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Within the past decade, the United Nations Commission on International Trade Law (UNCITRAL) has developed a model arbitration law which is geared specifically for international commercial disputes. In June, 1985, the Commission finalized and formally adopted this model law.[1] In the coming months the UN Secretary-General will send the text to Governments, recommending that the model law become the basis for national laws which regulate international commercial arbitration.

UNCITRAL developed a model law applicable to international commercial arbitration in response to widespread problems arising from the great divergency in national laws which regulate this field. Domestic laws, to varying degrees, restrict the disputes which can be submitted to arbitration, the selection and appointment of arbitrators, as well as the operation of the arbitration proceedings. The supervision and control which national courts may exert on these proceedings can additionally be effected by domestic regulations. The uncertainties which thus are cast upon the parties in their efforts to develop a workable arbitration agreement highlight the reasons UNCITRAL has attempted to unify measures in this field.

The UNCITRAL model law approach, rather than looking to national law, which is generally geared toward domestic arbitration as opposed to international arbitration issues, emphasizes the will of the parties as the governing principle. The model law leaves the parties free to determine the composition of the arbitral tribunal, to select the rules to govern appointment and challenge procedures, and to choose the rules of law applicable to the substance of the dispute. This freedom, however, is limited by certain mandatory provisions

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[1] The final text of the UNCITRAL model law on International Commercial Arbitration is contained in the Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session, June 3–21, 1985, 40 U.N. GAOR Supp. (No. 17) at 82–94, U.N. Doc. A/40/17 (1985). (Unpublished; to be formally issued to governments in the coming months) [hereinafter cited as U.N. Doc. A/40/17]. The final text of the model law is included in the appendix, *infra*.

guaranteeing due process. It is also limited by the model's link with national law, particularly at the post-award stage, though also where the court may render assistance at specific points in the proceedings. The approach of the UNCITRAL model law, therefore, balances the role of the national legal system with the freedom and will of the parties.

UNCITRAL chose to use a model law structure because it is a flexible approach and it allows states to adopt easily the principles contained within the document. Initially, UNCITRAL considered preparing a protocol to supplement and clarify the 1958 New York Arbitration Convention,[2] but UNCITRAL dropped this approach in favor of a model uniform law to serve as the basis for national arbitration laws.[3] Through a model law, rather than a convention or protocol, the need for flexibility vis a vis domestic law is recognized. This approach makes the legal principles in the model more palatable to individual states, allowing these states either to adopt the law in its entirety or tailor it to fit the specific domestic legal system. A protocol to the 1958 New York Convention, on the other hand, would lack the flexibility inherent in the model law approach, decreasing the likelihood of widespread international acceptance.[4]

Within this framework, the UNCITRAL model law aims to provide for the harmonization and unification of the national laws regulating international commercial arbitration.[5]

I. SCOPE

The model law attempts to have a broad scope of application which is evidenced by its expansive definition of fundamental terms. As indicated in Article 1, the terms "international" and "commercial" are intended to be interpreted in a non-restrictive manner.[6] Thus, Article 1(3) defines an arbitration as "inter-

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[2] The New York Arbitration Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 30, 1958, 330 U.N.T.S., No. 4739. The scope of this convention is narrower than that of the UNCITRAL model law, limited in its title to the "Recognition and Enforcement of Foreign Arbitral Awards." *See generally* J. VAN DEN BERG, NEW YORK ARBITRATION CONVENTION OF 1958 (1981).

[3] *See* United Nations Commission on International Trade Law, Report of the Secretary-General, U.N. Doc. A/CN/127, at 1–3 (1977).

[4] *See, e.g.*, The European Uniform Law of 1966 in the European Convention on Arbitration, 1966 Europ. T.S. No. 56. This agreement was only signed by Austria and Belgium.

[5] *But see* A. Herrmann, THE INTERNATIONAL ARBITRATION CONGRESS IN LAUSANNE: DOUBTS OVER THE UNCITRAL MODEL LAW Business Law Brief 3, 3–4 (1984). The idea of the model law has not been unanimously accepted. Some commentators have argued that there is no need for a model law at all; it will only add to the present confusion engendered by the multiplicity of already existing bilateral and multilateral international arbitration agreements.

[6] For the evolution of the drafting of Article (1), see United Nations Commission on International Trade Law, Report of the Secretary-General on the Possible Features of a Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/207, para. 28–40 (1981) [hereinafter cited as U.N. Doc. A/CN.9/207]; United Nations Commission on International Trade Law, Report of the Working Group

national" not only when the parties have their places of business in different states,[7] but also when a portion of either party's business is performed in another state. This broad approach is additionally supplemented with further objective criteria to encompass more fully the broad field of non-domestic arbitration. If, therefore, either the site of arbitration, place of performance, or subject-matter of the dispute is in or closely connected to a foreign state, the model law will consider the dispute to be "international" in nature.

Paragraph 3(c) contains what can be termed an "opting-in" provision; the arbitration will be classed international when the parties have expressly agreed that it relates to more than one country. This catch-all provision further extends the scope of the model law to include, for example, disputes between parties of the same state when one party is controlled by a foreign corporation.

The term "commercial", within the model law, has a similarly broad definition. Based on the model law, any transaction regarding the sale or exchange of goods or services, banking, financing, insurance, joint venture, exploitation agreements is of a commercial nature.[8] The model law, however, intentionally refrains from developing an exhaustive list of the relationships that should be considered as commercial in nature and only attempts to illustrate the expansive meaning of the term.[9] The UNCITRAL model law, therefore, is designed to prevail over any domestic law limiting the scope of international commercial arbitration. This approach is in contrast with Article 1(3) of the 1958 New York Convention which limits the Convention's scope to only those relationships which the state's domestic law defines as commercial.

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on International Contract Practices on the Work of its Third Session, U.N. Doc. A/CN.9/216, para. 16–21 (1982) [hereinafter cited as U.N. Doc. A/CN.9/216]; United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of its Fourth Session, U.N. Doc. A/CN.9/232, para. 27–31 (1982) [hereinafter cited as U.N. Doc. A/CN.9/232]; United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of its Fifth Session, U.N. Doc. A/CN.9/233, para. 48–60 (1983) [hereinafter cited as U.N. Doc. A/CN.9/233]; United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of its Sixth Session, U.N. Doc. A/CN.9/245, para. 61–168, 173 (1983) [hereinafter cited as U.N. Doc. A/CN.9/245]; United Nations Commission on International Trade Law, Report of the Working Group on International Contract Practices on the Work of its Seventh Session, U.N. Doc. A/CN.9/246, para. 158–171 (1984) [hereinafter cited as U.N. Doc. A/CN.9/246]; United Nations Commission on International Trade Law, Report of the Secretary-General, Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration, U.N. Doc. A/CN.9/264, 6–14 (1985) [hereinafter cited as U.N. Doc. A/CN.9/264]; U.N. Doc. A/40/17, *supra* note 1, at para. 17–36.

[7] This basic criterion is drawn from the United Nations Convention on Contracts for the International Sale of Goods 1980, U.N. Doc. A/CONF 97/18, Annex 1.

[8] U.N. Doc. A/40/17, *supra* note 1, at Ch. 1 n.2 lists samples of those relationships which would be considered commercial in nature. *See* appendix.

[9] *See* U.N. Doc. A/CN.9/233, *supra* note 6, at para. 52–56; U.N. Doc. A/CN.9/264, *supra* note 6, at para. 16.

II. ARBITRATION AGREEMENT

Article 7 refers to the arbitration agreement itself, and discusses concepts relevant to the form, validity, and contents of the agreement.[10] Of special significance is the provision in paragraph (1) which accords recognition to both an agreement to arbitrate an existing dispute as well as an agreement to submit future disputes to arbitration.[11] This feature is of particular importance with respect to Latin American countries, and other States with systems founded in Spanish law, which at present do not give full effect to the latter type of agreement.[12] Because this clause is a common element of international arbitration practice, UNCITRAL considered its equal treatment under the model law a necessity.[13]

In efforts to unify disparate national requirements concerning the form of an arbitration agreement, Article 7(1) also provides for the equal recognition of an arbitration clause, whether it is contained in the contract itself or in a separate agreement. The model law imposes few requirements on the text of that agreement, and essentially gives the parties complete freedom to determine its contents. This freedom, however, is minimally restricted since the parties may submit to arbitration only those disputes which arise from a "defined legal relationship."[14]

Following in this unrestrictive approach, the model law contains a broad definition of what constitutes a "writing" needed to satisfy requirements that the arbitration agreement be in written form.[15] To remedy uncertainties raised by the 1958 New York Arbitration Convention's treatment on this issue,[16] Article 7(2) of the model law expands the definition of writing to include various forms of telecommunication. Furthermore, an explicit reference in the contract to a

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[10] For the evolution of the drafting of this article, *see* U.N. Doc. A/CN.9/216, *supra* note 6, at para. 22–24; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 38–46; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 62–68; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 180–182; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 19; U.N. Doc. A/CN.9/264, *supra* note 6 at 21–23; U.N. Doc. A/40/17, *supra* note 1, at para. 82–87.

[11] *Compromise-clause compromissoire.*

[12] *See* The Fifth Conference of Ministers of Justice of the Hispanic-Portuguese-American Countries, Resolution No. 5, 1981. The conference adopted a model arbitration law restricting the *clause compromissoire.* In addition to the Latin American countries, the member States are Spain, Portugal, and the Philippines.

[13] U.N. Doc. A/CN.9/207, *supra* note 6, at para. 42.

[14] Article 7(1), U.N. Doc. A/40/17, *supra* note 1, at 84.

[15] U.N. Doc. A/CN.9/232, *supra* note 6, at para. 43.

[16] *See generally* United Nations Commission on International Trade Law, Report of the Secretary-General on International Commercial Arbitration: The Application and Interpretation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958), U.N. Doc. A/CN.9/168 para. 19–26 (1979). The study notes problems with the definition of a writing employed in Article 11 of the 1958 New York Convention.

separate document[17] containing an arbitration clause is sufficient to satisfy the writing requirement.[18]

III. COMPOSITION OF THE ARBITRAL TRIBUNAL

The model law gives the parties extensive autonomy on issues pertaining to the composition of the arbitral tribunal. Articles 10 and 11[19] leave determination of the number and appointment of arbitrators to the parties' discretion. Failing agreement by the parties, the model law provides supplementary rules for the appointment. In this instance, the common system is employed whereby each party appoints an arbitrator and these two appointees in turn select the third. In the event of failure of these procedures, Articles 11(3) and (4) establish a "reserve mechanism" whereby any party may resort to the courts to secure the necessary appointment. The model law provides guidelines for the decision of the court as well.[20]

The challenge procedure in Article 13 follows the same "two-level" approach as the appointment procedures and allows the parties to set their own rules for challenging an arbitrator. If an agreement cannot be worked out, the model law sets out additional rules, designating the arbitral tribunal to decide the unresolved matter, with the court again acting as the "reserve mechanism."

This formula was adopted amidst controversy over whether resort to the courts should be permitted during the arbitral proceedings, or only after the final award is made. The former position could encourage dilatory tactics, while adoption of the latter could result in considerable waste of time and expense. Ultimately UNCITRAL incorporated the first option into the text, but added several features to reduce the risk of delaying tactics. Article 13(3) imposes time limitations on the challenging party's right to judicial recourse, and allows the arbitration proceedings to continue while that appeal is pending. In addition,

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[17] For example, this reference could be to a document containing general conditions or another contract.

[18] Some commentators, however, have noted potential problems with the vagueness inherent in the Article 7(2) provision, particularly where multi-party arbitration is involved, or arbitration based on bills of lading. *See generally UNCITRAL's Project for a Model Law on International Commercial Arbitration* (P. Sanders ed. 1984). The text is a compilation of the proceedings of the International Council for Commercial Arbitration (ICCA) Interim Meeting in Lausanne on the UNCITRAL model law, May 9–12, 1984 [hereinafter cited as Lausanne Conference Proceedings].

[19] For the evolution of the drafting of Articles 10 and 11, see U.N. Doc. A/CN.9/207, *supra* note 6, at para. 64–70; U.N. Doc. A/CN.9/216, *supra* note 6, at para. 46–48, 73–74; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 78–88; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 87–100; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 192–201; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 27–32; U.N. Doc. A/CN.9/264, *supra* note 6, at para. 26–29; U.N. Doc. A/40/17, *supra* note 1, at para. 100–111.

[20] UNCITRAL declined to include specifications on the eligibility or qualifications of an arbitrator, although Article 11 is intended to supersede national laws which restrict the appointment of foreign arbitrators. Some States, however, may hesitate to entrust such broad responsibilities to a foreigner. *See* Lausanne Conference Proceedings, *supra* note 18, at 108.

Article 13 makes it clear that parties can only challenge an arbitrator's appointment in circumstances where there are "justifiable doubts as to the arbitrator's impartiality and independence."[21] While this broad standard includes numerous impossible situations, it precludes reliance on specific grounds set forth by domestic laws.[22]

IV. JURISDICTION OF THE ARBITRAL TRIBUNAL

Article 16(1)[23] empowers the tribunal to rule on its own jurisdiction,[24] although Article 16(3) subjects this decision to ultimate court control.[25] The tribunal's competence to rule on its jurisdiction may be exercised on its own initiative and arbitrators are not required to wait until an objection is raised by a party.[26] Should an objection be raised promptly, paragraph (3) accords the arbitral tribunal discretion to rule on this plea, either as a preliminary question or in the award.

Paragraph (3) also outlines an objecting party's right to challenge the jurisdiction of the arbitral tribunal in a court of law. In defining the parameters of this right, the text adopted by UNCITRAL on June 21, 1985 provides for immediate resort to the court. This right, however, is restricted by the same time limitations imposed in Article 13(3) on challenge procedure. Furthermore, with an Article 13(3) challenge arbitration proceedings may continue pending a court decision on the jurisdiction question. This newly adopted provision represents a significant change from the original model law text which initially provided for court control only in setting aside proceedings. In the original text the arbitral tribunal's determination of jurisdiction could then only be contested

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[21] Article 12(2); U.N. Doc. A/40/17, *supra* note 1.

[22] One observer commented that although the model law outlines the general procedures and grounds for a challenge, it does not address what effect a successful challenge could have on prior proceedings and to what extent those proceedings would remain valid. *See* "Convegno dell'ICCA sul Progetto di Legge Modello dell'UNCITRAL sull'arbitrato Commerciale Internazionale, Losanna, 9–12 Maggio 1984," 24 *Rassegna dell'arbitrato* No. 1–2 (1984), at 38–39 [hereinafter cited as *Rassegna*].

[23] For the evolution of the drafting of this article see U.N. Doc. A/CN.9/216, *supra* note 6, at para. 81–83; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 146–157; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 58–65; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 49–52; U.N. Doc. A/CN.9/264, *supra* note 6, at 37–42; U.N. Doc. A/40/17, *supra* note 1, at para. 150–163.

[24] Article 16(1) may prove controversial, since many states do not at present grant such power to arbitrators. *But see* the European Convention of 1961, Article V, and the Washington Convention of 1965, Article 41, which grant the arbitral tribunal power to rule on its own jurisdiction. Similar provisions are also found in the UNCITRAL Arbitration Rules and the ICC Rules of Arbitration.

[25] Article 16 does not specify which law arbitrators should apply in determining jurisdiction. It has been suggested, however, that the applicable law would be the same as that which an assisting court, designated by the state through Article 6, would apply. *See* U.N. Doc. A/CN.9/264, *supra* note 6, at 38.

[26] *Cf.* UNCITRAL Arbitration Rules which limit the tribunal's competence to rule on its own jurisdiction to those cases where a party has raised a jurisdictional objection.

once the final award on the merits was made.[27] Both proposed provisions were controversial; the issue became one of balancing the conflicting policy considerations of avoiding waste of time and money, on the one hand, and preventing dilatory tactics on the other. UNCITRAL ultimately concluded that because of the need for certainty with the fundamental question of jurisdiction, the model law should provide for instant court control over an arbitral tribunal's ruling on the issue. The provision for court control in Article 16(3) was therefore aligned with that of Article 13(3).[28]

Finally, Article 16 codifies the "doctrine of separability" of the arbitration clause; the principle that the arbitration clause may be considered independent of other contract terms. Thus, a ruling by the arbitral tribunal that the contract is invalid does not *ipso jure* require the conclusion that the arbitration clause is also invalid.

V. CONDUCT OF ARBITRAL PROCEEDINGS

One commentator has termed Article 19 the "Magna Carta of Arbitral Procedure."[29] This article guarantees the parties complete autonomy in determining what procedural rules shall govern the arbitration. The parties may develop their own rules, employ those of an arbitration institution,[30] or follow the standard arbitration practice of a particular trade association. They may even choose to refer to the civil procedure law of a specific legal system. In the event the parties have not agreed on some specific procedural rules Article 19(2) empowers the arbitral tribunal to conduct the proceedings in the manner it deems appropriate. This includes the power to determine the admissibility, relevancy, materiality and weight of any evidence.

Within this liberal framework, a limited number of mandatory provisions have been included to safeguard due process. The most fundamental of these is Article 18, which requires that the parties be treated with equality, and that each party be given a full opportunity to present his case. Among other mandatory provisions securing the procedural rights of the parties are those specified in Article 24(1), the right to request a hearing, and Article 26, the right to appoint and to question an expert.

In the case of default by a party, Article 25 can be applied[31] when failure to participate in the proceedings is without a showing of "sufficient cause."[32] Where

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[27] U.N. Doc. A/CN.9/264, *supra* note 6, at 37–42.

[28] U.N. Doc. A/40/17, *supra* note 1, at 33.

[29] Herrmann, *The UNCITRAL Model Law–Its Background, Salient Features, and Purposes*, 1 ARB. INT'L 19 (1985).

[30] For example, parties may employ ICSID, ICC, or UNCITRAL Arbitration Rules.

[31] Article 25 is not mandatory; the parties may agree on other procedures to be applied in the case of default.

[32] It is for the arbitral tribunal to decide whether a party has shown, "sufficient cause" for his failure to act. U.N. Doc. A/40/17, *supra* note 1, at 89.

the respondent fails to communicate a statement of defense or fails to appear, the arbitral tribunal may not treat this inaction as an admission. The tribunal is empowered to continue the proceedings and make the award based on the relevant evidence. Many national laws do not presently recognize such *ex parte* awards, and thus if accepted Article 25 would add considerable uniformity to this field.

Under Article 20, the parties are free to agree on the place of arbitration. In the event they do not agree, the arbitral tribunal determines the site. Venue is particularly important because it provides a connection for the territorial applicability of the model law. It also establishes a link to a national legal system, which is necessary both at the post-award stage, and during arbitral proceedings, when model law provisions provide recourse to the national courts.

VI. APPLICABLE LAW

Article 28(1) provides the parties with full autonomy in choosing the substantive law applicable to the dispute.[33] Article 28(1) is very broad and states that the parties may choose to apply "rules of law," not merely the "law" of a given state. This reference to "rules of law" provides the parties with a wide range of options. It enables the parties, for example, to select laws from more than one legal system and apply them to different aspects of their relationship, or to choose rules embodied in an international convention, whether or not that convention is in force. This progressive[34] approach is intended to provide the parties of an international transaction with the flexibility to apply those laws which are most suitable for their specific case.[35]

If the parties have not determined which substantive rules of law shall apply, the arbitral tribunal is required to apply conflict of laws rules to determine the applicable law.[36] This more cautious approach is a significant step away from the freedom of choice allowed the parties under paragraph (1). It has been argued that there is no reason to deny the arbitrators the same freedom and flexibility accorded the parties.[37] The intention behind this more restrictive

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[33] For the evolution of the drafting of Article 28, see U.N. Doc. A/CN.9/207, *supra* note 6, at para. 90–91; U.N. Doc. A/CN.9/216, *supra* note 6, at para. 87; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 161; U.N. Doc A/CN.9/245, *supra* note 6, at para. 94–95; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 103; U.N. Doc. A/CN.9/264, *supra* note 6, at 61; U.N. Doc. A/40/17, *supra* note 1, at para. 232–239.

[34] This approach has only been undertaken in the Washington Convention of 1965, Article 42, and the international arbitration laws of France and Djibouti.

[35] *But see* U.N. Doc. A/40/17, *supra* note 1, at para. 233 for criticisms of this concept of "rules of law."

[36] *Id.* at 90, art. 28(2).

[37] *See, e.g., Rassegna, supra* note 22, at 51–52.

provision, however, is to provide the parties with some degree of certainty as to what law the arbitral tribunal will apply to the substance of their dispute.[38]

Alternatively, under 28(3) the parties can agree that the arbitral tribunal shall decide the dispute *ex aequo et bono* or as *amiable compositor*. The model law does not define this type of arbitration, which in practice is implemented in various forms. It is supposed that the parties must establish the necessary rules or guidelines.[39]

VII. SUPERVISION AND ASSISTANCE OF THE COURTS

In recent years a few States have taken limited steps to minimize judicial interference in the arbitral process, and to allow the process wider autonomy.[40] The model law follows in this approach and attempts to establish a clearly defined and balanced regime governing court supervision and control over the arbitration. Article 5 provides that "in matters governed by [the model] law, no court shall intervene except where so provided in this law."[41] The UNCITRAL approach therefore allows for a "collaboration" between the courts and the arbitration, making intervention dependent upon the will of the parties or arbitrators. It is intended that court intervention be accepted only when necessary for the success of the arbitration.[42] Objections have been voiced that this provision may be unacceptably restrictive of judicial authority.[43] In adopting the model law, however, each state may choose to extend the scope of judicial intervention in accordance with that state's practice. The purpose of Article 5 is merely to attain certainty on the scope of court intervention and assistance by requiring the adopting State to list each instance where judicial authority may be exercised over the arbitration. Through this device, the parties and arbitrators may be spared unwelcome surprises.

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[38] *See* U.N. Doc. A/CN.9/264, *supra* note 6, at 62.

[39] Dr. Herrmann offers the following general guidelines: "The arbitral tribunal would seek a fair and equitable solution, bound merely by those norms which ensure the international public policy of a given State, i.e., *ordre public*, relating to international transactions." Herrmann, *supra* note 29, at 23. Further, in all cases, under Article 28(4) the arbitral tribunal must apply the conditions of the contract and consider trade usages.

[40] *E.g.*, Arbitration Act of 1979. For a discussion on the trend towards "a philosophy of increasing laissez-faire," allowing the arbitration to operate free from court intervention see, Lew, *The Unification of the Law on International Commercial Arbitration*, 5 BUS. L. REV. 147 (1984); Kerr, *Arbitration and the Courts: The UNCITRAL Model Law*, 34 INT'L & COMP. L.Q. 4–6 (1985).

[41] For the evolution of the drafting of Article 5, see U.N. Doc. A/CN.9/233, *supra* note 6, at para. 71–73; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 184; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 185–188; U.N. Doc. A/CN.9/264, *supra* note 6, at 18; U.N. Doc. A/40/17, *supra* note 1, at para. 59–65.

[42] *See generally* Kerr, *supra* note 40, at 2, for a discussion on the need for court assistance in arbitral proceedings, and for the disadvantages in allowing the court wide and varied powers to intervene.

[43] *See Rassegna*, *supra* note 22, at 34; U.N. Doc. A/40/17, *supra* note 1, at 13–14.

As a counterpart to Article 5, Article 6 compels the enacting state to designate a specific court or other authority, to perform the functions of arbitration assistance and supervision set out in the model law.[44] The intention of Article 6 is to provide the parties with additional certainty, and to prevent any conflict of court competence. The state may choose to entrust a certain category or number of courts with these functions and is not limited to using a single court. By specifying an "other authority" the article also envisages that a chamber of commerce or arbitral institution may be deemed competent to perform these functions.[45]

Articles 8 and 9 pertain to the relationship between the arbitration agreement and court intervention. When a party to an arbitration agreement initiates litigation, Article 8 obligates the court, upon request, to refer the dispute to arbitration unless it finds the agreement "null and void, inoperative or incapable of being performed."[46] UNCITRAL modeled Article 8 after Article II(3) of the 1958 New York Convention, although it included several additional elements.[47] First, the model law imposes a time restriction: the opposing party must request the court to decline jurisdiction prior to or with his first statement on the substance of the dispute. Should the party fail to invoke the arbitration agreement within the specified time, he is precluded from raising it as a defense in the ensuing court proceedings. Second, even if a jurisdictional issue is pending before a court, Article 8 paragraph (2) provides that the arbitration may be commenced or continued.

It is important to note that Article 8 would require courts of the adopting State to refer all valid agreements to arbitration, and not just those agreements where the adopting State is also the forum State. If widely accepted, this provision would constitute a significant step toward global recognition of international commercial arbitration agreements.

Article 9 makes it clear that a request for interim measures of protection by a court is compatible with the arbitration agreement.[48] UNCITRAL recognized

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[44] For the evolution of the drafting of Article 6, see U.N. Doc. A/CN.9/232, *supra* note 6, at para. 89–98; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 190–191; U.N. Doc. A/CN.9/246, *supra* note 6, at 189–190; U.N. Doc. A/CN.9/264, *supra* note 6, at 20; U.N. Doc. A/40–17, *supra* note 1, at para. 66–71.

[45] U.N. Doc. A/40/17, *supra* note 1, at 15.

[46] *Id.*, at 84 art. 8. (*see* appendix).

[47] For the evolution of the drafting of Article 8, see U.N. Doc. A/CN.9/207, *supra* note 6, at para. 59–61; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 49 -51, 146; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 74, 81; U.N. Doc. A/CN.9/245, *supra* note 6, at 66–69; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 20–23; U.N. Doc. A/CN.9/264, *supra* note 6, at 23–24; U.N. Doc. A/40/17, *supra* note 1, at para. 89–94.

[48] For the evolution of Article 9, see U.N. Doc. A/CN.9/207, *supra* note 6, at para. 77–78; U.N. Doc. A/CN.9/216, *supra* note 6, at para. 39; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 52–56; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 74–81; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 188–189; U.N.

that interim protection may often be necessary to secure the efficacy and success of the arbitration, and that the arbitration agreement should not operate to exclude court jurisdiction, nor should a party's request for such court action be construed as a waiver of that agreement. Article 9 however does not specify which interim measures are available. It only states that courts may employ those measures which are appropriate under national law, or are compatible with the agreement. The envisioned range of compatible measures includes pre-award attachments for the protection of the subject-matter or the evidence and extend to the protection of trade secrets and proprietary information.[49]

Article 17 gives the arbitral tribunal a concurrent power to order interim measures of protection, although the range of such measures is more limited than those provided for under Article 9. The text requires that the interim measure pertain to the subject-matter of the dispute, and the measure may only be directed to a party. Additionally, the arbitral tribunal lacks power to enforce these orders. As a result compliance may require assistance of the courts, assuming the national procedural law gives the court the authority to act.[50]

In addition to allowing court assistance in the context of interim measures of protection, the model law also recognizes the occasional need for judicial assistance in the taking of evidence. Since most national laws do not provide the arbitral tribunal with powers of compulsion, Article 27 provides that the tribunal or a party, with the tribunal's approval may resort to the court at this stage of the proceedings.

VIII. RECOURSE AGAINST AWARD AND RECOGNITION AND ENFORCEMENT OF AWARD

At the post-award stage, most existing national laws provide numerous means and grounds for recourse against the award, means which vary widely from State to State. The model law takes an entirely different tactic and recognizes only one means of challenging the award.[51] Article 34 requires the challenging party to submit to the court an "application for setting aside."[52] Through this

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Doc. A/CN.9/246, *supra* note 6, at para. 24–26; U.N. Doc. A/CN.9/264, *supra* note 6, at 25; U.N. Doc. A/40/17, *supra* note 1 at, para. 96–97.

[49] U.N. Doc. A/40/17, *supra* note 1, at para. 96.

[50] Earlier versions of Article 17 provided for court executory assistance, in an attempt to help the tribunal gather evidence. Drafters, however, did not adopt this factor in the final version of Article 17 since the role of courts in this context is governed by state procedural law, and wide acceptance of such a provision was therefore unlikely. *See* U.N. Doc. A/CN.9/245, *supra* note 6, at para. 72.

[51] No definition of "award" is included in the model law.

[52] For an evolution of the drafting of Article 34, see U.N. Doc. A/CN.9/232, *supra* note 6, at para. 15–22; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 179–195; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 146–155; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 127–139; U.N. Doc. A/CN.9/264, *supra* note 6, at 71–74; U.N. Doc. A/40/17, *supra* note 1, at para. 274–307.

setting aside procedure, the objecting party maintains the option of proceeding directly against the award, rather than having to wait and oppose the award when the successful party brings an enforcement action. This means of direct recourse is available to the objecting party only for a relatively short period of time. An application for setting aside must be made within three months of receipt of the award.[53]

Article 34 paragraph (2) sets forth the limited number of grounds upon which an award may be set aside. Paragraph (2) was modeled after Article 5 of the 1958 New York Convention, and the grounds listed are similar to those which may be invoked under Article 36 as a defense to recognition and enforcement of the award. By adopting similar grounds for Articles 34 and 36, the model law attempts to avoid the problem of "split validity" which enables an award to be found invalid in the state of origin but valid and enforceable abroad.[54]

The overall objective of Articles 35 and 36, which deal with the recognition and enforcement of awards, is to attain uniform treatment of all international commercial arbitration awards, irrespective of their country of origin.[55] Article 35 states that all arbitral awards shall be recognized as binding, and establishes uniform conditions for the recognition and enforcement of awards, wherever made.[56] Article 36 specifies the exclusive criteria on which recognition and enforcement may be refused. These criteria are to apply to all international commercial arbitration awards, whether domestic or foreign.[57]

In developing these award provisions, UNCITRAL noted that some states may not be willing to follow such an unrestrictive approach. States adopting the model law, may therefore choose to specify that Articles 35 and 36 will be applied on some basis of reciprocity.[58]

IX. CONCLUSION

The model law, through its three-part framework guaranteeing parties freedom to agree on fundamental aspects of the arbitration, providing a limited

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[53] Article 34(3); U.N. Doc. A/40/17, *supra* note 1, at 92.

[54] *But see* G. Herrmann, The Role of the Courts Under the UNCITRAL Model Law Script 14–17 (unpublished manuscript) that notes and responds to criticisms which have been voiced regarding this parallelism of grounds.

[55] *See* U.N. Doc. A/40/17, *supra* note 1, at 61.

[56] Article 35 leaves procedural details of recognition and enforcement to be determined by national laws, since there is no practical need for uniformity in this area.

[57] For the evolution of the drafting of Article 35, see U.N. Doc. A/CN.9/216, *supra* note 6, at para. 109; U.N. Doc. A/CN.9/232, *supra* note 6, at para. 19–20; U.N. Doc. A/CN.9/233, *supra* note 6, at para. 133–177; U.N. Doc. A/CN.9/245, *supra* note 6, at para. 138–145; U.N. Doc. A/CN.9/246, *supra* note 6, at para. 149–155; U.N. Doc. A/CN.9/264, *supra* note 6, at 78–79; U.N. Doc. A/40/17, *supra* note 1, at para. 320–324.

[58] U.N. Doc. A/40/17, *supra* note 1, at 61.

number of mandatory rules, and establishing supplementary, non-mandatory rules, establishes a structure for unifying and harmonizing disparate national laws on international commercial arbitration. Although the model law addresses many important intervention and commercial arbitration issues, it nevertheless leaves some questions and issues unresolved.[59] Potential problems have already been noted because of inadequate and imprecise definitions of fundamental terms. As one observer commented, through its open-ended approach the model laws fails to define fundamental terms, leaving the text in a state where " . . . it can be given almost any meaning in some of its critical passages, and has no meaning in others."[60] In effect, this could leave important provisions in the model law subject to disparate interpretations, rendering it unacceptable in a number of national legal systems. Despite these potential problems, the model law has initially been well-received by Government representatives and international arbitration organizations, and the majority of comments emanating from conferences and symposia on the subject have been favorable. As one Supreme Court Justice advised his audience, "[W]e should accept the concept of the model law if our trading partners do so, and we should then use it as a basis for a comprehensive and explicit restatement of our law, which is at present far too diffuse and inexplicit."[61]

APPENDIX

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985)

CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application**

(1) This law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.

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[59] For example, should the arbitral tribunal be empowered to adapt a contract for changed circumstances, or empowered to fill gaps therein, how should the concept of sovereign immunity apply under the model law? Furthermore, as questioned by Dr. Herrmann, should the law of the forum state govern the important issue of arbitrability, as Article 34(2)(b)(i) provides, or should this matter be governed by the law of the main contract? G. Herrmann, *supra* note 54, at 13.

[60] A. Herrmann, *supra* note 5, at 13.

[61] The Right Honorable Sir Michael Kerr, Lord Justice of Appeal of the Supreme Court of Judicature (U.K.). Kerr, *supra* note 40, at 16.

* 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, whether contractual or not. Relationships of a commercial

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(3) 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 parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

(4) For the purposes of paragraph (3) of this article:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

(5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

Article 2. *Definitions and rules of interpretation*

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

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

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this law, except article 28, 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;

(e) 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;

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nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; 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.

(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. *Receipt of written communications*

(1) Unless otherwise agreed by the parties:

(a) 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; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

(2) The provisions of this article do not apply to communications in court proceedings.

Article 4. *Waiver of right to object*

A party who knows 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 undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived his right to object.

Article 5. *Extent of court intervention*

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

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

The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2) shall be performed by . . . [Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]

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 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, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. 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 an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

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

It is not incompatible with an 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 of receipt of a request to do so from 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 or other authority 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 or other authority 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) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

any party may request the court or other authority 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 or other authority specified in article 6 shall be subject to no appeal. The court or other authority, 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 doubt 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, or if he does not possess qualifications agreed to by the parties. 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 after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12(2), 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 thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. *Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, 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 or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
(2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

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.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. *Competence of arbitral tribunal to rule on its jurisdiction*

(1) the arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or 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 the submission of 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 as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. 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. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17. *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 appropriate security in connection with such measure.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. *Equal treatment of parties*

The parties shall be treated with equality and each party shall be given a full opportunity of presenting his case.

Article 19. *Determination of rules of procedure*

(1) Subject to the provision 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 admissability, relevance, materiality and weight of any evidence.

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 having regard to the circumstances of the case, including the convenience of the parties.

(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 on 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, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with 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.

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 for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

(2) The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purposes of inspection of goods, other property or documents.

(3) 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 evidentiary 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 tribunal shall terminate the proceedings;

(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 in itself 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 its 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 put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. *Court assistance in taking evidence*

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 court may execute the request within its competence and according to its rules on taking evidence.

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.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

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, questions of procedure may be decided by a presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

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 an order of the arbitral tribunal in accordance with paragraph (2) of this article.
(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:

(a) 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) the parties agree on the termination of the proceedings;
(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(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 award; additional award*
(1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction 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. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(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 or 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 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) a party to the arbitration agreement referred to in article 7 was 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 an arbitrator 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 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.***

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) a party to the arbitration agreement referred to in article 7 was 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 an arbitrator 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

*** The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.

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