.¹²

Conciliation, while still less common in certain parts of the world than in others seems to have become an attractive method of dispute resolution, particularly in on-going relationships. The promulgation of the UNCITRAL Conciliation Rules certainly has generated new interest in the advantages of this amicable type of dispute settlement.

C. *Birth of the Model Law*

The third undertaking of UNCITRAL in the field of dispute settlement is the project to be reported on here in detail. It began with a recommendation by the Asian-African Legal Consultative Committee (AALCC) to review and possibly amend the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.¹³ Relying on a study on the application and interpretation of the 1958 New York Convention,¹⁴ UNCITRAL decided not to embark on a revision but rather to seek clarification of some issues and to meet practical concerns by uniform rules on arbitral procedure. Following a United Nations secretariat report on the feasibility of a model law on international commercial arbitration,¹⁵ in 1981 UNCI-

at 32, U.N. Doc. A/35/17 (1980).

11. *E.g.*, International Council for Commercial Arbitration (ICCA); Asian-African Legal Consultative Committee (AALCC).

12. See Dore, *Peaceful Settlement of International Trade Disputes: Analysis of the Scope of Application of the UNCITRAL Conciliation Rules*, 21 COLUM. J. TRANSNAT'L L. 339 (1983). Unlike arbitration, conciliation leads only to a recommended settlement, which is not binding until accepted by the parties. In addition conciliation may not continue without the cooperation of both parties, whereas arbitration requires no such cooperation. *Id.* at 341.

13. Note by the Secretary-General, Decision by the Asian-African Legal Consultative Committee on International Commercial Arbitration, [1977] 8 Y.B. COMM'N INT'L TRADE L. at 233, U.N. Doc. A/CN.9/127 [hereinafter cited as AALCC Recommendation].

14. UNCITRAL, Report of the Twelfth Session, [1979] 10 Y.B. COMM'N INT'L TRADE L. at 100, U.N. Doc. A/CN.9/168.

15. UNCITRAL, Report of the Fourteenth Session, [1981] 12 Y.B. COMM'N INT'L TRADE L. at 75, U.N. Doc. A/CN.9/207.

TRAL entrusted its Working Group on International Contract Practices with the preparation of a draft of such law, taking into account the 1958 New York Convention and the UNCITRAL Arbitration Rules.

The Working Group has held five sessions, and completed its work at the recent session in February 1984.¹⁶ The draft model law, as finalized by the Working Group, will be sent to all governments and to interested international organizations for comments. Before its final review and adoption by the Commission, probably in 1985, it will be discussed at the International Council for Commercial Arbitration (ICCA) at Lausanne, Switzerland in May 1984 and at many other conferences and symposia.

While the model law is, thus, still *in statu nascendi* and its precise shape will only be known at the delivery date, the key features of the *nasciturus* and its structure have been established. Above all, the conceptual necessity for a uniform law is clear to those engaged in international commerce. This should lay the foundation for its viability and acceptance by the international community.

II. Concerns and Principles Underlying the Project

A. *Desirability in View of Current Concerns and Problems*

A variety of concerns and difficulties encountered in practice, sometimes labelled "pitfalls" or "defects" of international commercial arbitration, led to UNCITRAL's formulation of this model law.

1. *Mandatory provisions as source of disappointment*

A recurrent complaint is that the expectations of parties as expressed in their arbitration agreements are often frustrated by

16. See UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Third Session, U.N. Doc. A/CN.9/216 (23 Mar. 1982); UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Fourth Session, U.N. Doc. A/CN.9/232 (10 Nov. 1982); UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Fifth Session, U.N. Doc. A/CN.9/233 (23 Mar. 1983); UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Sixth Session, U.N. Doc. A/CN.9/245 (22 Sept. 1983).

mandatory provisions of the law applicable to arbitration. This concern led the AALCC, in its above recommendation, to request legislative clarification to ensure that:

where the parties have adopted rules for the conduct of an arbitration between them, whether the rules are for *ad hoc* arbitration or for institutional arbitration, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in municipal laws and the award rendered should be recognized and enforced by all Contracting States [to the 1958 New York Convention.]¹⁷

The disappointment of the parties may result from provisions which unduly restrict their freedom to submit future disputes to arbitration or to appoint arbitrators of their choice. Other restrictions may relate to the competence of the arbitral tribunal to decide on its own jurisdiction, or to the power of the arbitral tribunal to conduct the proceedings in accordance with the wishes of the parties or as deemed appropriate by the tribunal. It is well known that in this important field, arbitration is often simply equated with court litigation, without examining in detail whether the general law on civil procedure is really adequate for arbitral proceedings, in particular those dealing with international commercial disputes. Another area of possible concern is that supervision and control by courts is not always welcomed by parties, at least not to the extent envisaged in various municipal laws.

However, the diagnosed defects should not lead to adopting the radical therapy of doing away with all mandatory features of law and giving the parties and the arbitrators total freedom of action. It seems essential to retain certain mandatory features which would cure major procedural defects, prevent denial of justice, and ensure due process of law. A supportive and corrective role should be played by courts, within defined limits, during the arbitral proceedings and, in particular, at the post-award stage, either in recourse proceedings or in the recognition and enforcement of the award. This need has been realized in the AALCC Recommendation that “[w]here an arbitral award has been rendered under procedures which operate unfairly against

17. See AALCC Recommendation, *supra* note 13, Annex.

either party, the recognition and enforcement of the award should be refused.”¹⁸

2. Problems ensuing from non-mandatory or from non-existent provisions

Permissive as well as mandatory provisions of the applicable law may be a source of disappointment to the parties. Although, by definition, parties may derogate from permissive provisions and, thus, nullify their effects if deemed undesirable, the parties may not have made a contrary stipulation, simply because they were not aware of such an undesired rule in a foreign law.

Where the parties have not agreed on a certain procedural point, problems may also arise from the fact that the applicable law contains no provision settling the issue. The lack of such supplementary rules may create uncertainty and controversy which causes delay and sometimes additional costs. Such a contingency commonly arises where parties have merely agreed that certain disputes be submitted to arbitration; yet, it may also occur where parties have incorporated standard arbitration rules, which, even if elaborate, may not be comprehensive enough to cover all procedural eventualities.

3. Adverse effects aggravated by disparity between national laws and their inadequacy for international cases

In international commercial arbitration — as in any other international context — at least one of the parties is often confronted with unfamiliar provisions and procedures. The above problems and undesired consequences are aggravated by the fact that the national laws on arbitral procedure differ widely.

Although there are useful publications on arbitration laws, most notably the national reports published in the Yearbook of Commercial Arbitration, there are practical limitations, including language barriers, in obtaining a full and precise account of the law. Furthermore, it is not always clear at the time of the conclusion of the arbitration agreement what law will govern the proceedings. While it is usually the law of the state where the arbitration will be held, the parties may have good reasons for

18. *Id.*

not determining the place of the arbitration. The place of arbitration is often chosen for reasons other than the governing law, such as convenient location or proximity to the object of the dispute.

The applicable law of a particular country raises important problems which have spawned UNCITRAL's model law project. Apart from possibly being outdated or fragmentary, national law is likely to have been drafted primarily, if not exclusively, for domestic arbitrations.¹⁹ The unfortunate consequence of such domestic preoccupation is that traditional concepts and local peculiarities are also imposed on the minority, non-domestic cases, where such imposition tends to run counter to the special needs and concerns of the parties.

A few countries, until now, have understood the consequences of this situation and have adopted provisions which specifically cater to the needs of international commercial arbitration. The prime example is France with its decree of 12 May 1981²⁰ which added a new section to its code of civil procedure and opened a new chapter of the global book of arbitration statutes. More limited steps toward restricting or excluding recourse to courts²¹ were taken by the United Kingdom and Austria and are envisaged in the Swiss private international law bill. Also the recent amendments in Hong Kong and Italy, as well as the bill in the Netherlands,²² reflect an awareness of the needs of modern international commercial arbitration.

B. *General Principles and Objectives of Model Law*

From the above concerns and difficulties one may easily deduce what the model law should try to achieve, but the implementation of general objectives is considerably less simple when it comes to defining and regulating certain procedures.

19. It should be noted that this is an understandable and legitimate approach by any national legislature since even today the bulk of the cases governed by such national laws are of strictly a domestic nature.

20. See Derains, *France*, 7 Y.B. COM. ARB. 3 (ICCA 1982).

21. See Schmitthoff, *The United Kingdom Arbitration Act 1979*, in 5 Y.B. COM. ARB. 231 (ICCA 1980). See Bernini, *Italy*, 8 Y.B. COM. ARB. 327 (ICCA 1983).

22. See Sanders, *New Arbitration Law for the Netherlands*, 4 PACE L. REV. 581 (1984).

Before looking at the general purposes of a special law on international commercial arbitration, it is necessary to discuss the vehicle or form of the preparatory work. While subject to final decision by UNCITRAL, the form envisaged is that of a "model law." This means that the text of the law, once it is finalized and adopted by UNCITRAL, would be recommended by it and by the General Assembly of the United Nations to all states for incorporation into their national legislation. The alternative would be to submit the text to a diplomatic conference which would then conclude a convention with the law either contained in the body of the convention itself, or annexed to it as a uniform law which would then become binding on states by ratification or accession.

There is no clear answer as to which is the better approach, in view of the many pros and cons which are beyond the scope of this Article. Yet, it seems clear that a model law is not necessarily less conducive to attaining the desired objectives harmonization than a convention which may contain a lengthy list of reservations, as illustrated by the ill-fated Strasbourg "Uniform" Law of 1966.²³ It is ultimately the quality of the text which determines its appeal (as a "model") and thus its acceptance.

1. *Improvement and harmonization of national laws for international transactions*

The disparity between the various national arbitration laws and their focus on national concerns demonstrate the necessity for harmonization of those laws governing international transactions. Consequently, the UNCITRAL project aims to create a legal regime specifically geared to international arbitration issues. Its provisions, to be adopted by individual states, would be accorded priority (as *lex specialis*) over other rules of that state dealing with arbitration.

The specific scope of a model law is not simply a consequence of UNCITRAL's mandate as expressed in its name (International Trade Law). It is rather the recognition of two im-

23. European Convention Providing A Uniform Law on Arbitration, 20 Jan. 1966, Europ. T.S. 56, reprinted in 2 REGISTER OF TEXTS OF CONVENTION AND OTHER INSTRUMENTS CONCERNING INTERNATIONAL TRADE LAW 65 (1973) [hereinafter cited as U.N. REGISTER OF TEXTS].

portant issues. The first is that the disparity between national laws and the difficulty of obtaining sufficient legal information have adverse effects in international cases, or create problems to a considerably greater degree than in cases involving domestic issues. The second is that imposition of territorial constraints, stringent requirements, and local peculiarities are less justified in international commercial arbitration with its increasingly recognized need for flexibility and liberalisation. However, most of the provisions of the draft model law would be suitable for domestic arbitration and may, thus, be adopted for both categories of cases by any state wishing to avoid a dichotomy within its own arbitration law.

The Working Group, following the traditional UNCITRAL principle of consensus, strived in extensive deliberations for widely acceptable and workable solutions. That does not mean, however, that it settled on the "lowest common denominator" (as is sometimes alleged) which may be observed by the various radical and advanced provisions in the draft.

2. Wide freedom of parties and, failing agreement, of arbitrators, subject to some procedural safeguards

In order to avoid frustration of the parties' expectations, a fundamental principle of the model law is to recognize their freedom to agree on how an arbitration should be conducted. The parties would be able to tailor the procedural rules to their specific needs, whether by referring to a proven set of standard arbitration rules or by negotiating an individual (one-off) arbitration agreement. This guaranteed freedom may relate to the binding submission of future disputes, to the number of arbitrators and the procedure of their appointment as well as to any challenge or replacement of the arbitrators and, in particular, to the many crucial points of how the arbitral proceedings should be conducted.

Subject to any such agreement by the parties, the arbitral tribunal would be given wide procedural discretion. To grant such power to conduct the proceedings as deemed appropriate means that the arbitrators need not follow the local law of procedure, including the rules of evidence. This freedom allows the tribunal to adjust the procedure to the special needs and characteristics of the international case at hand.

As noted earlier, the latitude envisaged by the model law is not absolute; it would be limited by provisions designed to prevent or to remedy certain procedural injustices such as any instance of denial of justice or violation of due process of law. Such restrictions are in the interest not only of the parties, by ensuring fairness and equality, but also of the concerned State which could hardly be expected to guarantee the above flexibility and yet provide court assistance without procedural safeguards pertaining to fundamental principles of justice. The more difficult task is to determine the precise limits of this procedural and substantive flexibility.

3. *Suppletory rules and some clarifications*

Another guiding principle for the model law is to meet the above concerns relating to non-mandatory or to non-existent provisions. The approach adopted by the Working Group was to devise a fairly comprehensive and generally acceptable set of non-mandatory provisions. This should protect those parties who have not agreed on procedural rules or have not settled certain points relating to an unexpected and undesired provision, or *lacuna*, in the applicable procedural law.

While one might question the need for helping those who are not diligent (although lack of agreement is not necessarily due to lack of diligence), a basic objective of the model law is to provide a suitable "emergency kit" for getting an arbitration started and proceeding to the final settlement of the dispute. This was, incidentally, the true motive for suggesting inclusion of suppletory rules and not, as has been alleged, any pre-meditated promotional plan or notion to turn the UNCITRAL Arbitration Rules into a model law. Of course, it should not come as a surprise that the suppletory rules, as to their contents, are closely modeled on these arbitration rules, elaborated by the same organ of the United Nations and proven acceptable in most parts of the world.

Finally, the model law would attempt to clarify a number of points which have created interpretive problems in the 1958 New York Convention and similar legal instruments. These issues relate to the requirement of the written form of the arbitration agreement, the compatibility of interim measures by courts with an arbitration agreement, and the choice of law applicable

to the substance of the dispute.

III. Subject Areas and Main Provisions of Draft Model Law

A. General Provisions

The draft model law²⁴ contains in its first chapter a varied assortment of general provisions, a number of which are not only of considerable importance but also quite controversial.

1. *Substantive scope of application*

Article 1(1) states that the "Law applies to international commercial arbitration." While this scope of application was clear from the beginning of the project and, in fact, expressed in UNCITRAL's terms of reference to the Working Group, it was less clear — and a subject of extensive discussions — how it should be defined.

(i) *"International"*

The most controversial issue was how to define "international." Some members were in favour of a general formula such as "involving international commercial interests,"²⁵ as adopted in the French law of 1981, and made somewhat more concrete by a list of objective criteria setting forth typical international connecting factors. Others preferred the more precise and narrower test adopted in the United Nations Convention on Contracts for the International Sale of Goods: the contracting parties must have their places of business in different states.²⁶ Yet others suggested a middle-of-the-road solution which finally led to the compromise: to adopt the Vienna test but add further stipulations; place of arbitration or place of the subject-matter of the

24. References to provisions of the draft model law are to the text as it stands at the time of this writing. See Composite Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/WG.II/WP.48 (29 Nov. 1983) [hereinafter cited as Model Law].

25. See UNCITRAL, Report of the Working Group on International Contract Practices on the Work of its Fifth Session, U.N. Doc. A/CN.9/233, paras. 57-60 (23 Mar. 1983).

26. United Nations Convention on Contracts for the International Sale of Goods, 11 Apr. 1980, reprinted in [1980] 11 Y.B. COMM'N INT'L TRADE L. at 149, U.N. Doc. A/CONF.97/18, Annex I.

dispute or the performance of contract is situated in a state other than that of the places of business of the parties, or the subject-matter of the arbitration agreement is otherwise related to more than one state.

(ii) "*Commercial*"

As regards the second element of "international commercial arbitration," no satisfactory definition could be found for the term "commercial." Instead, the model law contains a note calling for "a wide interpretation so as to cover matters arising from all relationships of a commercial nature."²⁷ The note then provides an illustrative list of commercial relationships which underscores the width of the interpretation and reflects the variety of cases encountered in international arbitration practice:

any trade transaction for the supply or exchange of goods; distribution agreements; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.²⁸

(iii) "*Arbitration*"

Also the term "arbitration" has been left undefined, except for the rather obvious statement that it comprises *ad hoc* as well as administered or institutional arbitration.

2. *Model law yields to treaty law*

Turning to a different aspect of application, the model law expressly states that its provisions are "subject to any multilateral or bilateral agreement which has effect in this state"²⁹ (i.e., the state adopting the model law). While this proviso may be regarded as being superfluous, it is at least a useful reminder that this is a field of law where a considerable degree of global or regional harmonization has been achieved by conventions on

27. Model Law, *supra* note 10, art. 1(1) & n.*.

28. *Id.*

29. *Id.* art. 1(1).

matters also dealt with in the model law such as recognition of arbitration agreements and enforcement of foreign awards.

3. *Territorial scope of application*

Still another aspect of applicability which has not yet been decided but may be expressly regulated in the final version, is what one may call the territorial scope of application. The model law would govern the procedure of those arbitrations which take place in the state where the law is in force, possibly qualified by allowing the parties to select the procedural law of a state other than the one of the place of arbitration. A wider and in fact global scope would be adopted for recognition of arbitration agreements, including their compatibility with interim measures of protection by courts and, in particular, for recognition and enforcement of awards.

4. *Waiver of right to object*

Another general provision of considerable practical importance is contained in Article 4. A party is estopped from later invoking non-compliance with a procedural requirement, laid down in a non-mandatory provision of the model law or in the arbitration agreement, if that party did not object without delay. This waiver should be effective not only for the subsequent phases of the arbitral proceedings but more importantly for the post-award stage involving any recourse against the award or against its recognition and enforcement. The issues relating to a lack of valid arbitration agreement or the arbitral tribunal exceeding its mandate are discussed in the context of the arbitral tribunal's competence to rule on its own jurisdiction.³⁰

5. *Court assistance and supervision (limited)*

Articles 5 and 6 deal with the same fundamental subject of court assistance and supervision but differ in how they invoke the judicial machinery of the court.

30. *Id.* art. 16(1); see *infra* Part III D.

(i) *Special court for arbitration assistance and supervision*

Article 6, which is the generally accepted provision, calls upon each model law state to designate a special "court" which would aid and supervise certain arbitration procedures. The court would deal with the appointment of an arbitrator, or his challenge, or the termination of his mandate because of failure to act and, in particular, any setting aside proceedings.

The expected advantages of such designation would be centralisation, specialisation, and acceleration. However, designation of a court does not necessarily mean that it would only be one individual court in each state; in larger countries it might well be one type of court, all commercial courts, or commercial chambers of district courts. On the other hand, it need not be a full court or chamber; it may be only the president of a court or presiding judge of a given chamber in cases of a more administrative nature where speed and a restriction of appeal procedures are desired.

(ii) *Limitation of court control*

Article 5, which some members and specialists view as highly undesirable and an attack on the brotherhood of bench and bar, provides that in matters governed by the model law, courts may supervise or assist arbitrations only if so provided in the model law. This provision, which has been criticized as anti-interventionist in nature, does not really take a stand on what is the appropriate role of courts in assisting or supervising arbitrations. All it does is to compel the drafters of the model law (and those adopting it for a given state) to spell out all the instances (possibly many) in which courts may intervene. It would, therefore, exclude any general or residual powers envisaged in a domestic system which the parties or the arbitrators may not expect or want.

In assessing the value of the provision, two points should be noted. One is that the model law envisages court assistance not only in the cases entrusted to the special court of Article 6, but also in the following instances where resort may be had to other courts: request for interim measures of protection before or during arbitral proceedings, request for court assistance in taking

evidence, and recognition and enforcement of awards. The second point is that the provision of Article 5 applies only in respect to "matters governed by this Law."³¹ Therefore, it does not exclude court assistance or supervision in those matters which are not dealt with in the law: arbitrability of subject-matter of dispute, capacity of parties to conclude arbitration agreement, impact of state immunity, enforcement by courts of interim measures granted by arbitral tribunals, competence of arbitral tribunal to adapt contracts, fixing of fees or request for deposit including security for fees or costs and time-limits for enforcement of awards.

B. *Arbitration Agreement*

The second chapter of the model law deals with the arbitration agreement, including its recognition by courts. The draft provisions closely parallel Article II of the 1958 New York Convention,³² with several clarifications.

1. *Definition and form of arbitration agreement*

Article 7(1) recognizes the validity and effect of a commitment by the parties to submit to arbitration an existing dispute (*compromis*) or any future dispute (*clause compromissoire*). The latter type of agreement is currently not given full effect under certain national laws. Article 7(1) further states that the arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

Although in commercial arbitration oral agreements are found in practice and are recognized by some national laws, Article 7(2) follows the 1958 New York Convention in requiring written form. It widens and clarifies the definition of Article II(2) of that Convention by adding to exchange of letters or telegrams any exchange of "telex . . . or other means of telecommunication which provide a record of the agreement,"³³ and by providing that "the reference in a contract to a document

31. Model Law, *supra* note 27, art. 5.

32. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 21 U.S.T. 2517, T.I.A.S. No. 6997, 330 U.N.T.S. 38, *reprinted in* 2 U.N. REGISTER OF TEXTS, *supra* note 24, at 24.

33. Model Law, *supra* note 24, art. 7(2).

containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause a part of the contract."³⁴

2. *Arbitration agreements and the courts*

Articles 8 and 9 deal with two important aspects of the complex issue of the relationship between arbitration agreements and resort to courts.

(i) *Referral to arbitration*

Modeled on Article II(3) of the 1958 New York Convention, Article 8(1) obliges any court to refer the parties to arbitration if the dispute relates to a matter which is the subject of an arbitration agreement unless it finds that the agreement is void, or incapable of being performed. The referral is dependent on a request which a party, under the model law, may make not later than the date he submits his first statement on the dispute to the court. While this provision, where adopted as part of the model law of a given state, by its nature binds merely the courts of that state, it is, like the 1958 New York Convention, not restricted to agreements providing for arbitration in that state and, thus, helps to give universal recognition and effect to international commercial arbitration agreements.

(ii) *Interim measures by courts compatible with arbitration agreement*

A similar global orientation, though in a different direction, characterizes Article 9, which expresses the principle that interim measures of protection by courts such as pre-award attachments are compatible with arbitration agreements. Like Article 8, this provision is addressed to the courts of a given state insofar as it determines their granting of interim measures as being compatible with an arbitration agreement, again irrespective of the place of arbitration. However, the provisions should apply whether the request is made to a court of the given state or of any other country. Wherever such a request is made, it

34. *Id.*

may not be relied upon, under the model law, as if it were an inherent part of an arbitration agreement.

C. *Composition of Arbitral Tribunal*

The third chapter contains a number of fairly detailed provisions on appointment, challenge and replacement of arbitrators. It illustrates the implementation of two major legislative principles stated above: the recognition of the parties' freedom to agree on the procedure to be followed, and the provision of supplementary rules for those cases where the parties have failed to settle these issues.

1. *Appointment of arbitrators*

Under Article 10, the parties may determine the number of arbitrators. They are, thus, not bound to select an uneven number, as prescribed by some national laws. Failing agreement by the parties, the number of arbitrators would be three.

While some national laws allow the appointment of their nationals only, Article 11(1) recognizes the universality of international commercial arbitration and emphasizes freedom of choice by providing that "[n]o person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties."³⁵

As to the appointment procedure, again the parties are given full control to establish the rules they wish. If the parties are unable to decide, an elaborate mechanism is provided in the model law for the appointment of arbitrators. In either case, the special court mentioned earlier may assist the parties in case of undesired delay or any deadlock. Under Article 15 the same rules of appointment would be applied later if a substitute arbitrator had to be appointed.

2. *Grounds and procedure for challenging an arbitrator*

An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. This general formula would replace the often detailed

35. *Id.* art. 11(1).

and lengthy lists of grounds for challenge found in national laws, usually applicable to both arbitrators and judges. The model law requires any arbitrator, even a prospective arbitrator, to disclose circumstances likely to give rise to such doubts.

Again, the parties may agree on the challenge procedure and failing agreement, the model law supplies procedural rules. In either case, however, the challenging party may have final resort to the special court of Article 6.

3. *Failure or impossibility to act*

The special court may also render assistance if a controversy exists about the termination of the mandate of an arbitrator under Article 14. The grounds listed in the provision are *de jure* or *de facto* impossibility of performing the functions of an arbitrator and, what may be particularly controversial in terms of the legal effect, "failure to act."

D. *Jurisdiction*

Article 16 adopts the two important and related principles of *Kompetenz-Kompetenz* and of separability/autonomy of the arbitration clause. Under the concept of *Kompetenz-Kompetenz*, the arbitral tribunal has the power to rule on its own jurisdiction, including the authority to decide on objections, if raised promptly by the respondent, as to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is void shall not entail *ipso jure* the invalidity of the arbitration clause.

The arbitral tribunal's *Kompetenz-Kompetenz* is not conclusive but ultimately subject to court review. However, a positive ruling by the arbitral tribunal may be contested only in an action for setting aside the final award on the merits.

Unlike some national laws, the model law under Article 18 would empower the arbitral tribunal, unless otherwise agreed by the parties, to order interim measures of protection if so requested by a party.

E. *Conduct of Arbitral Proceedings*

1. *Determination of rules of procedure*

The fifth chapter opens with a provision which may be labelled as the "Magna Charta of Arbitral Procedure." Article 19 guarantees the parties' freedom to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings, subject, of course, to the (few) mandatory provisions. Of equal importance is the power of the arbitral tribunal, failing agreement by the parties, to conduct the arbitration in such a manner as it considers appropriate; in either case, the parties shall be treated with equality and each party shall be given a full opportunity to present his case. The power conferred upon the arbitral tribunal includes the authority to determine the admissibility, relevance, materiality and weight of any evidence.

The effect of this fundamental provision is that the rules of procedure, unless laid down by the model law itself, are determined either by the parties or by the arbitral tribunal, but not by any other arbitration law or national code of civil procedure. This exclusion of local procedural laws allows for the facilitation of international commercial arbitration and the structuring of the conduct of the proceedings to the unique features of the "transnational" case which often has little or no connection to any particular legal system.

2. *Place of arbitration*

The order of priority adopted for determining the rules of procedure applies also to the important question of where the arbitration is to take place. Article 20 states that the place of arbitration may be agreed upon by the parties. Throughout the model law, an agreement by the parties includes reference to arbitration rules and any authorization of a third person or institution to make the determination on behalf of the parties. If the parties fail to reach an accord, the arbitral tribunal may determine the place without being bound to hold all meetings, hearings, and consultations at that place.

The place of arbitration is of great legal importance in two respects. It is a connecting factor for the applicability of a given national law, or the adopted model law, and it is relevant as the place of origin of the award for purposes of its recognition and

enforcement. The model law, therefore, provides in Article 31(3) that the award shall state the place of arbitration and that it shall be deemed to have been made at that place. As to this presumption, it is important to note that the final rendering of the award is a legal act which may be done in stages: either in deliberations at various places, or by telephone conversation or correspondence. Most importantly, the award need not be signed by all arbitrators at the same place of arbitration.

3. *Hearings and evidence*

In addition to the draft provisions on the commencement of arbitral proceedings (Art. 21), language (Art. 22), and statements of claim and defence (Art. 23), the fifth chapter contains a number of important rules which provide fundamental procedural rights and safeguards to ensure due process and enhance the effectiveness and expediency of the arbitral process.

(i) *Fundamental procedural rights of a party*

Arbitral proceedings are sometimes conducted as “written proceedings,” which rely only on documents and other materials, without any hearing. Article 24(1) of the model law, while permitting such practice if so wished by the parties, would grant each party the right to request that the arbitral tribunal shall, at an appropriate stage of the proceedings, hold hearings for oral argument or for the presentation of evidence. Another fundamental right of a party to be heard and to present his case relates to evidence by an expert appointed by the arbitral tribunal. After having delivered his (written or oral) report, the witness, under Article 26(3), shall participate in a hearing where the parties may interrogate him and then present their own expert witnesses in order to testify on the points in dispute, if such a hearing is requested by a party or deemed necessary by the arbitral tribunal.

There are two further mandatory provisions aimed at ensuring fairness, objectivity and impartiality. According to Article 24(3): all statements, documents and other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report and other documents, on which the arbitral tribunal may rely in making its decision, shall

be communicated to the parties.

Finally, in order to enable the parties to be present at any hearings and at any meeting of the arbitral tribunal for inspection purposes, Article 24(2) states that the parties shall be given sufficient notice in advance. This requirement is not only an essential element of due process allowing parties to prepare and present their case but is also relevant as a necessary condition for *ex parte* proceedings and awards.

(ii) *Default of a party*

Only if due notice was given can the arbitral proceedings be continued in the absence of a party. This applies, in particular, to the failure of a party to appear at a hearing or to produce documentary evidence without showing sufficient cause for the failure under Article 25(c). The arbitral tribunal may also continue the proceedings where the respondent fails to communicate his statement of defence, while there is no need for continuing the proceedings if the claimant fails to submit his statement of claim under Article 25(a), (b).

Such a provision, which empowers the arbitral tribunal to carry out its task even if one of the parties does not participate, would contribute to the harmonization of laws in view of the fact that a number of national laws (in particular the Latin American region) may hesitate to recognize foreign *ex parte* awards. The provision is of great practical importance since, as experience has shown, it is not uncommon that one of the parties has little interest in cooperating and in expediting matters. The default provision would, thus, give international commercial arbitration its necessary effectiveness and "teeth."

(iii) *Court assistance in taking evidence*

Another "dental" provision is the power to compel witnesses or enforce other orders relating to evidence. Under Article 27, the arbitral tribunal, or a party with the approval of that tribunal, may request from a competent court in the same state assistance in taking evidence. The court, depending on its rules of procedure or on what it deems to be the most appropriate course of action, would then take the evidence, or order the person in question to bring the evidence directly to the arbitral tribunal.

F. *Making of Award and Termination of Proceedings*

The sixth chapter of the model law contains various provisions on the making of the award (and other decisions) and on further issues relevant at the end of the arbitral proceeding. While most of these provisions, together with the rules in the fifth chapter, may be viewed as a part of the "code of arbitral procedure," the first article is of a different dimension.

1. *Rules applicable to substance of dispute*

Article 28 deals with the substantive law aspects of arbitration. It obliges and empowers the arbitral tribunal to decide the dispute in accordance with such rules of law as may be agreed by the parties. To those who think that this is self-evident, two important features should be pointed out.

The first is that this rule would grant the parties the freedom of choosing the applicable substantive law even if the national law, as is the case in a number of countries, does not normally or fully recognize such a choice of law. The second and more important point is that the parties are not simply given the freedom to designate a given "law," understood as the law or legal system of one particular state, but to agree on "rules of law." The parties are thus provided with a wider range of options and may, for example, designate as applicable to their case rules of more than one legal system, including rules which have been elaborated on the international level. This scope of freedom of choice — to date recognized only in the Convention on the Settlement of Investment Disputes Between States and Nationals of other States³⁶ and the new French law — may be viewed as a major contribution of the model law to the fulfillment of the expectations and wishes of parties in international dispute settlement.

The rather ambitious, if not revolutionary, approach in this respect led the Working Group to adopt a more cautious approach with regard to what law the arbitral tribunal should apply if the parties have not agreed on the rules applicable to the

36. Convention on the Settlement of Investment Disputes Between States and Nationals of other States, 18 Mar. 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 160.

substance of the dispute. In such a case, Article 28(2) provides that the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable. Although this "conservative" rule may not please those who would prefer to meet the needs of international arbitration practice by allowing the arbitral tribunal to apply the substantive law rules it considers appropriate, it seems not unreasonable to grant the parties wider freedom than that accorded to the arbitral tribunal by virtue of a law.

Finally, it should be noted that either rule relating to the law applicable to the substance of the dispute applies in full only if the dispute is to be decided in accordance with all the substantive rules of a law. This is not the case where the parties authorize the arbitral tribunal to decide the dispute *ex aequo et bono*³⁷ or, as labelled in some systems, as *amiables compositeurs*. While there is no uniform understanding of what exactly that means and the model law does not attempt to give directions in this regard, the following guideline may be offered to those unfamiliar with this type of dispute resolution: The arbitral tribunal would seek a fair and equitable solution, bound merely by those norms of the applicable law which ensure the international public policy of the given state, such as *ordre public* relating to international transactions.

2. Making of award and other decisions

In its rules on the making of the award, the model law in Articles 29 through 31, pays special attention to the rather common rule that the arbitral tribunal consists of a plurality of arbitrators. It provides that any award or other decision — except on questions of procedure which may be left to a presiding arbitrator — shall be made by a majority of all arbitrators. The same applies to the signing of the award, which is significant since some national laws require the signatures of all arbitrators which, on occasions have led to futile proceedings with wasted time and costs.

Any arbitral award, whether made by a sole arbitrator or a

37. A phrase derived from the civil law, meaning, in justice and fairness; according to what is just and good; according to equity and conscience. See BLACK'S LAW DICTIONARY 500 (rev. 5th ed. 1979). See also I.C.J. Stat. § 38(2).

panel of arbitrators, must be in writing. And it must state the reasons on which it is based, unless the parties have agreed otherwise or the award is an award on agreed terms : an award which records the terms of an amicable settlement by the parties (*accord des parties*).

3. *Termination of proceedings (and remaining tasks of arbitral tribunal)*

Under Article 32, the arbitral proceedings can be terminated in three ways: one, by the rendering of the final award which constitutes or completes the disposition of all claims; two, by an agreement of the parties to that effect; three, by an order of termination which the arbitral tribunal would issue in certain cases.

The termination of the arbitral proceedings normally terminates the mandate of the arbitral tribunal. However, there are some remaining functions which the arbitral tribunal may be required to perform. Article 33 allows a party to request the correction of a typographical or similar error, an interpretation of a specific point or part of the award, or an additional award on a claim omitted in the original award. A more substantial task could be to cure the award in other respects if a court in setting aside proceedings would remit the case to the arbitral tribunal as envisaged in Article 34(4).

G. *Recourse Against Award*

National laws on arbitration, which often equate awards with court decisions, provide several means of recourse against arbitral awards. These procedures often have long time-periods in which to initiate the protest and there are usually extensive lists of grounds that can be utilized to nullify the award. Unfortunately, these lists can differ markedly in the various legal systems. The model law attempts to ameliorate these situations which have been of great concern to those involved in international commercial arbitration.

1. *Application for setting aside as exclusive recourse*

Article 34, involving the application for setting aside awards, restricts recourse against arbitral awards to one proce-

ture. This restriction injects consistency and efficiency into the appeal procedure provided by the model law and also, by virtue of the special character and priority of the model law, it operates to the exclusion of any other means of recourse regulated in another procedural law of the state in question. The "state in question" would normally be the country of origin, where the award was made, but could possibly be another state, whose law is chosen to control the arbitration agreement.

An application for setting aside an award must be made within three months of the receipt of the award. Considering the exclusive nature of this recourse, that is a rather short period of time which, however, seems desirable in international commercial arbitration where pragmatic businessmen prefer an expeditious solution to long-lasting uncertainty.

2. Grounds for setting aside

The model law contains a fairly short list of grounds on which an award may be set aside, which is a further improvement over national laws on arbitration. This list, which is essentially taken from Article V of the 1958 New York Convention, includes: lack of capacity of parties to conclude arbitration agreement or lack of valid arbitration agreement; lack of notice of appointment of arbitrators or inability of a party to present his case; award dealing with matters not covered by submission to arbitration; composition of arbitral tribunals or conduct of arbitral proceedings contrary to agreement of parties or, failing agreement, applicable arbitration law; and violation of public policy, including non-arbitrability of subject-matter of dispute. Although the list of grounds for setting aside awards is almost identical to the one relevant to recognition and enforcement in the 1958 New York Convention, two practical differences do exist. First, the grounds relating to public policy, including non-arbitrability, may be quite different, depending on the state in question (i.e. the state of setting aside or state of enforcement). The second and more important difference is that the grounds for refusal of recognition or enforcement are valid and effective only in the state (or states) where the winning party seeks recognition and enforcement, while the grounds for setting aside have a different impact: if an award is set aside (at the place of origin), it prevents enforcement of that award in all other countries

(under Article V(1)(e) of the 1958 New York Convention and Article 36(1)(a)(v) of the model law) and thus kills the award at the root.

H. *Recognition and Enforcement of Awards*

The eighth and final chapter of the model law deals with recognition and enforcement of awards. Its provisions reflect the still controversial answers to fundamental questions of policy. The policy issues were, for example, whether the model law should follow closely the relevant provisions of the 1958 New York Convention and whether foreign and domestic awards should be dealt with separately. The most basic question, however, was "to be or not to be" — whether the model law should contain any provisions on recognition and enforcement of awards.

1. *Towards uniform treatment of all awards irrespective of country of origin*

A considerable number of delegates in the Working Group saw no need for such provisions since domestic awards were appropriately regulated by national laws which were often equated with domestic court decisions. Furthermore, since foreign awards were satisfactorily dealt with in the 1958 New York Convention and similar instruments, any interested state could adhere to these guidelines.

The prevailing view, however, was to retain provisions on recognition and enforcement since without them the model law would be incomplete. Moreover, such provisions could be closely modelled on the 1958 New York Convention and, thus, without creating conflicts, supplement the legal network for recognition and enforcement. The most persuasive justification was the necessity of a uniform treatment of all awards irrespective of their country of origin.

This idea, which at first sight looks rather revolutionary, is less radical when one considers the scope of application of the model law. It would only pertain to those awards which are rendered in international commercial arbitration. Accordingly, it would draw the line between "international" and "non-international" awards instead of the present demarcation line between

“foreign” and “domestic” awards. This new line would be a recognition of the earlier mentioned consideration that the place of arbitration (and of the award) is of minor importance in international commercial arbitration. Consequently, the recognition and enforcement of “international” awards, whether “foreign” or “domestic,” should be governed by the same provisions.

2. *Procedural conditions of recognition and enforcement*

Article 35(1) categorically states that any arbitral award shall be recognized as binding, subject to the provisions of Article 36 (which sets forth the grounds on which recognition or enforcement may be refused).

The model law would not lay down all procedural details of recognition and enforcement since there is no practical need for unifying the modalities of the respective proceedings, which form an intrinsic part of the national judicial system. However, under Article 35(2) it would set the maximum conditions for obtaining enforcement: application in writing, accompanied by the award and the arbitration agreement.

3. *Grounds for refusing recognition or enforcement*

As noted earlier, the grounds on which recognition or enforcement may be refused under the model law are identical to those listed in Article V of the 1958 New York Convention. Under the model law, however, they are relevant, not merely to foreign awards but to all awards emanating from international commercial arbitration. It was deemed desirable to adopt the same approach as the important and widely adhered to Convention for the sake of harmony, although some parts of the provisions needed clarification. For example, the first ground on the list, “the parties to the arbitration agreement . . . were, under the law applicable to them, under some incapacity,” has been viewed by some as containing an incomplete and potentially misleading conflicts rule. Similar reservations have been expressed with regard to the next ground, the “agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made.” On the other hand, this indirect and somewhat incomplete conflicts rule could serve as a useful

starting point, if the Commission were to decide in favour of including some general conflicts rules in the model law.

IV. Concluding Remarks: Timely and Promising

While it is too early to evaluate the final outcome and success of the project, the following assessment of its prospects is offered.

As evidenced during the preparatory stages, there is a tremendous and widespread interest in the UNCITRAL project. The expectations of arbitrators, attorneys, businessmen and others involved in arbitration matters should be met by a model law which promises to be modern, complete and specifically tailored to the needs of international commercial arbitration. Like the UNCITRAL Arbitration Rules, it promises to be acceptable to countries with different legal and economic systems. It will be a useful model not only for those States which have no law on arbitration but also for those who have a rather fragmentary and outdated one. Any State could benefit from adopting the model law, if only to enhance its position in the increasingly competitive market of international commercial arbitration.

APPENDIX

[Note: Reproduced here is the annex to the report of the Working Group on International Contract Practices on the work of its seventh session, New York, 6-17 February 1984; it sets forth the draft model law on international commercial arbitration as adopted by the UNCITRAL Working Group at that session]

**DRAFT TEXT OF A MODEL LAW ON INTERNATIONAL
COMMERCIAL ARBITRATION AS ADOPTED BY THE
WORKING GROUP [Articles 3 and 17 were deleted by the
Working Group. The Articles will be renumbered when the**

model law is adopted by the Commission in 1985.]

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application**

(1) This Law applies to international commercial** arbitration, subject to any multilateral or bilateral agreement which has effect in this State.

(2) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or

(b) one of the following places is situated outside the State in which the parties have their places of business:

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

(c) the subject-matter of the arbitration agreement is otherwise related to more than one State.

(3) For the purposes of paragraph (2) of this article, if a party has more than one place of business, the relevant place of business is that which has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference is to be made to his habitual residence.

Article 2. *Definitions and rules of interpretation*

For the purposes of this Law:

(a) "arbitral tribunal" means a sole arbitrator or a panel of

* Article headings are for reference purposes only and are not to be used for purposes of interpretation.

** The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.

arbitrators;

(b) "court" means a body or organ of the judicial system of a country;

(c) where a provision of this Law leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(d) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(e) unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known place of business, habitual residence or mailing address. The communication shall be deemed to have been received on the day it is so delivered.

Article 4. *Waiver of right to object*

A party who knows or ought to have known that any provision of this Law from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection to such non-compliance without delay or, if a time-limit is provided therefore, within such period of time, shall be deemed to have waived his right to object.

Article 5. *Scope of court intervention*

In matters governed by this Law, no court shall intervene except where so provided in this Law.

Article 6. *Court for certain functions of arbitration assistance and supervision*

The Court with jurisdiction to perform the functions referred to in articles 11 (3), (4), 13 (3), 14 and 34 (2) shall be the . . . (blanks to be filled by each State when enacting the model law).

CHAPTER II. ARBITRATION AGREEMENT

Article 7. *Definition and form of arbitration agreement*

(1) "Arbitration agreement" is an agreement by the parties to submit to arbitration, whether or not administered by a permanent arbitral institution, all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. *Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(2) Where, in such case, arbitral proceedings have already commenced, the arbitral tribunal may continue the proceedings while the issue of its jurisdiction is pending with the court.

Article 9. *Arbitration agreement and interim measures by court*

It is not incompatible with the arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. *Number of arbitrators*

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.

Article 11. *Appointment of arbitrators*

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days after having been requested to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court specified in article 6;
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Court specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (a) a party fails to act as required under such procedure;
or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or
 - (c) an appointing authority fails to perform any function entrusted to it under such procedure,any party may request the Court specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.
- (5) A decision on a matter entrusted by paragraph (3) or (4) of

this article to the Court specified in article 6 shall be final. The Court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. *Grounds for challenge*

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. *Challenge procedure*

(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), whichever is the later, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within fifteen

days after having received notice of the decision rejecting the challenge, the Court specified in article 6 to decide on the challenge, which decision shall be final; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings.

Article 14. *Failure or impossibility to act*

If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the Court specified in article 6 to decide on the termination of the mandate, which decision shall be final.

Article 14 *bis*

The fact that, in cases under article 13 (2) or 14, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator does not imply acceptance of the validity of any ground referred to in article 12 (2) or 14.

Article 15. *Appointment of substitute arbitrator*

Where the mandate of an arbitrator terminates under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced, unless the parties agree otherwise.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. *Competence to rule on own jurisdiction*

(1) The arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence of validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and

void shall not entail *ipso jure* the invalidity of the arbitration clause.

(2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised promptly after the arbitral tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. In either case, a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside the arbitral award.

Article 18. Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide security for the costs of such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19. Determination of rules of procedure

(1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

(3) In either case, the parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 20. *Place of arbitration*

(1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal.

(2) Notwithstanding the provisions of paragraph (1) of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or the parties, or for inspection of goods, other property, or documents.

Article 21. *Commencement of arbitral proceedings*

Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date of which a request for that dispute to be referred to arbitration is received by the respondent.

Article 22. *Language*

(1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal.

(2) The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

Article 23. *Statements of claim and defence*

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his defence in respect of these particulars. The parties may annex to their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of

the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.

Article 24. *Hearings and written proceedings*

(1) Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings or whether the proceedings shall be conducted on the basis of documents and other materials.

(2) Notwithstanding the provisions of paragraph (1) of this article, if a party so requests, the arbitral tribunal may, at any appropriate state of the proceedings, hold hearings for the presentation of evidence or for oral argument.

(3) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for inspection purposes.

(4) All statements, documents or other information supplied to the arbitral tribunal by one party shall be communicated to the other party. Also any expert report or other document, on which the arbitral tribunal may rely in making its decision, shall be communicated to the parties.

Article 25. *Default of a party*

Unless otherwise agreed by the parties, if, without showing sufficient cause,

(a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral proceedings shall be terminated;

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations;

(c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. Expert appointed by arbitral tribunal

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
 - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
 - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to interrogate him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

- (1) In arbitral proceedings held in this State or under this Law, the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The request shall specify:
 - (a) the names and addresses of the parties and the arbitrators;
 - (b) the general nature of the claim and the relief sought;
 - (c) the evidence to be obtained, in particular,
 - (i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;
 - (ii) the description of any document to be produced or property to be inspected.
- (2) The court may, within its competence and according to its rules on taking evidence, execute the request either by taking the evidence itself or by ordering that the evidence be provided directly to the arbitral tribunal.

CHAPTER VI. MAKING OF AWARD AND
TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable

to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

Article 29. *Decision making by panel of arbitrators*

In arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made, unless otherwise agreed by the parties, by a majority of all its members. However, the parties or the arbitral tribunal may authorize a presiding arbitrator to decide questions of procedure.

Article 30. *Settlement*

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. *Form and contents of award*

(1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under article 30.

(3) The award shall state its date and the place of arbitration

as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

(4) After the award is made, a copy signed by the arbitrators in accordance with paragraph (1) of this article shall be delivered to each party.

Article 32. *Termination of proceedings*

(1) The arbitral proceedings are terminated by the final award or by agreement of the parties or by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) The arbitral tribunal

(a) shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) may issue an order of termination when the continuation of the proceedings for any other reason becomes unnecessary or inappropriate.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of articles 33 and 34 (4).

Article 33. *Correction and interpretation of awards and additional awards*

(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties, a party, with notice to the other party, may request the arbitral tribunal:

(a) to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) to give an interpretation of a specific point or part of the award.

The arbitral tribunal shall make the corrections or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in paragraph (1) (a) of this article on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice

to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal shall make the additional award within sixty days, if it considers the request to be justified.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award and to an additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34. Application for setting aside as exclusive recourse against arbitral award

(1) Recourse to a court against an arbitral award made [in the territory of this State] [under this Law] may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this article.

(2) An arbitral award may be set aside by the Court specified in article 6 only if

(a) the party making the application furnishes proof that:

(i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or

(ii) the party making the application was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of

this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the award or any decision contained therein is in conflict with the public policy of this State.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under article 33, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The Court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. *Recognition and enforcement*

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of this State, the party shall supply a duly certified translation thereof into such language.

(3) Filing, registration or deposit of an award with a court of the country where the award was made is not a pre-condition for its recognition or enforcement in this State.

Article 36. *Grounds for refusing recognition or enforcement*

(1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

(a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:

(i) the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(ii) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator(s) or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or

(b) if the court finds that:

(i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or

(ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

(2) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforce-

ment of the award, order the other party to provide appropriate security.