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Report No 20

Arbitration

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LAW·COMMISSION

Report No 20

Arbitration

October 1991
Wellington, New Zealand

The Law Commission was established by the Law Commission Act 1985 to promote the systematic review, reform and development of the law of New Zealand. It is also to advise on ways in which the law can be made as understandable and accessible as practicable.

The Commissioners are:

Sir Kenneth Keith KBE—President

The Hon Mr Justice Wallace

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8 October 1991

Dear Minister

I am pleased to submit to you Report No 20 of the Law Commission, *Arbitration*.

The Commission recommends a new legislative framework for both domestic and international arbitration in New Zealand, a framework largely based on the Model Law on International Commercial Arbitration produced by the United Nations Commission on International Trade Law (UNCITRAL). Our recommendations include adaptations and elaborations of the Model Law designed to make it more suitable for domestic arbitration. The parties to international arbitrations can agree to apply those adaptations and elaborations to their arbitration.

The proposals give significant effect to the right of parties to commercial and similar contracts to choose their own method of resolving their disputes—their own tribunal, procedure and law. If arbitration operates effectively the disputes can be resolved more quickly, less formally, by a chosen expert and with savings in cost to the State as well as to the parties.

In recommending that New Zealand adopts the UNCITRAL Model Law for international commercial arbitration, the Law Commission is mindful that this step has already been taken by Australia and other countries with which we have extensive trade relations.

We commend the draft legislation contained in this Report for favourable consideration.

Yours sincerely

K J Keith
President

Hon D A M Graham MP
Minister of Justice
Parliament House
WELLINGTON

SUMMARY OF RECOMMENDATIONS

- 1 The principal recommendation is the introduction and enactment of a new Arbitration Act as proposed (Chapters I and VII).
- 2 The UNCITRAL Model Law should apply to all arbitrations in New Zealand whether commercial or not, and whether international or domestic (Chapters III and IV). Limited modifications to the text are desirable: the extent of and reasons for these are explained in Chapter VII.
- 3 There should be additional provisions presumptively applicable to domestic arbitrations. To maximise the consistency between the international and domestic regimes, parties to international arbitrations should be able to contract into the provisions of the domestic regime (Chapter IV).
- 4 A limited right of appeal in order to correct errors of law should be included in the new domestic regime (paras 93-97).
- 5 The court's powers of referral of a question or proceedings for an inquiry or report should be retained, but be added to the High Court and District Court Rules (Chapter IV). The Rules Committee should be invited to consider draft provisions modelled on the New South Wales Supreme Court Rules, Part 72. The development of new procedures in New South Wales for compulsory arbitration in civil proceedings should be kept under review (paras 108-111).
- 6 The new Act should continue to make provision for it to apply to disputes arising under other particular enactments if they so provide. When such enactments are being proposed or revised, an appropriate choice should be made between arbitration, the courts, tribunals and other methods of resolving disputes arising under them (paras 115-117).
- 7 The confidentiality of commercial litigation including that arising from arbitration proceedings should be examined at an early date (para 360).
- 8 The scope for mediation or conciliation to receive statutory recognition as an adjunct to arbitration should be kept under review (para 387).

I

Introduction:

Draft Arbitration Act

A NEW ARBITRATION ACT

1 In this Report the Law Commission recommends a new legislative framework for arbitration. That framework is largely based on the Model Law on International Commercial Arbitration adopted in June 1985 by the United Nations Commission on International Trade Law (UNCITRAL), and endorsed in December 1985 by a resolution of the General Assembly of the United Nations. The framework involves some modifications to the UNCITRAL Model Law and includes additional provisions applicable to domestic arbitrations, as contrasted with international arbitrations.

2 This Chapter sets out the draft of the proposed new Arbitration Act. It would replace the present Arbitration Act 1908 as amended and supplemented, especially by the Acts of 1933 and 1938, and the Arbitration (Foreign Agreements and Awards) Act 1982 (all reproduced in Appendix A). In most cases, the conduct of international arbitrations will be governed by Schedule 1 which is essentially the Model Law. Non-international ("domestic") arbitrations will generally be governed by Schedule 1 as supplemented and modified by Schedule 2. Domestic arbitral parties may opt out of those additional provisions of Schedule 2, and international arbitral parties may opt into them.

3 Arbitration law concerns a critical balance: the balance which is to be struck between the autonomy of the parties and the law of the land. On the one side of the balance is the agreement of the parties. The parties to a contract or to a dispute agree that their disputes are to be resolved by a tribunal which they establish themselves or to which they agree. The tribunal is to follow a procedure on which the parties may agree, and is to apply the law which they may state. The parties also, in general, pay for the arbitration. That is to say, the whole process rests on the parties' consent and is their creation. But not quite. For on the other side of the balance is the significant weight of the general law of the land. The very agreement that sets up the tribunal is an agreement under some system of law. It is national law, with national courts, which can be used to require a reluctant party to submit to arbitration, and to enforce any resulting award. The law may state the procedure to be followed. The law might, as well, also be used to control the arbitrator. To what extent should the courts, enforcing their perception of the law and of procedural fairness, be free to override the decision of the arbitral tribunal and to upset the conclusions reached through that consensual process? To what extent should judicial supervision be able to undermine the advantages of informality, privacy, expedition, expertise and cost which arise from the agreement? And what matters cannot be made the subject of arbitration, that is of the parties' private ordering?

4 In settling answers to those questions and making the recommendations set out in this Report, the Law Commission has been able to draw on very valuable sources of information, advice and comment. The process has led the Commission to revise opinions it expressed on a number of important matters in its discussion paper on *Arbitration* published in 1988. The detail of the changes illustrates once again the importance and value of the consultative processes which the Law Commission endeavours to apply in its work. We are greatly indebted to those individuals and organisations who responded to the discussion paper, and in many cases to several subsequent requests for advice on drafts or on particular points. In short, we have had excellent assistance from those prominent in the arbitration world in New Zealand and elsewhere. A summary of our consultative activities, including a list of those who helped us, appears as Appendix B. Our work on arbitration also owes an immeasurable debt to those who have reflected and written on the topic of arbitration and its reform in other parts of the world—expert practitioners, commentators, and those involved in law reform

agencies. An indication of the scope of the relevant literature on arbitration may be found in the selected bibliography in Appendix C.

5 That process and the related review and rewriting of arbitration statutes in many parts of the world (including Australia) have led the Law Commission to a clear conviction that a new statutory regime for arbitration is highly desirable now. The increasing demands on the courts in New Zealand, as elsewhere, have generated wider interest in the full range of methods of resolving disputes. A number of those methods—conciliation or mediation, for example—require an agreed decision by the parties and not necessarily a statutory framework. Arbitration by contrast does require such a framework if it is to produce efficient procedures and final decisions. One specific development highlights the need for a re-examination of the present legislation. That development is the discernible trend in favour of enhanced party autonomy and, as a consequence, restricted judicial review in arbitration legislation in various countries. The trend has been acknowledged and reflected by the Court of Appeal in *CBI New Zealand Ltd v Badger Chiyoda* [1989] 2 NZLR 669. That trend involves a change from an earlier more intrusive approach. Such a changing philosophy will very likely be relevant to the interpretation and application of a new arbitration statute reflecting it. There is the more general consideration that the present New Zealand legislation is essentially that enacted in the United Kingdom in 1889 and 1934. That law has been substantially amended and supplemented in the United Kingdom and has been replaced in other parts of the Commonwealth in which it was earlier copied. As we indicate later, much of the new legislation in the Commonwealth and elsewhere is based on the UNCITRAL Model Law.

6 Apart from recommending the enactment of a new Arbitration Act, the Law Commission makes the following related recommendations:

- the new procedures in New South Wales for compulsory arbitration in civil proceedings should be kept under review (para 111);
- new court rules should be adopted enabling the courts to refer questions for inquiry and report (paras 108–111);
- all proposals for the inclusion of arbitration as a means of resolving disputes arising under new or revised statutes should include consideration of the full range of appropriate means of resolving the disputes (para 117);

- the confidentiality of commercial litigation including that arising out of arbitral processes should be examined at an early date (para 360);
- the scope for mediation or conciliation to receive statutory recognition as an adjunct to arbitration should be kept under review (para 387).

THE STRUCTURE OF THE REPORT

7 Chapter II of this Report discusses the nature of arbitration and highlights the principal issues to be resolved in this report. It draws heavily on the 1988 discussion paper.

8 Chapter III discusses the origins and nature of the UNCITRAL Model Law, and its international reception to date. As the preparatory materials relating to the Model Law will be of assistance on some points of interpretation of our proposed statute and may not be readily accessible, we have reproduced in Appendix D

- the Analytical Commentary on a draft of the Model Law prepared by the UNCITRAL Secretariat, and
- the report of UNCITRAL on the debate and adoption of the Model Law at its 18th Session in June 1985.

9 Chapter IV reviews the use of the UNCITRAL Model Law in domestic arbitrations. It includes a discussion of the existence and scope of any right of appeal to a court against an arbitral award, perhaps the most contentious issue in arbitration reform.

10 Chapter V discusses two areas where legislation provides for “arbitration” even in the absence of an agreement between the parties: references by a court; and references under an enactment. Appendix E lists statutes which provide for the arbitration of disputes arising out of them.

11 Chapter VI indicates how the proposed legislation will give effect to the various treaties relating to arbitration to which New Zealand is party. The treaties concern the binding effect of arbitration agreements, the recognition and enforcement of arbitral awards, and the arbitration of investment disputes between States and foreign investors.

12 Chapter VII sets out the provisions of our draft Act with a commentary on each: the sections of the Act itself; the articles of the First

Schedule (essentially the Model Law); the clauses of the Second Schedule (supplementary provisions principally for domestic arbitration); and the amendments to other enactments in the Fourth Schedule. The table in Appendix F relates the proposed statute to the existing legislation.

THE TEXT OF THE RECOMMENDED DRAFT ACT

13 The text of the new draft Act, which incorporates the Law Commission's recommendations for arbitration law reform, follows:

DRAFT ARBITRATION ACT 199-

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- 1 Purposes
- 2 Entry into force
- 3 Crown to be bound
- 4 Definitions
- 5 Interpretation
- 6 Rules governing arbitration
- 7 Arbitration under other enactments
- 8 Arbitrability of disputes
- 9 Consumer arbitration agreements
- 10 Powers of arbitral tribunal in deciding disputes
- 11 Liability of arbitrators
- 12 Certificates concerning parties to the Conventions
- 13 Repeals and amendments
- 14 Transitional provisions

SCHEDULE 1—RULES GOVERNING ARBITRATION GENERALLY

I General Provisions

- 1 Scope of application
- 2 Definitions and rules of interpretation
- 3 Receipt of written communications
- 4 Waiver of right to object
- 5 Extent of court intervention
- 6 Court or other authority for certain functions of arbitration assistance and supervision

II Arbitration Agreement

- 7 Form of arbitration agreement
- 8 Arbitration agreement and substantive claim before court
- 9 Arbitration agreement and interim measures by court

III Composition of Arbitral Tribunal

- 10 Number of arbitrators
- 11 Appointment of arbitrators
- 12 Grounds for challenge

- 13 Challenge procedure
- 14 Failure or impossibility to act
- 15 Appointment of substitute arbitrator

IV Jurisdiction of Arbitral Tribunal

- 16 Competence of arbitral tribunal to rule on its jurisdiction
- 17 Power of arbitral tribunal to order interim measures

V Conduct of Arbitral Proceedings

- 18 Equal treatment of parties
- 19 Determination of rules of procedure
- 20 Place of arbitration
- 21 Commencement of arbitral proceedings
- 22 Language
- 23 Statements of claim and defence
- 24 Hearings and written proceedings
- 25 Default of party
- 26 Expert appointed by arbitral tribunal
- 27 Court assistance in taking evidence

VI Making of Award and Termination of Proceedings

- 28 Rules applicable to substance of dispute
- 29 Decision-making by panel of arbitrators
- 30 Settlement
- 31 Form and contents of award
- 32 Termination of proceedings
- 33 Correction and interpretation of award; additional award

VII Recourse Against Award

- 34 Application for setting aside as exclusive recourse against arbitral award

VIII Recognition and Enforcement of Awards

- 35 Recognition and enforcement
- 36 Grounds for refusing recognition or enforcement

SCHEDULE 2—ADDITIONAL OPTIONAL RULES GOVERNING ARBITRATION

- 1 Default appointment of arbitrators

- 2 Consolidation of arbitral proceedings
- 3 Powers relating to conduct of arbitral proceedings
- 4 Determination of preliminary point of law by court
- 5 Appeals on questions of law
- 6 Costs and expenses of an arbitration

SCHEDULE 3—TREATIES RELATING TO ARBITRATION

- 1 Protocol on Arbitration Clauses (1923)
- 2 Convention on the Execution of Foreign Arbitral Awards (1927)
- 3 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)

SCHEDULE 4—AMENDMENTS TO OTHER ENACTMENTS [included in Chapter VII]

ARBITRATION ACT 199-

Assented to on []
Comes into force on []

The Parliament of New Zealand enacts the Arbitration Act 199-.

1 Purposes

The purposes of this Act are

- (a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes;
- (b) to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985;
- (c) to promote consistency between the international and domestic arbitral regimes in New Zealand;
- (d) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards;
- (e) to facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
- (f) by so doing, to give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in Schedule 3).

2 Entry into force

This Act comes into force on -- 199-.

3 Crown to be bound

This Act binds the Crown.

4 Definitions

In this Act

arbitral tribunal means a sole arbitrator or a panel of arbitrators;

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

arbitration agreement means 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;

award means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award;

party means a party to an arbitration agreement, or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

5 Interpretation

The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law referred to in section 1(b) and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law.

6 Rules governing arbitration

(1) If the place of arbitration is in New Zealand, the arbitration is governed

- (a) by the provisions of Schedule 1, and
- (b) by those provisions of Schedule 2 (if any) which apply to that arbitration under subsection (2).

(2) A provision of Schedule 2 applies

- (a) to an arbitration referred to in subsection (1) which
 - (i) is an international arbitration as defined in article 1(3) of Schedule 1, or

(ii) is covered by the provisions of the Protocol on Arbitration Clauses (1923) or the Convention on the Execution of Foreign Arbitral Awards (1927), or both, only if the parties so agree, and

(b) to every other arbitration referred to in subsection (1), unless the parties agree otherwise.

(3) If the place of arbitration is not in New Zealand, or is still to be agreed or determined, that arbitration is governed by the provisions of articles 8, 9, 11(6), 35 and 36 of Schedule 1, so far as those provisions are applicable in the circumstances.

7 Arbitration under other enactments

(1) Nothing in section 6 affects any other enactment providing that any arbitration is governed, in whole or in part, by provisions other than those of Schedule 1 and, to the extent that they would otherwise apply, those of Schedule 2.

(2) No agreement of the parties under section 6(2) shall be of any effect if it is inconsistent with any enactment referred to in subsection (1).

(3) For the purposes of applying the provisions of Schedule 1 and Schedule 2 (so far as those provisions are applicable) to the arbitration of any question required by any other enactment to be determined by arbitration, those provisions shall be read as if

- (a) that other enactment were an arbitration agreement,
- (b) the arbitration were under an arbitration agreement, and
- (c) the parties to the dispute were parties to an arbitration agreement,

subject, however, to the provisions of that enactment.

8 Arbitrability of disputes

(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

9 Consumer arbitration agreements

(1) Where

- (a) a contract contains an arbitration agreement, and
- (b) a person enters into that contract as a consumer,

the arbitration agreement is enforceable against the consumer only if the consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it.

(2) For the purposes of this section, a person enters into a contract as a consumer if

- (a) that person enters into the contract otherwise than in trade, and
- (b) the other party to the contract enters into that contract in trade.

(3) Nothing in subsection (1) applies to a contract that is not governed by the law of New Zealand.

(4) For the purposes of article 4 of Schedule 1, subsection (1) shall be treated as if it were a requirement of the arbitration agreement.

(5) Unless a party who is a consumer has, under article 4 of Schedule 1, waived the right to object to non-compliance with subsection (1), an arbitration agreement which is not enforceable by reason of non-compliance with subsection (1) shall be treated as inoperative for the purposes of article 8(1) of Schedule 1 and as not valid under the law of New Zealand for the purposes of articles 16(1), 34(2)(a)(i) and 36(1)(a)(i) of Schedule 1.

10 Powers of arbitral tribunal in deciding disputes

(1) Without prejudice to the application of article 28 of Schedule 1, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings,

- (a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court;
- (b) may award interest on the whole or any part of any sum which
 - (i) is awarded to any party, for the whole or any part of the period up to the date of the award, or
 - (ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.

(2) Nothing in this section affects the application of section 8 or of article 34(2)(b) or article 36(1)(b) of Schedule 1.

11 Liability of arbitrators

An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for fraud in respect of anything done or omitted to be done in that capacity.

12 Certificates concerning parties to the Conventions

A certificate purporting to be signed by the Secretary of External Relations and Trade, or a Deputy Secretary of External Relations and Trade, that, at the time specified in the certificate, any country had signed and ratified or had denounced, or had taken any other treaty action under, the Protocol on Arbitration Clauses (1923) or the Convention on the Execution of Foreign Arbitral Awards (1927) in respect of the territory specified in the certificate is presumptive evidence of the facts stated.

13 Repeals and amendments

- (1) The Arbitration Act 1908 and the Arbitration (Foreign Agreements and Awards) Act 1982 are repealed.
- (2) The Acts specified in Schedule 4 are amended in the manner indicated in that Schedule.

14 Transitional provisions

(1) Subject to subsection (2)

- (a) this Act applies to every arbitration agreement, whether made before or after the commencement of this Act, and to every arbitration under such an agreement, and**
- (b) a reference in an arbitration agreement to the Arbitration Act 1908, or to a provision of that Act, shall be construed as a reference to this Act, or to any corresponding provision of this Act.**

(2) Where the arbitral proceedings were commenced before the commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been passed.

(3) For the purposes of this section, arbitral proceedings are to be taken as having commenced on the date of the receipt by the respondent of a request for the dispute to be referred to arbitration, or, where the parties have agreed that any other date is to be taken as the date of commencement of the arbitral proceedings, then on that date.

(4) This Act applies to every arbitral award, whether made before or after the commencement of this Act.

SCHEDULE 1

RULES GOVERNING ARBITRATION GENERALLY

Sections 6, 7

[The provisions of this Schedule correspond, for the most part, to the provisions of the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, and approved by the General Assembly of the United Nations on 11 December 1985 (General Assembly Resolution 40/72). Certain changes have been made to amend or supplement the provisions of the Model Law in its application to New Zealand. The original numbering of the articles of the Model Law and their paragraphs has been retained.]

CHAPTER I—GENERAL PROVISIONS

1 Scope of application

- (1) This Schedule applies as provided in sections 6 and 7.
- (2) *(deleted)*
- (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 any commercial or other 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)
 - (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 that party's habitual residence.

2 Definitions and rules of interpretation

For the purposes of this Schedule

- (a) **arbitration, arbitration agreement, arbitral tribunal and award** have the meanings assigned to those terms by section 4;
- (b) **court** means a body or organ of the judicial system of a State;
- (c) where a provision of this Schedule, 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;
- (d) where a provision of this Schedule 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) where a provision of this Schedule, 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;
- (f) article headings are for reference purposes only and are not to be used for purposes of interpretation.

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 the addressee's 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.

4 Waiver of right to object

A party who knows that any provision of this Schedule 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 that party's 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 the right to object.

5 Extent of court intervention

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

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

Any court having jurisdiction may perform any function conferred on a court by these articles, except where the article provides that the function shall be performed by a specified court or courts.

CHAPTER II—ARBITRATION AGREEMENT

7 Form of arbitration agreement

(1) An arbitration agreement may be made orally or in writing. Subject to section 9, an arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) A reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

8 Arbitration agreement and substantive claim before court

(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

(2) Where proceedings referred to in paragraph (1) have been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

9 Arbitration agreement and interim measures by court

(1) 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.

(2) For the purposes of paragraph (1), the High Court or a District Court shall have the same power as it has for the purposes of proceedings before that court to make

- (a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or
- (b) an order securing the amount in dispute; or
- (c) an order appointing a receiver; or
- (d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) an interim injunction or other interim order.

(3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or

any finding of fact made in the course of the ruling as conclusive for the purposes of the application.

CHAPTER III—COMPOSITION OF ARBITRAL TRIBUNAL

10 Number of arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination,
 - (a) in the case of international arbitration the number of arbitrators shall be three;
 - (b) in every other case the number of arbitrators shall be one.

11 Appointment of arbitrators

- (1) No person shall be precluded by reason of that person's 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).
- (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 High Court;
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed, upon request of a party, by the High Court.
- (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 High Court 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 paragraphs (3), (4) or (6) to the High Court shall be subject to no appeal. 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, in the case of an international arbitration, take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

- (6) In an international arbitration where
- (a) the place of the arbitration has not been agreed, or
 - (b) the parties have agreed to an arbitration with two, or four or more, arbitrators,

and no procedure for the appointment of arbitrators has been agreed upon, the High Court may, upon request of a party, appoint the requisite number of arbitrators, having due regard to the matters referred to in paragraph (5).

12 Grounds for challenge

(1) A person who is approached in connection with that person's possible appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to that person's impartiality or independence. An arbitrator, from the time of 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 that arbitrator.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to that arbitrator's impartiality or independence, or if that arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator

appointed by that party, or in whose appointment that party has participated, only for reasons of which that party becomes aware after the appointment has been made.

13 Challenge procedure

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

(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 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) is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the High Court 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.

14 Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* (in law or in fact) unable to perform the functions of that office or for other reasons fails to act without undue delay, that arbitrator's mandate terminates on withdrawal from office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of those grounds, any party may request the High Court 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 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).

15 Appointment of substitute arbitrator

- (1) Where the mandate of an arbitrator terminates under article 13 or 14 or because of withdrawal from office for any other reason or because of the revocation of that arbitrator's mandate by agreement of the parties or in any other case of termination of that mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.
- (2) Unless otherwise agreed by the parties,
 - (a) where the sole or the presiding arbitrator is replaced, any hearings previously held shall be repeated, and
 - (b) where an arbitrator, other than a sole or a presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.
- (3) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this article is not invalid solely because there has been a change in the composition of the arbitral tribunal.

CHAPTER IV—JURISDICTION OF ARBITRAL TRIBUNAL

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* (necessarily) 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 that party 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) either as a preliminary question or in an award on the merits. If the arbitral tribunal rules on such a plea as a preliminary question, any party may request, within thirty days after having received notice of that ruling, the High Court 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.

17 Power of arbitral tribunal to order interim measures

(1) 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.

(2) Unless otherwise agreed by the parties, articles 35 and 36 apply to orders made by an arbitral tribunal under article 17 as if a reference in those articles to an award were a reference to such an order.

CHAPTER V—CONDUCT OF ARBITRAL PROCEEDINGS

18 Equal treatment of parties

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

19 Determination of rules of procedure

(1) Subject to the provisions of this Schedule, 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 Schedule, 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) Every witness giving evidence, and every counsel or expert or other person appearing before an arbitral tribunal, shall have the same privileges and immunities as witnesses and counsel in proceedings before a court.

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), 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.

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.

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, 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.

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 the

claim, the points at issue and the relief or remedy sought, and the respondent shall state the 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 the 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.

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.

(4) At any hearing or any meeting of the arbitral tribunal of which notice is required to be given under paragraph (2), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.

25 Default of a party

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

- (a) the claimant fails to communicate the statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate the 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;
- (d) the claimant fails to prosecute the claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.

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 the expert's 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 a written or oral report, participate in a hearing where the parties have the opportunity to put questions and to present expert witnesses in order to testify on the points at issue.

27 Court assistance in taking evidence

- (1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the court assistance in taking evidence.

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

(2) For the purposes of paragraph (1),

- (a) the High Court may make an order of subpoena or a District Court may issue a witness summons to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents;
- (b) the High Court or a District Court may order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the court or any other person for the use of the arbitral tribunal;
- (c) the High Court or a District Court shall have, for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for
 - (i) the discovery of documents and interrogatories;
 - (ii) the issue of a commission or request for the taking of evidence out of the jurisdiction;
 - (iii) the detention, preservation or inspection of any property or thing which is in issue in the arbitral proceedings and authorizing for any of those purposes any person to enter upon any land or building in the possession of a party, or authorising any sample to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

CHAPTER VI—MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

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* (according to considerations of general justice and fairness) only if the parties have expressly authorised it to do so.

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

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 authorised by the parties or all members of the arbitral tribunal.

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.

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) shall be delivered to each party.

(5) Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt.

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).

(2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when

- (a) the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on the respondent's 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).

(4) Unless otherwise agreed by the parties, the death of a party does not terminate the arbitral proceedings or the authority of the arbitral tribunal.

(5) Paragraph (4) does not affect any rule of law or enactment under which the death of a person extinguishes a cause of action.

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) 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 paragraphs (1) or (3).

(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

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).

(2) An arbitral award may be set aside by the High Court only if

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

- (i) a party to the arbitration agreement 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 on that question, under the law of New Zealand; 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 that party's 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 Schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Schedule; or
- (b) the High Court finds that
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
 - (ii) the award is in conflict with the public policy of New Zealand.

(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. This paragraph does not apply to an application for setting aside on the ground that the award was induced or affected by fraud or corruption.

(4) The High 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.

(5) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is declared that an award is in conflict with the public policy of New Zealand if

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

CHAPTER VIII—RECOGNITION AND ENFORCEMENT OF AWARDS

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 High Court, shall be enforced by entry as a judgment in terms of the award, or by action, 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, and, if recorded in writing, the original arbitration agreement or a duly certified copy. If the award or agreement is not made in the English language, the party shall supply a duly certified translation into the English language.

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 court where recognition or enforcement is sought proof that
 - (i) a party to the arbitration agreement 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 on that question, 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 that party's 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 New Zealand; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of New Zealand.

(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) 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.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii), it is declared that an award is contrary to the public policy of New Zealand if

- (a) the making of the award was induced or affected by fraud or corruption; or
- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

SCHEDULE 2

ADDITIONAL OPTIONAL RULES GOVERNING ARBITRATION

Sections 6, 7

1 Default appointment of arbitrators

(1) For the purposes of article 11 of Schedule 1, the parties shall be taken as having agreed on the procedure for appointing the arbitrator or arbitrators set out in subclauses (2) to (5), unless the parties agree otherwise.

(2) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator.

(3) In an arbitration with a sole arbitrator, the parties shall agree on the person to be appointed as arbitrator.

(4) Where, under paragraph (2) or paragraph (3), or any other 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, by written communication delivered to every such party, arbitrator or third party, specify the details of that person's default and propose that, if that default is not remedied within the period specified in the communication (being not less than 7 days after the date on which the communication is received by all of the persons to whom it is delivered), a person named in the communication shall be appointed to such vacant office of arbitrator as is specified in the communication, or the arbitral tribunal shall consist only of the person or persons who have already been appointed to the office of arbitrator.

(5) If the default specified in the communication is not remedied within the period specified in the communication,

- (a) the proposal made in the communication shall take effect as part of the arbitration agreement on the day after the expiration of that period; and

- (b) the arbitration agreement shall be read with all necessary modifications accordingly.

2 Consolidation of arbitral proceedings

(1) This subclause applies to arbitral proceedings all of which have the same arbitral tribunal:

- (a) the arbitral tribunal may, on the application of at least one party in each of the arbitral proceedings, order
 - (i) those proceedings to be consolidated on such terms as the arbitral tribunal thinks just;
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any other of them;
- (b) if an application has been made to the arbitral tribunal under paragraph (a), and the arbitral tribunal refuses or fails to make an order under that paragraph, the High Court may, on application by a party in any of the proceedings, make any such order as could have been made by the arbitral tribunal.

(2) This subclause applies to arbitral proceedings not all of which have the same arbitral tribunal:

- (a) the arbitral tribunal for any one of the arbitral proceedings may, on the application of a party in the proceedings, provisionally order
 - (i) the proceedings to be consolidated with other arbitral proceedings on such terms as the arbitral tribunal thinks just;
 - (ii) the proceedings to be heard at the same time as other arbitral proceedings, or one immediately after the other; or
 - (iii) any of those proceedings to be stayed until after the determination of any other of them;
- (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitral proceedings concerned;

- (c) the arbitral tribunals may communicate with each other for the purpose of conferring on the desirability of making orders under this subclause and of deciding on the terms of any such order;
 - (d) if a provisional order is made for at least one of the arbitral proceedings concerned, but the arbitral tribunal for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the High Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subclause;
 - (e) if inconsistent provisional orders are made for the arbitral proceedings, the High Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
- (3) When arbitral proceedings are to be consolidated under subclause (2), the arbitral tribunal for the consolidated proceedings shall be that agreed on for the purpose by all the parties to the individual proceedings, but, failing such an agreement, the High Court may appoint an arbitral tribunal for the consolidated proceedings.
- (4) An order or a provisional order may not be made under this clause unless it appears
- (a) that some common question of law or fact arises in all of the arbitral proceedings; or
 - (b) that the rights to relief claimed in all of the proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
 - (c) that for some other reason it is desirable to make the order or provisional order.
- (5) Any proceedings before an arbitral tribunal for the purposes of this clause shall be treated as part of the arbitral proceedings concerned.
- (6) Arbitral proceedings may be commenced or continued, although an application to consolidate them is pending under subclause (1) or (2) and although a provisional order has been made in relation to them under subclause (2).

(7) Subclauses (1) and (2) apply in relation to arbitral proceedings whether or not all or any of the parties are common to some or all of the proceedings.

(8) There shall be no appeal from any decision of the High Court under this clause.

(9) Nothing in this clause prevents the parties to two or more arbitral proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

3 Powers relating to conduct of arbitral proceedings

(1) For the purposes of article 19 of Schedule 1, and unless the parties agree otherwise, the parties shall be taken as having agreed that the powers conferred upon the arbitral tribunal include the power to

- (a) adopt inquisitorial processes;
- (b) draw on its own knowledge and expertise;
- (c) order the provision of further particulars in a statement of claim or statement of defence;
- (d) order the giving of security for costs;
- (e) fix and amend time limits within which various steps in the arbitral proceedings must be completed;
- (f) order the discovery and production of documents or materials within the possession or power of a party;
- (g) order the answering of interrogatories;
- (h) order that any evidence be given orally or by affidavit or otherwise;
- (i) order that any evidence be given on oath or affirmation;
- (j) order any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently; and
- (k) make an interim, interlocutory or partial award.

(2) Notwithstanding anything in article 5 of Schedule 1, the arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the court assistance in the exercise of any power conferred on the arbitral tribunal under subclause (1).

(3) If a request is made under subclause (2), the High Court or a District Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of any thing which the arbitral tribunal is empowered to order under subclause (1) as it would have in civil proceedings before that court.

4 Determination of preliminary point of law by court

(1) Notwithstanding anything in article 5 of Schedule 1, on an application to the High Court by any party

- (a) with the consent of the arbitral tribunal, or
- (b) with the consent of every other party,

the High Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The High Court shall not entertain an application under subclause (1)(a) with respect to any question of law unless it is satisfied that the determination of the question of law concerned

- (a) might produce substantial savings in costs to the parties, and
- (b) might, having regard to all the circumstances, substantially affect the rights of one or more of the parties.

(3) With the leave of the High Court, any party may, within one month from the date of any determination of the High Court under this clause or within such further time as that Court may allow, appeal from that determination to the Court of Appeal.

(4) If the High Court refuses to grant leave to appeal under subclause (3), the Court of Appeal may grant special leave to appeal.

5 Appeals on questions of law

(1) Notwithstanding anything in articles 5 or 34 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award

- (a) if the parties have so agreed before the making of that award; or
- (b) with the consent of every other party given after the making of that award; or

(c) with the leave of the High Court.

(2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.

(3) The High Court may grant leave under subclause (1)(c) on such conditions as it sees fit.

(4) On the determination of an appeal under this clause, the High Court may, by order,

(a) confirm, vary or set aside the award; or

(b) remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration or, where a new arbitral tribunal has been appointed, to that arbitral tribunal for consideration,

and where the award is remitted under paragraph (b) the arbitral tribunal shall, unless the order otherwise directs, make the award not later than three months after the date of the order.

(5) With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave or from any determination of the High Court under this clause.

(6) If the High Court refuses to grant leave to appeal under subclause (5), the Court of Appeal may grant special leave to appeal.

(7) Where the award of an arbitral tribunal is varied on an appeal under this clause, the award as varied shall have effect (except for the purposes of this clause) as if it were the award of the arbitral tribunal; and the party relying on the award or applying for its enforcement under article 35(2) of Schedule 1 shall supply the duly authenticated original order of the High Court varying the award or a duly certified copy.

(8) Article 34(3) and (4) of Schedule 1 apply to an appeal under this clause as they do to an application for the setting aside of an award under that article.

(9) For the purposes of article 36 of Schedule 1,

- (a) an appeal under this clause shall be treated as an application for the setting aside of an award; and
- (b) an award which has been remitted by the High Court under subclause 4(b) to the original or a new arbitral tribunal shall be treated as an award which has been suspended.

6 Costs and expenses of an arbitration

(1) Unless the parties agree otherwise,

- (a) the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of Schedule 1, or any additional award under article 33(3) of Schedule 1, or
- (b) in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,

- (a) if a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and
- (b) the fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court, may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where

(a) an arbitral tribunal refuses to deliver its award before the payment of its fees and expenses, and

(b) an application has been made under subclause (3),

the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.

(5) An application may not be made under subclause (3) after three months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

SCHEDULE 3

TREATIES RELATING TO ARBITRATION

Protocol on Arbitration Clauses

Opened for signature at Geneva on 24 September 1923

The undersigned, being duly authorised, declare that they accept, on behalf of the countries which they represent, the following provisions:

1 Each of the Contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Contracting State reserves the right to limit the obligation mentioned above to contracts which are considered as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other Contracting States may be so informed.

2 The arbitral procedure, including the constitution of the arbitral tribunal, shall be governed by the will of the parties and by the law of the country in whose territory the arbitration takes place.

The Contracting States agree to facilitate all steps in the procedure which require to be taken in their own territories, in accordance with the provisions of their law governing arbitral procedure applicable to existing differences.

3 Each Contracting State undertakes to ensure the execution by its authorities and in accordance with the provisions of its national laws of arbitral awards made in its own territory under the preceding articles.

4 The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article 1 applies and including an arbitration agreement, whether referring to present or future differences, which is valid in virtue of the said

article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators.

Such reference shall not prejudice the competence of the judicial tribunals in case the agreement or the arbitration cannot proceed or becomes inoperative.

5 The present protocol, which shall remain open for signature by all States, shall be ratified. The ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who shall notify such deposit to all the signatory States.

6 The present protocol shall come into force as soon as two ratifications have been deposited. Thereafter it will take effect, in the case of each Contracting State, one month after the notification by the Secretary-General of the deposit of its ratification.

7 The present protocol may be denounced by any Contracting State on giving one year's notice. Denunciation shall be effected by a notification addressed to the Secretary-General of the League, who will immediately transmit copies of such notification to all the other signatory States and inform them of the date on which it was received. The denunciation shall take effect one year after the date on which it was notified to the Secretary-General, and shall operate only in respect of the notifying State.

8 The Contracting States may declare that their acceptance of the present protocol does not include any or all of the under-mentioned territories—that is to say, their colonies, overseas possessions or territories, protectorates, or the territories over which they exercise a mandate.

The said States may subsequently adhere separately on behalf of any territory thus excluded. The Secretary-General of the League of Nations shall be informed as soon as possible of such adhesions. He shall notify such adhesions to all signatory States. They will take effect one month after the notification by the Secretary-General to all signatory States.

The Contracting States may also denounce the protocol separately on behalf of any of the territories referred to above. Article 7 applies to such denunciation.

Convention on the Execution of Foreign Arbitral Awards

Opened for signature at Geneva on 26 September 1927

Article 1

In the territories of any High Contracting Party to which the present convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called "a submission to arbitration") covered by the Protocol on Arbitration Clauses, opened at Geneva on September 24th, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall, further, be necessary—

- (a) that the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto:
- (b) that the subject matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon:
- (c) that the award has been made by the arbitral tribunal provided for in the submission to arbitration, or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure:
- (d) that the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appel or pourvoi en cassation (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending:
- (e) that the recognition or enforcement of the award is not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon.

Article 2

Even if the conditions laid down in Article 1 hereof are fulfilled, recognition and enforcement of the award shall be refused if the Court is satisfied—

- (a) that the award has been annulled in the country in which it was made:
- (b) that the party against whom it is sought to use the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case; or that, being under a legal incapacity, he was not properly represented:
- (c) that the award does not deal with the differences contemplated by or falling within the terms of the submission to arbitration or that it contains decisions on matters beyond the scope of the submission to arbitration.

If the award has not covered all the questions submitted to the arbitral tribunal, the competent authority of the country, where recognition or enforcement of the award is sought can, if it think fit, postpone such recognition or enforcement or grant it subject to such guarantee as that authority may decide.

Article 3

If the party against whom the award has been made proves that, under the law governing the arbitration procedure, there is a ground, other than the grounds referred to in Article 1(a) and (c), and Article 2(b) and (c), entitling him to contest the validity of the award in a Court of law, the Court may, if it thinks fit, either refuse recognition or enforcement of the award or adjourn the consideration thereof, giving such party a reasonable time within which to have the award annulled by the competent tribunal.

Article 4

The party relying upon an award or claiming its enforcement must supply, in particular:

(1) the original award or a copy thereof duly authenticated, according to the requirements of the law of the country in which it was made;

(2) documentary or other evidence to prove that the award has become final, in the sense defined in Article 1(d), in the country in which it was made;

(3) when necessary, documentary or other evidence to prove that the conditions laid down in Article 1, paragraph 1 and paragraph 2(a) and (c), have been fulfilled.

A translation of the award and of the other documents mentioned in this article into the official language of the country where the award is sought to be relied upon may be demanded. Such translation must be certified correct by a diplomatic or consular agent of the country to which the party who seeks to rely upon the award belongs or by a sworn translator of the country where the award is sought to be relied upon.

Article 5

The provisions of the above articles shall not deprive any interested party of the right of availing himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

Article 6

The present convention applies only to arbitral awards made after the coming into force of the Protocol on the Arbitration Clauses, opened at Geneva on September 24th, 1923.

Article 7

The present convention, which will remain open to the signature of all the signatories of the Protocol of 1923 on Arbitration Clauses, shall be ratified.

It may be ratified only on behalf of those members of the League of Nations and non-member States on whose behalf the Protocol of 1923 shall have been ratified.

Ratifications shall be deposited as soon as possible with the Secretary-General of the League of Nations, who will notify such deposit to all the signatories.

Article 8

The present convention shall come into force three months after it shall have been ratified on behalf of two High Contracting Parties. Thereafter, it shall take effect, in the case of each High Contracting Party, three months after the deposit of the ratification on its behalf with the Secretary-General of the League of Nations.

Article 9

The present convention may be denounced on behalf of any member of the League or non-member State. Denunciation shall be notified in writing to the Secretary-General of the League of Nations, who will immediately send a copy thereof, certified to be in conformity with the notification to all the other Contracting Parties at the same time informing them of the date on which he received it.

The denunciation shall come into force only in respect of the High Contracting Party which shall have notified it, and one year after such notification shall have reached the Secretary-General of the League of Nations.

The denunciation of the Protocol on Arbitration Clauses shall entail, ipso facto, the denunciation of the present convention.

Article 10

The present convention does not apply to the colonies, protectorates, or territories under suzerainty or mandate of any High Contracting Party unless they are specially mentioned.

The application of this convention to one or more of such colonies, protectorates, or territories to which the Protocol on Arbitration

Clauses, opened at Geneva on September 24th, 1923, applies, can be effected at any time by means of a declaration addressed to the Secretary-General of the League of Nations by one of the High Contracting Parties.

Such declaration shall take effect three months after the deposit thereof.

The High Contracting Parties can at any time denounce the convention for all or any of the colonies, protectorates, or territories referred to above. Article 9 hereof applies to such denunciation.

Article 11

A certified copy of the present convention shall be transmitted by the Secretary-General of the League of Nations to every member of the League of Nations and to every non-member State which signs the same.

Convention on the Recognition and Enforcement of Foreign Arbitral Awards

Adopted at New York by the United Nations Conference on International Commercial Arbitration on 10 June 1958

Article I

1 This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2 The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3 When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the national law of the State making such declarations.

Article II

1 Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2 The term “agreement in writing” shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3 The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Article III

Each Contracting State shall recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1 To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) the duly authenticated original award or a duly certified copy thereof;
- (b) the original agreement referred to in article II or a duly certified copy thereof.

2 If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1 Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) the parties to the agreement referred to in article II 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
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) the award deals with a difference 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 recognised and enforced; or

- (d) the composition of the arbitral authority 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
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2 Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1 The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the

extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2 The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1 This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialised agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2 This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1 This Convention shall be open for accession to all States referred to in article VIII.

2 Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1 Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2 At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3 With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reasons, to the consent of the Governments of such territories.

Article XI

In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) with respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;
- (b) with respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) a federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1 This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2 For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1 Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2 Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3 This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) signatures and ratifications in accordance with article VIII;

- (b) accessions in accordance with article IX:
- (c) declarations and notifications under articles I, X and XI;
- (d) the date upon which this Convention enters into force in accordance with article XII;
- (e) denunciations and notifications in accordance with article XIII.

Article XVI

1 This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2 The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

SCHEDULE 4
AMENDMENTS TO OTHER ENACTMENTS

[The text of this Schedule is reproduced in Chapter VII]

II

The Nature of Arbitration: the Reform Issues

THE NATURE OF ARBITRATION

14 The relevant meaning of “arbitration” in *The Oxford English Dictionary* is as follows:

The settlement of a dispute or question at issue by one to whom the conflicting parties agree to refer their claims in order to obtain an equitable decision.

15 The definition indicates the wider context in which arbitration law must be viewed: arbitration is just one of a number of methods by which disputes may be settled. History demonstrates that disputes continue to arise in human societies, and ours is no exception. Many disputes are resolved informally whether by explicit or tacit agreement, or by simply letting the point lapse. Sometimes there is scope for the assistance of a third party, but without the power to impose a settlement or decision on the parties in dispute—a mediator or conciliator. Other processes lead to a binding decision given by a third party—arbitration before an arbitrator, litigation before a judge, or decision by a statutory tribunal. The Law Commission has reported on *The Structure of the Courts* (1989 NZLC R 7) and legislation giving effect in part to its proposals has very recently been enacted. The Legislation Advisory Committee has reported on *Administrative Tribunals* (1989 Report 4) and Cabinet has endorsed the criteria it

proposed for the allocation of functions between courts, tribunals and the executive government.

16 There are similarities between arbitration and litigation. In both, the decision-maker must be impartial, treat the parties equally, and hear their respective cases—and its decision is binding on the parties. The difference is that arbitration is essentially a private matter based on agreement between the parties. This agreement extends not only to the use of arbitration, but also to the identity of the arbitrator, the procedure to be followed and the law to be applied. But arbitration and litigation are not entirely separate as the public powers of the courts are used to enforce both arbitration agreements and the awards which result.

17 At its best, arbitration can offer advantages to the disputing parties over litigation—the opportunity to choose an expert as decision-maker, the degree of informality and flexibility in terms of procedure, the reduction in time and expense (consequent on flexibility and expertise), and the choice of the governing principles and law, as well as privacy. Not all of these features will always be present. For instance some arbitrations are very formal and drawn out, with pleadings, discovery, oral evidence and full arguments, and involve, as well as the arbitrator, lawyers, expert witnesses and so on, all of whom have to be paid. Others are one-off affairs where a simple on-site inspection suffices for an immediate decision. Ultimately the difference between arbitration and litigation comes down to the factor of choice and the flexibility this allows for. There are, as well, public interests arising from this recognition of private ordering including the reduction of the pressure on the courts and cost savings.

18 Arbitration (outside the industrial context) is probably not well known nor understood in New Zealand. In part that may reflect favourably on our system of courts which, by international standards, operate speedily and efficiently. But it may also relate to the fact that lawyers—to whom many disputes are referred—have been educated and trained to think in terms of litigation when a dispute arises rather than some other form of resolving the dispute. Thus, although there are exceptions, arbitration of disputes in New Zealand has been and still is predominantly associated with the construction industry, sharemilking and valuation disputes. It may be that the law reform process and the related conferences and seminars of which this

Report is a part will achieve, among other things, a greater awareness of the availability of arbitration as an alternative to litigation.

19 Legal constraints on arbitration have undoubtedly reduced its popularity in some spheres of activity. For example s 8 of the Insurance Law Reform Act 1977 makes unenforceable against the insured an arbitration agreement in an insurance contract unless entered into after a dispute has arisen, and s 16 of the Disputes Tribunals Act 1988 prevents parties contracting out of the tribunals' jurisdiction through an arbitration clause. And it is well accepted that there are some matters—such as questions of personal status or disputes about illegal transactions—which may fall outside the permissible scope of private arbitration. The public institutions of the State must resolve such matters and others in which there is also a significant public interest.

20 The present modest use of arbitration may, as well, be at least partly the result of the now antiquated system of arbitration statutes we have inherited from England (and which has now been the subject of extensive revision there and replacement elsewhere). The statutory part of New Zealand's arbitration law consists principally of

- the Arbitration Act 1908 as substantially amended by the Arbitration Amendment Act 1938, comprising the main body of law regulating the arbitration of disputes in New Zealand (or subject to New Zealand law);
- the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 and the Arbitration (Foreign Agreements and Awards) Act 1982—implementing international conventions designed to facilitate the recognition and enforcement of foreign agreements and awards, the latter Act now virtually supersedes the former;
- the Arbitration (International Investment Disputes) Act 1979—implementing the Washington or ICSID Convention which establishes mechanisms for the resolution of investment disputes between states and foreign nationals.

21 In addition, the common law—distilled from judicial decisions—plays an important part both in interpreting the statutes and in filling the gaps left by them (and imposes a general standard of decision according to law). This is particularly the case in respect of

the 1908 and 1938 Acts which are only partially a codification of the general law on arbitration.

22 Most of the body of law relates to disputes submitted to arbitration under an agreement between the parties. A standard arbitration agreement is clause 12.3 of the *New Zealand Conditions of Contract for Building and Civil Engineering Construction* NZS 3910 1987, which provides as follows in respect of a dispute on which the Engineer is asked to give a decision under cl.12.2.2:

If either:

- (a) the Principal or the Contractor is dissatisfied with the Engineer's decision under 12.2.2, or
- (b) no decision is given by the Engineer within the time prescribed by 12.2.2

then either the Principal or the Contractor may by notice require that the matter in dispute be referred to arbitration.

(There are as well detailed provisions regarding notice, conciliation and appointment of arbitrators.) But an arbitration clause can be much simpler—as in one recent case over an agreement for the sale of shares:

In the event of a disagreement on the terms of this Agreement or the interpretation thereof such disagreement shall be referred to arbitration under the provisions of the Arbitration Act and its amendments.

The simplest of all arbitration agreements is the one-off—perhaps unwritten—agreement to submit a particular dispute which has arisen to a chosen arbitrator.

23 All of these forms have in common that they are consensual—subject to arguments which might be made about standard form contracts, and so on. As the *Oxford English Dictionary* definition indicates, an essential element of most definitions of arbitration is that it is the result of an agreement between the parties.

24 However, the 1908 Act also contains provisions for compulsory arbitration. First, the High Court is empowered to refer certain matters which arise in litigation to an arbitrator for a ruling which the Court may or may not accept (and similar provisions are found in the District Courts Act 1947, although there the consent of the parties is

necessary). Secondly, a number of statutes which provide that disputes arising in relation to the subject matter regulated by the statute are to be resolved in accordance with the Arbitration Act. Those two forms of compulsory arbitration are considered in Chapter V. There is obviously a question about the appropriateness of legislation which is directed to consensual arbitration being applied to such compulsory processes.

HISTORICAL DEVELOPMENTS

25 The word “arbitration” is derived from Old French as is “arbitrator” which in turn is interchangeable with “arbitrer”—derived from Latin and incorporating the notion of “one who goes to see”. This illustrates the antiquity of arbitration as a method of dispute resolution. A leading English Judge in referring to the history of commercial arbitration once observed that “the submission of disputes to independent adjudication is a form of ordering human society as old as society itself”: Lord Parker of Waddington, *The History and Development of Commercial Arbitration* (Magnes Press, Hebrew University 1959) 5. And according to David Walker, *The Oxford Companion to Law* (Oxford University Press 1980) 73:

The practice [of arbitration] was well known among the [ancient] Greeks and there is evidence for the existence of public arbitrators in many states. In Athens private arbitrators were frequently appointed to settle claims on an equitable basis and so relieve the pressure on the courts.

26 New Zealand’s present arbitration law can be traced back to the law merchant—the customs and law which developed in the Middle Ages in Western Europe to regulate the relationships between merchants. Over time, the major common law English court, the Court of King’s Bench, assimilated the rules of the law merchant with the common law of England. But this involved some extension of judicial control over other forms of commercial dispute resolution. Thus, for instance, the courts developed the rules that an agreement to oust the jurisdiction of the King’s Court was void, and awards could be set aside for error of law on their face.

27 The first English Arbitration Act was passed in 1698. The aim was to make the written submission of an existing dispute to a named arbitrator enforceable in the courts. (At common law, the courts

would not lend their powers to enforce an arbitration agreement before the making of the award unless they had made the reference under their own inherent jurisdiction.) However at the same time a “price” was exacted for this recognition, because the Act also emphasises the judicial scrutiny of arbitration, by providing that:

any arbitration or umpirage procured by corruption or undue means, shall be judged and esteemed void and of none effect, and accordingly be set aside by any court of law or equity

New Zealand inherited this Act in 1840.

28 The United Kingdom Common Law Procedure Act of 1854 attempted to make the arbitral process more effective (eg providing for the appointment of arbitrators by default, and for the stay of court proceedings to enforce an arbitration agreement). But at the same time it expanded the court’s powers of supervision and control, introducing a procedure whereby the court could direct the arbitral tribunal to state a preliminary point of law in the form of a “consultative case” for the opinion of the court. The courts held that this was not subject to any contrary agreement of the parties. The provisions of this Act were adopted in New Zealand by the General Assembly in the Supreme Court Practice and Procedure Amendment Act 1866.

29 The British arbitration legislation was consolidated in a single Act in 1889. The Act also made some important changes to the law—extending the term “submission” to mean all written agreements for arbitration (whether made before or after a dispute arose), implying a code of powers for the arbitral tribunal, and making the award itself summarily enforceable. It was at least partially a codification of the existing practice as well. In particular, it recognised the court’s power, previously based on its inherent jurisdiction, to set aside an award on the grounds of an arbitrator’s misconduct. But the codification was not complete, leaving untouched the court’s inherent power to set aside an award on the ground of error of law on its face—and the courts continued to exercise this in addition to their statutory powers. The United Kingdom Act formed the basis for the New Zealand Arbitration Act 1890, and the 1908 Act which consolidated the 1890 Act and the 1906 amendment which extended the earlier Act to cover valuation agreements.

30 Further amendments were made in the United Kingdom by the Arbitration Act 1934. In particular the court was empowered to

compel the tribunal to state its award in the form of a "special case". This, together with the power to compel a reference of a preliminary point of law, effectively enabled the courts to adjudicate on any point of law arising in the reference. The New Zealand Arbitration Amendment Act 1938 essentially reproduces the 1934 Act.

31 When the law was again consolidated in the United Kingdom Act of 1950 there were few substantive amendments. It was not until the 1979 Act that any substantial changes were made to reduce the court's powers. Among other things this Act replaced the consultative and special case procedures and the common law power to set aside an award for error of law, with somewhat more limited provisions for judicial determination of preliminary points of law and appeal on points of law, and, further, allowed most international parties to contract out of these provisions altogether.

32 Thus, before the 1979 Act, arbitration in the United Kingdom was very much subject to law and to the supervision of the courts. The autonomy of arbitration as a form of dispute resolution was recognised but only within clearly defined limits. The important legislative change made there has not yet been made in New Zealand, since our arbitration legislation remains based on the pre-1979 United Kingdom legislation.

REFORMING INFLUENCES

33 Those 1979 reforms were largely the result of the Report of the Commercial Court Committee, chaired by Mr Justice (now Lord) Donaldson, responding to the demands of international arbitration, in particular, and the difficulties and delays which had been experienced with the special case procedure. The reforms have been used as a model for reform of arbitration legislation in Hong Kong, Singapore and Bermuda, and to a lesser extent in British Columbia (for domestic arbitration). In New Zealand the Contracts and Commercial Law Reform Committee considered the possibility of similar reforms here but that project was deferred because of what were felt to be more pressing priorities.

34 The United Kingdom reforms have also provided the starting point for a comprehensive review of the Australian state legislation on arbitration (which previously tended to be along the same lines as

the current New Zealand legislation, based also on the English model). The review was carried out by the Standing Committee of Attorneys-General ("SCAG") drawing on work which had already been done in the various state law reform agencies. It resulted in a uniform Arbitration Bill in 1984 which has since been enacted in all Australian states except Queensland.

35 Of central importance is a third thrust of reform: the UNCITRAL Model Law on International Commercial Arbitration, adopted by UNCITRAL in June 1985, and by the United Nations General Assembly in December 1985. The aim of that Model Law is to unify national laws dealing with international commercial arbitration and to provide a "fair and equitable framework for the settlement of international commercial disputes". As we indicate later, the Model Law has already found favour in the common law world and also in civil law countries although it is regarded there as somewhat conservative, paras 65-77.

36 Moreover, the fact that the Model was intended primarily for international arbitration has not prevented it being adopted also for domestic arbitration (as in Canada, the 1986 Commercial Arbitration Act and new arbitration provisions in the Quebec Civil Code 1986, and see also Hong Kong, *FT Business Law Brief* August 1991). The SCAG Working Group has also proposed some modifications to the Commercial Arbitration Acts for domestic arbitration, partly in response to the Model Law.

COMPETING PRINCIPLES

37 In all these reforms, as in the law which preceded them, a primary tension exists between two principles:

- party autonomy—that is, that arbitration is founded on the agreement of the parties, and that agreement should be respected even though a court may have reservations about its terms, the process followed or the result achieved; and
- judicial scrutiny—that is, that courts have a public right and responsibility as organs of the state to ensure that the process of arbitration operates in all cases according to a uniform, if minimum, standard imposed by law.

38 This tension relates back to the conceptual basis for arbitration. There are various theories which have been put forward to explain arbitration—each with consequences for where the balance between party autonomy and judicial scrutiny should lie.

39 The “jurisdictional theory” holds that the real authority of arbitration derives not from the contract between the parties, but from the recognition accorded by the state. It argues that the court, representing the State and applying its law, is entitled to insist on certain conditions. These need not be limited to the parties’ immediate concerns—for instance there are the interests of the state in maintaining a fair and uniform system of law and order. The uniformity policy was, in particular, the rationale for court intervention in England for a long time. A high point was the statement made in relation to arbitration by Scrutton LJ in *Czarnikow v Roth Schmidt and Co* [1922] 2 KB 478, 488, that “There must be no *Alsatia* in England where the King’s writ does not run.” (The term “*Alsatia*” once referred to a part of London which had become known as a sanctuary for criminals.)

40 Subsequently, intervention has been justified in order to protect weaker contractual parties from the consequences of their contracts (see for instance the Donaldson Committee’s report and the insurance legislation referred to in para 19 above). Most recent arguments have been framed in terms of “procedural fairness”, as in the (English) Departmental Advisory Committee and Scottish Advisory Committee Consultative Document on the UNCITRAL Model Law. But these still presuppose that it is for the state to determine whether, and to what extent, parties should be able to order their private relations.

41 The “contractual theory” by contrast holds that arbitration, having its origins in and depending for its continuity solely on the agreement of the parties, is essentially contractual. (It does not however deny that there are some matters which State institutions must resolve, as matters beyond private ordering, para 19 above.) The argument here is that the parties voluntarily agree to submit their disputes to arbitration, to appoint the arbitrator and, most importantly, to accept the arbitral tribunal’s award as having binding force. Once authorised by the parties to make the award the tribunal acts as agent of the parties, and the award is binding on them as an agreement made on their behalf by their agent. Thus, according to this

theory, the authority of the parties is paramount in all respects, and the only essential function of the court is to enforce as unexecuted contracts those agreements and awards which are not honoured.

42 Both the interests of individual freedom and public order are relevant to the statement of the law and its operation: at the very least the parties must initiate the process by agreeing to go to arbitration in the first place, but on the other hand the law through the court system must decide what legitimacy to accord to the agreement and what effect to give to the award, since the tribunal cannot itself enforce the agreement or the award in the event that a dissatisfied party refuses to comply with one or the other. In such proceedings the court may be entitled to demand that some standards of conduct are met since the tribunal is carrying out an adjudicative function, and the parties would have expected compliance with such standards. But ultimately, if contract principles are to mean anything in this context, the freedom of the parties to select arbitration rather than court processes as the means for resolving their disputes must be respected.

43 This is a practical as well as conceptual necessity. If a court exercises too great a control over an arbitral proceeding and its outcome, the advantages of arbitration over litigation stand to be undermined: speed and economy are negated by the delays and costs of litigation brought in the course of the arbitration, after it is completed, or both; if the final decision is not left to the chosen arbitrator the choice and expertise of the adjudicator becomes of relatively less benefit; and the advantages of privacy are lost since the court proceedings are heard in public. Further, the flexibility of the arbitration process is of little value if the possibly rigid procedures of the court are superimposed. The balance is thus a delicate one and in modern times has tended to move in favour of effective arbitration, while at the same time attempting to ensure minimum standards of legality, fairness and due process.

DOMESTIC AND INTERNATIONAL ARBITRATION

44 The balance may be drawn differently for international arbitration which, broadly speaking, takes place in the context of more than one national system of law. It has been argued that international arbitration should be entirely “delocalised” from national systems of law on the basis that those systems are irrelevant to the parties’

concerns—and especially that the place of the arbitration, often chosen simply for geographical convenience, should not involve any particular legal consequences. The argument is the strongest for arbitrations involving States; indeed, as appears in Chapter VI, the Washington Convention setting up the International Centre for the Settlement of Investment Disputes effectively establishes a supra-national method for resolving disputes between States and foreign investors.

45 A variation on this argument holds that even though the national law of the place of the arbitration is relevant to international arbitrations it need not regulate them to a great degree. Parties resident or doing business in different states might prefer to detach the arbitral process, so far as practicable, from the courts and the law of the State with which the one or the other has a close connection. The limited relevance of the law of the place of arbitration suggests that that law should not apply strict controls, and also suggests that it would not have a great interest in doing so. There are, as well, significant practical advantages in having liberal treatment for international arbitration—since international parties tend to want flexibility in their dealings and may be more able to shop around, selecting the national forum whose law is most congenial to them (a fact noted in the Donaldson Committee's report). Moreover, since international parties can usually look after themselves (and are often supported in a practical sense by international arbitration institutions such as the International Chamber of Commerce), they may have less need of support from national laws and courts.

46 Parties to domestic arbitrations by contrast are likely to have a much closer connection with the law of the place of the arbitration. Their transaction is more likely to be subject to the substantive law of that place. They are not as likely to be able to select other places to arbitrate. The parties are perhaps less likely to be on an equal footing; we have already noted a consumer protection provision which recognises that (para 19 above). The State of the place of the arbitration may well also have a greater real interest in the subject matter of domestic arbitrations.

47 The differences just mentioned are however matters of degree and sometimes they will not be present. Accordingly it is not surprising that when the Model Law was adopted by UNCITRAL it was recognised that its principles could, with adaptation, be extended also

to domestic arbitration. There may be both theoretical and practical reasons for drawing the balance between private autonomy and public interest differently in the two categories, but this need not result in completely separate laws for international and domestic arbitration. Essentially there is no fundamental distinction between the two: both are based on contract, and both represent an attempt to find a form of dispute resolution which is distinct from adjudication and requires a certain degree of autonomy to be truly effective. In the domestic case as well, national law may be of little relevance to the parties' commercial interests. And domestic parties too may have some experience of arbitration. For the sake of conceptual coherence and consistency there are advantages in having the same arbitration law wherever possible. There are also significant practical reasons for not taking a dualistic approach, including the difficulty in defining precisely where the dividing line comes between "international" and "domestic" arbitrations.

48 Relevant international and national law had already by 1985 significantly assimilated domestic and international arbitrations. Thus the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (given effect by the 1982 Act) requires the recognition and enforcement (through the staying of competing court processes) of *all* arbitral agreements and the recognition and enforcement of all foreign arbitral awards whether the particular process is international or not. Those provisions are further considered in Chapter VI.

THE MAIN ISSUES

49 The first question is whether new arbitration legislation is required or desirable. The discussion in this chapter and Chapter I of the changes over the last 100 years since the first principal statute was enacted in New Zealand and over the last 50 since the last major amendment was made to it, suggest a clear positive answer. This point will be further developed in the next two chapters, concerned in turn with international and domestic arbitration.

50 The second issue concerns the model for a new statute. Should it be (1) the improved United Kingdom model (including amendments made by the Courts and Legal Services Act 1990 which have just become effective), (2) the UNCITRAL Model Law, with or without

different provisions for domestic arbitrations perhaps on the model of the Australian provisions, or (3) a new New Zealand statute drawing the best elements from the models on offer but adapted to local needs?

51 The choice among those models has to be affected by a number of matters—the great value of being able to draw on the exhaustive expert processes which have led to the various models, the related value of sharing in their developing practical interpretation and application, the importance of uniform or at least similar law for international transactions, and any special local considerations. One important practical matter is the comprehensive character of the model; does it cover the full range of the arbitral process from the establishment of the tribunal to the enforcement of the award? Or does it cover only parts?

52 A third question relates to the difference between domestic arbitrations and others. What distinctions if any should the law make between them? Should it scrutinise and support domestic arbitrations more closely, on the basis of the greater national interest in them or a greater need to protect one or other of the parties to those processes?

53 Fourth, what provision, if any, should the new legislation make for “arbitrations” which are not voluntary, but can be forced on the parties by a court or other body under statutory authority?

54 Finally and generally, how is the balance between party autonomy and the general law to be struck? If choices are to be made in the drafting and later in the application and interpretation of the law should the present emphasis on autonomy continue? That is a pervasive matter which arises throughout the Report.

III

The UNCITRAL Model Law: International Arbitration

55 The UNCITRAL Model Law provides the foundation for the new legislative framework for arbitration in New Zealand recommended in this Report. This chapter outlines the origins and nature of the Model Law and its international reception to date. The text of the Model Law in its unmodified form appears in Appendix D.

56 This chapter draws on a number of valuable discussions of the UNCITRAL Model Law, in particular, an article by Dr Gerold Herrmann, "The UNCITRAL Model Law—Its Background, Salient Features and Purposes" (1985) 1 *Arbitration International* 6, and the text by Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer, 1989).

57 As its name suggests, UNCITRAL was established (in 1966) by a resolution of the United Nations General Assembly as a specialised body dealing with international trade law. In December 1985 the General Assembly reaffirmed the mandate of UNCITRAL

as the core legal body within the United Nations system in the field of international trade law, to coordinate legal activities in this field in order to avoid duplication of effort and to promote

efficiency, consistency and coherence in the unification and harmonisation of international trade law.

58 The membership of UNCITRAL is made up of representatives of 36 of the member countries of the United Nations, although its business sessions are attended by observers from other countries and from various international organisations. The membership of UNCITRAL involves a regional distribution designed to ensure appropriate representation from Africa, Asia, Eastern Europe, Latin America, and Western Europe and others (including Australia, Canada, New Zealand and the USA). The work undertaken by UNCITRAL is usually advanced by working groups which present reports for consideration by annual sessions of the full UNCITRAL membership. The International Trade Law Branch of the United Nations Office of Legal Affairs serves as the Secretariat to UNCITRAL and its working groups.

59 The diversity of topics addressed by UNCITRAL may be illustrated by the fact that the 18th Session in June 1985, which adopted the Model Law, also had on its agenda such matters as a draft convention on international bills of exchange and international promissory notes, electronic funds transfers, the liability of operators of transport terminals, and international contracts for the construction of industrial works. Given the significance of dispute resolution in international trade, UNCITRAL has given particular attention to arbitration and related topics. The UNCITRAL Arbitration Rules were completed in 1976, the UNCITRAL Conciliation Rules were completed in 1980, and UNCITRAL has promoted acceptance of the 1958 (New York) Convention on Recognition and Enforcement of Foreign Arbitral Awards.

60 In June 1979 UNCITRAL asked the Secretariat to prepare a preliminary draft of a model law on arbitral procedure which would be restricted to international commercial arbitration and would take into account the provisions of the 1958 New York Convention and the UNCITRAL Arbitration Rules. In 1981 the 14th Session of UNCITRAL considered a report from the Secretariat and recorded

general support for the suggestion to proceed towards the drafting of a model law on international commercial arbitration. This was deemed desirable in view of the manifold problems encountered in present arbitration practice and of

the need for a legal framework for equitable and rational settlement procedures for disputes arising out of international trade transactions. It was also stated in support that a model law could be of great value to all States, irrespective of their legal or economic system.

The work of preparing the draft Model Law was entrusted to UNCITRAL's Working Group on International Contract Practices.

61 The Working Group produced five reports and in March 1984 adopted a draft text of a model law. That draft was considered at UNCITRAL's 17th Session in August 1984 which directed the Secretariat to transmit the draft text to all Governments and interested international organisations for comments, to prepare an analytical compilation of comments received, and to prepare a commentary on the draft text. The Analytical Commentary on the draft Model Law prepared by the UNCITRAL Secretariat in response to that direction is reproduced in Appendix D.

62 At its 18th Session in June 1985, UNCITRAL considered the Analytical Commentary and the text of the draft Model Law, adopted a final draft, and invited the General Assembly to recommend to States that they should consider the Model Law when enacting or revising their national laws. The report of the 18th Session on the Model Law was adopted by consensus, and is also reproduced in Appendix D.

63 In December 1985 the General Assembly adopted by consensus the following resolution (40/72) approving and promoting the Model Law.

The General Assembly

Recognising the value of arbitration as a method of settling disputes arising in international commercial relations,

Being convinced that the establishment of a model law on arbitration that is acceptable to States with different legal, social and economic systems contributes to the development of harmonious international economic relations,

Noting that the Model Law on International Commercial Arbitration was adopted by the United Nations Commission on

International Trade Law at its eighteenth session, after due deliberation and extensive consultation with arbitral institutions and individual experts on international commercial arbitration,

Being convinced that the Model Law, together with the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the Arbitration Rules of the United Nations Commission on International Trade Law recommended by the General Assembly in its resolution 31/98 of 15 December 1976, significantly contributes to the establishment of a unified legal framework for the fair and efficient settlement of disputes arising in international commercial relations,

1. **Requests** the Secretary-General to transmit the text of the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law, together with the *travaux préparatoires* from the eighteenth session of the Commission, to Governments and to arbitral institutions and other interested bodies, such as chambers of commerce;

2. **Recommends** that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

In a contemporaneous resolution (40/71) the General Assembly noted "with particular satisfaction the completion and adoption of the UNCITRAL Model Law on International Commercial Arbitration".

64 In his 1985 article (see para 56, above), Dr Gerold Herrmann, who was Secretary of the UNCITRAL Working Group on the Model Law and now heads the UNCITRAL Secretariat, discussed the objectives and principles of the Model Law under four headings:

- improvement and harmonisation of national laws to facilitate international arbitrations;
- guaranteed freedom of parties and, failing agreement, discretion of arbitrators;
- functioning and fairness of arbitral process; and
- "statutory help" by suppletive rules and some clarifications.

Those headings conveniently summarise the major features of the Model Law.

65 By early 1991 the UNCITRAL Model Law had been adopted for international commercial arbitration in the following jurisdictions:

Alberta (1986)	Newfoundland (1986)
Australia (1988)	Nigeria (1988)
British Columbia (1986)	North West Territories (1986)
Bulgaria (1988)	Nova Scotia (1986)
California (1988)	Ontario (1988)
Canada (1986)	Prince Edward Island (1986)
Cyprus (1987)	Quebec (1986)
Connecticut (1989)	Saskatchewan (1988)
Hong Kong (1989)	Scotland (1990)
Manitoba (1986)	Texas (1989)
New Brunswick (1986)	Yukon (1987)

Canada

66 The federal and provincial Canadian jurisdictions were among the earliest to adopt the UNCITRAL Model Law. This process has been the subject of a number of published discussions, including the papers edited by Professor Robert K Paterson and Bonita J Thompson QC in *UNCITRAL Arbitration Model in Canada: Canadian International Commercial Arbitration Legislation* (Carswell, 1987). In the preface to that publication, the editors refer to

the realisation, particularly in Western Canada, of the enormous economic growth in the newly industrialised economies of east Asia (Taiwan, South Korea, Hong Kong, Singapore and others) and of the opportunities this growth represents for Canadian trade and investment ... Once Canadian business began to take international trade and investment opportunities more seriously, not surprisingly its attitude changed toward the need for more effective means of resolving disputes arising in this international business environment. [vii]

67 The legislative reaction to those matters was made explicit in the preamble to the 1986 British Columbia statute which gave effect to the Model Law:

WHEREAS British Columbia, and in particular the City of Vancouver, is becoming an international financial and commercial centre;

AND WHEREAS disputes in international commercial agreements are often resolved by means of arbitration;
AND WHEREAS British Columbia has not previously enjoyed a hospitable legal environment for international commercial arbitrations;

AND WHEREAS there are divergent views in the international commercial and legal communities respecting the conduct of, and the degree and nature of judicial intervention in, international commercial arbitrations;

AND WHEREAS the United Nations Commission on International Trade Law has adopted the UNCITRAL Model Arbitration Law which reflects a consensus of views on the conduct of, and degree and nature of judicial intervention in, international commercial arbitrations;

THEREFORE HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of British Columbia, enacts ...

68 In his contribution to Paterson and Thompson's volume, Dr Gerold Herrmann discussed the modifications and additions to the UNCITRAL Model Law contained in the British Columbia statute and characterised these

as being essentially compatible with the philosophy of the Model Law and its underlying concepts facilitating international commercial arbitration.

... [T]he enactment in British Columbia may be viewed and appreciated as a good start for the world-wide efforts of harmonising and improving national laws using the universal model. [74]

Earlier Dr Herrmann had noted that the UNCITRAL Model Law was, by conscious decision and for very good reason, adopted as a model law and not as a Convention, which must be accepted or rejected as is. [71]

Hong Kong

69 The adoption of the UNCITRAL Model Law for international commercial arbitrations in Hong Kong followed the recommendations to that effect in the 1987 report of the Law Reform Commission of Hong Kong (HKLRC).

70 The HKLRC gave as the primary reason for recommending adoption of the UNCITRAL Model Law "the need to make knowledge of our legal rules for international commercial arbitration more accessible to the international community". Accordingly, it recommended that the Model Law be enacted with the minimum number of alterations or additions possible.

71 The HKLRC elaborated the advantages of adoption of the Model Law in Hong Kong as follows:

- (a) The Model Law provides a sound framework within which international arbitrations can be conducted.
- (b) There is great benefit to be gained from Hong Kong's point of view in its role as a burgeoning centre for international arbitrations.
- (c) The general philosophy behind the Model Law of giving more autonomy to the arbitrator is one which is more likely to appeal to lawyers and parties who are not infused with English concepts of arbitration.
- (d) If the Model Law is adopted widely it will encourage international arbitration as a way of settling commercial disputes. This can only work to the advantage of Hong Kong as a leading international commercial centre in the Far East, and we would like Hong Kong to be in the vanguard when adopting the new law.
- (e) The Model Law has been drafted in the languages of the United Nations. Although Hong Kong will initially adopt the law in English only, the basic framework will thus be accessible to lawyers and businessmen in all countries.[8]

United Kingdom

72 The UNCITRAL Model Law has not been without critics. Among those are some experienced in arbitrations in London which

continues to be the location for arbitration of many international trade disputes. The suitability of the UNCITRAL Model Law for adoption by legislation in England and Wales and Northern Ireland was considered by a Departmental Advisory Committee chaired by Lord Justice Mustill. The Committee reached a negative conclusion in its 1989 report (conveniently reproduced as "A New Arbitration Act for the United Kingdom?" in (1990) 6 *Arbitration International* 3).

73 The essence of the Mustill Committee's conclusion was set out in paragraph 89 of its report:

Judged on its intrinsic merits the Model Law has some features which could be of some benefit, principally as statutory statements of existing common law principles. But it does not offer a regime which is superior to that which presently exists in these law districts. A number of the provisions of the Model Law would be detrimental, and others of doubtful benefit, to the law and practice of arbitration there. The arguments in favour of enacting the Model Law in the interests of harmonisation, or of thereby keeping in step with other nations, are of little weight. The majority of trading nations, and more notably those to which international arbitrations have tended to gravitate, have not chosen thus to keep in step. There would in our judgment be undoubted disadvantages in introducing a new and untried regime for international commercial arbitration, with all the transitional difficulties that this would entail, and at the same time retaining the present regime for domestic arbitration.

74 A Scottish Advisory Committee on arbitration law, chaired by Lord Dervaird, reached a contrary conclusion in relation to Scotland adopting the UNCITRAL Model Law in its contemporaneous report (reproduced as "Scotland and the UNCITRAL Model Law" in (1990) 6 *Arbitration International* 63). The Dervaird Committee, after noting that the adoption or otherwise of the Model Law in England and Wales and Northern Ireland was not decisive of the position in Scotland, observed that

the Model Law has been adopted, or proposals for its adoption have been made, in Australia, Cyprus, Hong Kong and New Zealand, also substantial common law jurisdictions. It appears to the Committee therefore that having already established

that there would be no significant detriments to the existing law of arbitration arising from the adoption of the Model Law, the decisions taken in those countries and the likelihood of the widespread availability of the Model Law in important commercial countries represent another reason for its adoption in Scotland. [Para 1.9]

Australia

75 The adoption of the Model Law in Australia through the enactment of a federal statute, the International Arbitration Amendment Act 1989, followed the recommendation of a working group established by the Commonwealth Attorney-General in 1986 to examine the Model Law.

76 The working group noted that Australia had played an active role in the UNCITRAL working group which prepared a draft of the Model Law, and recorded

a ready agreement that the Model Law should be adopted [in Australia], for the following reasons

- it provides an internationally agreed legal framework for the conduct of international arbitrations;
- it could therefore assist Australia's efforts to establish itself as a centre for international commercial arbitration;
- it complements the UNCITRAL Arbitration Rules, which are becoming increasingly used in the conduct of international ad hoc arbitrations;
- it complements and expands on parts of existing Australian commercial arbitration laws;
- in a more general context, party autonomy is respected and facilitated by the Model Law. Parties are not frustrated by unknown provisions of national laws which may conflict with their intentions in respect of their arbitration. While the law in Australia is relatively modern it may be unfamiliar to foreign parties and may be perceived to be undesirable by them; and
- while the Model Law recognises the supportive and corrective role to be played by the courts, it limits judicial intervention in and supervision of an arbitration. [6-7]

77 In moving that the legislation implementing the UNCITRAL Model Law be read a second time in the Commonwealth Parliament, the Attorney-General observed that

international recognition of the Model Law means that its adoption should assist Australia's efforts to establish itself as a centre for international commercial arbitration. In this regard I note that both Melbourne and Sydney have facilities for conducting international arbitrations with the establishment of the Australian Centre for International Commercial Arbitration in Melbourne and the Australian Commercial Disputes Centre in Sydney.

New Zealand

78 The Law Commission has had little hesitation in recommending that the UNCITRAL Model Law should apply to international commercial arbitrations in New Zealand. The factors mentioned in the United Nations General Assembly resolution of December 1985, the Paterson & Thompson preface, the British Columbia statutory preamble, the HKLRC report, the Dervaird committee report, and the Australian Working Group report, are generally applicable to New Zealand. Indeed, such a development in harmonising international trading laws can only assist a nation as economically dependent on international trade as is New Zealand. Further, with our location as part of the Pacific Rim, it is impossible to overlook the fact that British Columbia, California, Australia, and Hong Kong have already adopted the Model Law. The adoption of the Model Law by Australia is of particular significance in terms of the development of trade across the Tasman under the Closer Economic Relations agreement.

79 The June 1990 summary of the report to the Australian and New Zealand Governments by a Steering Committee of Officials, *The Harmonisation of Australian and New Zealand Business Law*, states

New Zealand is currently reviewing its commercial arbitration laws and is considering the adoption of the UNCITRAL model law for both international and domestic arbitrations. If adopted, this approach would promote harmony between the two countries' laws in respect of international arbitrations, and any disharmony in respect of domestic arbitrations is unlikely to inhibit trans-Tasman business. [Para 81]

80 Once it is accepted that the UNCITRAL Model Law should be adopted in New Zealand, two major questions remain:

- Should the text of the Model Law be retained more or less unchanged from that adopted by UNCITRAL?
- Should the same regime (ie, based on the Model Law) apply to domestic arbitrations as well as international arbitrations?

The second question is addressed in Chapter IV. On the first question, the Law Commission has concluded that limited modifications to the text of the UNCITRAL Model Law are desirable. The extent of and reasons for these modifications may be found in the commentary in Chapter VII of this Report on the provisions of the Model Law. To the extent that the modifications are substantive, this recommendation involves slight differences from the position in Australia and Hong Kong, but consistently with the approach taken in various Canadian jurisdictions, California and, to a lesser extent, Scotland.

81 We do not, of course, expect any dramatic increase in New Zealand's share of the market for international commercial arbitrations as a result of adopting the UNCITRAL Model Law in this country. Although such adoption would ensure that New Zealand becomes a more attractive venue than it is under the present legislation, and there are other advantages for those who choose to have their disputes resolved in New Zealand, the applicable law is only one of a number of relevant factors. Further, a number of jurisdictions (eg, British Columbia and Hong Kong) are aggressively marketing themselves as desirable venues for international arbitration, and the traditional venues (eg, London, New York and Paris) are well aware of the challenges to their pre-eminence in this area and can be expected to make considerable efforts to retain their present advantages.

82 The Law Commission is aware of the valuable work of the Arbitrators' Institute of New Zealand in advancing the quality of arbitration in New Zealand. It is also aware of various private centres which specialise in assisting arbitration and other means of alternative dispute resolution. It gave some emphasis to these matters in its report on *The Structure of the Courts* (NZLC R7 1989) paras 138–142. Although recognising that public funds are subject to many demands, the Law Commission notes that, in other parts of the world, including Australia, similar enterprises have enjoyed a degree

of public funding, apparently on the basis that such funds represent an investment with a real yield in terms of reduced pressure on the courts and, in the context of international disputes, the attraction of economically positive activity.

IV

Domestic Arbitration

83 The tentative preference of the Law Commission, indicated in our 1988 discussion paper, was for identical statutory provisions to govern both international and domestic arbitrations. That preference was based on two propositions: first, that the inadequacies of the 1908 Act made it inappropriate to govern domestic arbitration; and, second, that the fundamental nature of arbitrations is unaffected by the location or nationality of the parties. Putting the second point another way, there seems to be no good reason why an Auckland company agreeing to arbitrate a dispute with a Christchurch based company should be subject to rules different from those applicable to a dispute with a Melbourne based company.

84 Most of the submissions received on the 1988 discussion paper heavily supported the propositions that domestic arbitrations should be based on the Model Law, and that there should be a high degree of consistency between international and domestic arbitral regimes. Nevertheless, the submissions contained consistent suggestions that, at least in the context of domestic arbitrations, there was a need for a greater degree of elaboration of the powers of arbitral tribunals. It was also suggested that domestic arbitrations should be subject to a greater degree of judicial review. Our consequent consultations and consideration of these issues has led us, on balance, to depart from our tentative preference and to recommend the additional provisions applicable to domestic arbitrations contained in Schedule II of our

draft statute. The ability of parties to international arbitrations to contract into Schedule II provisions is designed to maximise the consistency between the two regimes.

85 The position which our draft statute seeks to achieve is comparable to that which is developing in the Canadian jurisdictions. Although only Quebec province has to date adopted legislation based on the UNCITRAL Model Law for both international and domestic arbitrations, while the federal and other provincial jurisdictions have adopted Model Law based legislation for international arbitrations, that position seems likely to change in the relatively near future. The October 1988 report of the Alberta Institute of Law Research and Reform, *Proposals for a New Alberta Arbitration Act*, recommended the enactment of a new statute governing domestic arbitrations heavily influenced by the UNCITRAL Model Law:

The reasons for patterning the draft Act on the Model Law are (a) that this will keep Alberta law about domestic arbitration in as much harmony as circumstances permit with the Alberta law about international commercial arbitration; (b) the Model Law is, in general, a good model; and (c) there is some value in keeping the Alberta law in as much harmony as circumstances permit the developing international mainstream of arbitration law. [9]

The draft Act has since been enacted without substantial modification as the Arbitration Act 1991.

86 The influence of the Model Law on Canadian domestic arbitration legislation is likely to be substantially enhanced by the adoption in November 1990 by the Uniform Law Conference of Canada of a uniform domestic arbitration statute. This statute owes a great deal to the work of the Alberta law reformers, which is referred to at various points in Chapter VII of this Report.

87 Similarly, the UNCITRAL Model Law seems likely to have a substantial impact on domestic arbitration legislation in the United Kingdom. Notwithstanding the Mustill Committee's recommendation against enactment of the UNCITRAL Model Law as such in England and Wales and Northern Ireland, that Committee did recommend work towards a new domestic arbitration statute, and stated that

consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its accessibility to those who are familiar with the Model Law. [Para 108]

88 In Scotland the Dervaird Committee did not express a concluded view on the relationship of the Model Law to purely domestic arbitration. However, paragraph 1.12 of the Committee's report stated:

In a paper submitted to the Committee by Dr Fraser Davidson of Dundee University it has been suggested that a new system, more or less based on the Model Law, should apply to all forms of arbitration other than specialised statutory systems. The Committee does not consider that it is necessary, or indeed desirable, to defer adoption of the Model Law for its designated purpose pending a decision on that matter. This possibility will be considered by the Committee during the next phase of its work.

89 In a subsequent article, "International Commercial Arbitration—the United Kingdom and UNCITRAL Model Law" [1990] *Journal of Business Law* 480, Professor Fraser Davidson noted that not only do difficulties arise when separate and markedly different legal regimes govern international and domestic arbitrations, but the Model Law must interact in a number of respects with the existing law of arbitration. Thus where the Model Law has been adopted in order to overcome the perceived inadequacies of the domestic law, those same inadequacies may betray the legislator's purpose. [492]

... The new [international arbitration] law can never become truly effective, nor can Scotland become attractive as a forum for international commercial arbitration, until the domestic law of arbitration is reformed. Scotland should seek to pursue such an initiative by legislative means before long. The Model Law might indeed afford a model since most of its basic precepts are in harmony with the traditional philosophy of the Scots law of arbitration. [493]

90 In Australia the UNCITRAL Model Law has been adopted for international commercial arbitrations (see para 75, above) while domestic arbitrations remain governed by the uniform Commercial

Arbitration Acts enacted in each of the states and territories (except Queensland) in the mid 1980s. Advice received from the Federal Attorney-General's Department was that

adoption of the Model Law as a basis for domestic arbitration legislation was never considered to be a realistic option in Australia because the uniform legislation, after some years of preparation, had only just been implemented at the time the working group [considering the Model Law] was meeting. It is likely that separate regimes for domestic and international arbitrations ... will exist for some years to come.

91 Some of those consulted by the Law Commission on arbitration law reform favoured a New Zealand domestic arbitration statute modelled on the Australian uniform domestic legislation, seeing this as consistent with the spirit of the CER agreement and trans-Tasman harmonisation of business laws. However, the majority of those consulted saw greater merit in consistency between the international and domestic arbitration regimes within New Zealand, and thought any adverse impact from any disharmony between the domestic arbitration statutes on either side of the Tasman unlikely (see also the Officials Committee view, para 79 above). Further, as may be seen in Chapter VII, provisions from the Australian uniform statutes have been used as models for several of the provisions contained in the draft statute. Finally, we have noted that the trend of the latest amendments to the Australian uniform statutes is in the direction of the principles which underlie the UNCITRAL Model Law. Accordingly, the Law Commission has concluded that there should not be a separate New Zealand domestic arbitration statute modelled on the Australian uniform legislation.

92 Most of the provisions of Schedule 2 may fairly be regarded as consistent with the thrust of the UNCITRAL Model Law. The comments of Dr Gerold Herrmann on the Mustill Committee's recommendation for a new domestic arbitration statute in England are particularly relevant:

An UNCITRAL Model restatement of English (or UK) arbitration law would probably contain some clarifications or true additions, both of which would not be contrary to the spirit of the venture. Based on comments in the Consultative Document and various other publications, one could think, for example, of a definition of "arbitral award", including the

clarification that interim awards may be rendered, of a provision offering court assistance in the appointment process even before the place of arbitration is determined, of a rule empowering courts to strike out stale claims (which would go beyond the powers of the arbitral tribunal to terminate the proceedings under Article 32), and possibly a provision empowering courts to consolidate separate arbitrations. [(1988) 4 Arbitration International 62, 66-67]

Each of those points has been adopted in our recommended draft statute, in some cases for international arbitration as well as for domestic arbitration. In the United Kingdom, the Courts and Legal Services Act 1990 has in fact made extra provision in respect of appointment and the striking out of state proceedings.

APPEALS TO THE COURTS

93 The one feature of Schedule 2 of our draft statute which cannot be said to be in accordance with the spirit of the UNCITRAL Model Law is the provision of a limited right of appeal against an award to the High Court on a question of law. This was perhaps the single most difficult issue to be addressed in our review on arbitration legislation, and our final recommendation, for an opt-out right of appeal on a question of law, represents a departure from the tentative preference expressed in our 1988 discussion paper.

94 Our change of view follows consideration of the submissions received on the discussion paper and on drafts of a new statute which were given limited circulation. Although those we consulted were perhaps evenly divided on whether or not there should be any power to review an award beyond that contained in article 34 of the Model Law, there was wide agreement that the legal and other experience of arbitrators in New Zealand is variable, and that there should be no departure from the basic proposition that an arbitration should be determined in accordance with the law (as reflected in article 28(1) of the Model Law).

95 An example of the submissions which weighed with the Law Commission was that submitted jointly by Messrs A N Frankham and J C Hagen, Chartered Accountants in Auckland experienced in arbitration, in which they stated:

We feel quite strongly that for both international commercial arbitrations and [domestic arbitrations, an appeal on points of law] should apply on an "opt-out" basis. We note that there are many instances where an arbitral tribunal appropriately comprises non-legal arbitrators. We believe it would be wrong for non-legal specialists to endeavour to deal definitively with the law. There should always be a right of appeal on points of law except where a party is happy to opt-out of a right of appeal on legal grounds.

96 More recently, the Law Commission has noted the comments of the President of the Court of Appeal, Sir Robin Cooke, concurred in by Mr Justice Hardie Boys, in *Manukau City Council v Fencible Court Howick Ltd* (CA 192/89; judgment 18 April 1991):

At the present day there is a strong judicial respect for arbitration as a valuable mode of dispute resolution. When an expert arbitrator or umpire has acted impartially (and here the challenge to the umpire's conduct has not been renewed on appeal) the Court should be slow to be persuaded to strike down the decision. The mere possibility of a different result should not normally be enough to justify judicial intervention. There should be no assumption that an error in expounding the meaning of the contract was or may have been material. The onus should be the other way. In my opinion, the Court should not set aside an arbitral award on the ground of error of law unless satisfied affirmatively that the error made a difference to the decision or at least probably did so.

Changes in the law as to arbitration are under consideration in New Zealand, as they have been in other countries. The result of the present case may serve to underline that the New Zealand Courts are alive to the need to encourage arbitration and respect arbitral awards. At the same time the view should not be overlooked that a party who can show that there has been a truly significant error of law has a justifiable grievance for which the law should provide a remedy, unless he or she has freely contracted out of that right. [4-5]

97 With those considerations in mind, the Law Commission has concluded, on balance, that at least for the time being a new domestic arbitration regime should include a limited right of appeal in order to correct errors of law, in the form of clause 5 of Schedule 2. Clause 5

is designed to follow the position under the current English and Australian legislation (see the commentary in Chapter VII).

V

Court and Statutory References to Arbitration

98 The essence of the arbitral process is that it is consensual: it is based on an agreement by the parties to have their dispute arbitrated rather than litigated before a court. Nevertheless, the perceived advantages of arbitration, including informality, expertise of decision-making, and the saving of costs and speed, have led to two distinct species of non-consensual “arbitration”: those directed by a court; and those required by the terms of an enactment. This chapter deals with each of those.

COURT REFERENCES

99 The Arbitration Act 1908 includes several sections dealing with references of matters to arbitrators by order of the High Court. Section 14 provides for referral of “any question arising” in any matter “for enquiry or report to any official or special referee”. Any such report may be adopted wholly or partially by the High Court, and if adopted may be enforced as a judgment or order of the court.

100 Section 15 of the 1908 Act provides that where there is either consent of all parties, or matters of account are involved, or a prolonged examination of documents or scientific or local investigation

is required, the High Court may order the whole or any question or any issue in the case “to be tried before an arbitrator agreed on by the parties, or before an officer of the court”. In *Davidson v Wayman* [1984] 2 NZLR 115, the Court of Appeal confirmed that

while an award [on a reference under section 15] will never be interfered with lightly, the Court has wider reviewing scope than as regards ordinary arbitrations. [116]

Section 15 provides a mode of trial by the High Court itself; the arbitrator is an officer of the court; and the court has the extensive control referred to in s 16(1). It follows that the supervision which the court exercises is not the same as that exercised in respect of arbitrations out of court. [122]

101 The High Court also has an inherent jurisdiction to order the reference of a dispute pending in court to arbitration where the parties consent. In that case the arbitration is equivalent to any other consensual arbitration, and not subject to the same powers of review as on a s 15 reference: *Darlington Wagon & Co Ltd v Harding and Trouville Pier and Steamboat Co Ltd* [1891] 1 QB 245.

102 These powers of referral by a court offer considerable flexibility. In a recent dispute over workmanship in laying tiles involving no more than \$25,000, the parties acceded to the court’s suggestion that an arbitrator be appointed by consent and subject to conditions laying down an abridged and informal procedure (a relatively simple letter of instruction, no formal hearing, and no solicitors or counsel involved, brief reasons in writing, fee shared equally and paid before the decision, and the parties to give effect to the decision within one month of its receipt): *Permathene Plastics Ltd v Woodward* (Thomas J, High Court, Auckland M 977/90; 24 July 1990).

103 The introduction of Masters in the High Court (see Judicature Act 1908, s 26C) appears to have expanded the opportunity and advantages of references to arbitration under s 15. In *Elders Pastoral Ltd v Farmers’ Cooperative Organisation Society of NZ Ltd* (Master J H Williams QC, High Court—New Plymouth, CP 33/90; 28 March 1991), the Master held that, when acting under s 15 of the 1908 Act, he was entitled to employ the powers conferred on him for the purposes of general court proceedings. He observed that the legislative intention was

to give litigants ready access to a mode of trial of their proceedings which can be both cheap—given that no fees are prescribed when Masters are appointed under section 15—and rapid—given that Masters can determine all the interlocutory aspects of such a reference as well as a reference itself—but it still gives litigants, and thus this Court, wider powers of review or challenge than may be available following a conventional reference to arbitration.

104 The Commission's 1988 discussion paper set out tentative views on court-annexed arbitration:

It may be questioned whether these forms of "arbitration" [ie, under ss 14 and 15 of the 1908 Act] can be regarded as sufficiently close to the normal concept of arbitration to remain in an arbitration statute, especially if the statute itself moves closer to the contractual model. On the other hand, since the processes are valuable there may be a case for retaining them in some form. There could, for instance, be something equivalent to the English or Australian provisions for referees, arbitrators (although it might be better to avoid this terminology) and assessors in the Judicature Act and High Court Rules [Para 174]

105 The responses to the discussion paper generally supported this approach. The issues were canvassed in a particularly helpful submission from Mr Justice Smellie of the High Court at Auckland:

I am persuaded by the argument in the discussion paper that court-annexed arbitration is something of an anomaly and therefore in principle should be removed from the Arbitration Act. I am equally firmly of the view, however, that complex commercial litigation can often be shortened and made less expensive and uncertain for the parties by using the present provisions in the Act.

It is true that the provisions have not been much used so far but there is a growing tendency to use them in Commercial List business in Auckland, especially in building and construction type cases. A number of those cases are directed to me for hearing and I have had some limited success so far in referring technical matters off to referees in such cases. I should be most unhappy if the court-annexed arbitration provisions were

taken out of the present Arbitration Act before some other well established procedure was in place.

106 The Law Commission has examined procedures adopted in other jurisdictions relating to the referral by courts to referees of particular disputes or issues within a dispute. It has concluded that a particularly useful model for reform is to be found in the New South Wales Supreme Court Rules, Part 72 of which was added in 1975 and authorises the court to refer any question or proceedings to a referee for a report which the court may reject or adopt in whole or in part.

107 Mr Justice Andrew Rogers, Chief Judge of the Commercial Division of the Supreme Court of New South Wales, reviewed the operation of Part 72 in an address given in November 1979:

The most frequent use of the power to refer is in the Construction List. Almost as a matter of course, technical issues involving engineering, building, architectural or other expertise are referred to appropriately qualified persons for report. Generally, the parties select their own referee ...

At the time the appointment is made, the parties are required to advise the Court of a date when the referee can commence the hearing and the expected duration of the reference. The judge then fixes a date some time after the conclusion of the reference hearing, by which the referee's report is required. A further, later, date is allocated at which time the report comes before the Court to be appropriately dealt with. At the time that the appointment of the referee is made, the judge makes a number of other orders. These orders generally follow a standard form.

108 In June 1990 the Law Commission circulated to a limited number of those we consulted a draft of proposed additions to the High Court Rules based on Part 72. The response to that draft was very positive. We have taken account of the comments received, and set out here an amended version as an indication of the changes which we would propose for consideration by the Rules Committee. Parallel changes should be considered for the District Courts Rules.

Judicature Act 1908

Insert the following provisions in Schedule 2:

383A Reference to referee

The court may, on application of any party before or at the trial of a proceeding, but subject to any right of trial by jury, refer the proceeding or any question arising in the course of the proceeding to a referee for inquiry and report.

383B Directions

Where an order is made under rule 383A, the court shall

- (a) state the question or proceeding referred;
- (b) direct that the referee make a report in writing to the court, stating, with reasons, his or her decision or opinion;
- (c) give such instructions as the court thinks fit relating to the inquiry or report.

383C Directions as to procedure

Where an order is made under rule 383A, the court may by the same or subsequent order

- (a) order that the referee hold any trial or make any inquiry that may be necessary to enable the referee to decide the question or proceeding referred;
- (b) give directions for the conduct of the trial or inquiry;
- (c) direct that the referee give such further information on the report as the court thinks fit;

and rules 406 (powers of persons taking accounts or making inquiries) and 407 (duty of persons summoned to attend) shall apply with necessary modifications to a reference under rule 383A.

383D Costs of reference

- (1) Where an order is made under rule 383A, the court may by the same or subsequent order fix the remuneration of the referee

and determine who shall pay the costs of the reference and in what proportion.

(2) The court may order any party to give security for the costs of the reference.

(3) The provisions of subclause (2) are without prejudice to the power of the court to make an order providing for costs of the reference as part of the costs of the proceeding.

383E Report on reference

(1) On receipt of the report of the referee, the court shall serve it on the parties.

(2) The court may, of its own motion, after notice to the parties, or on application of any party

- (a) adopt, vary, or reject the report in whole or in part;
- (b) require an explanation by way of report from the referee;
- (c) on any ground, remit for further consideration by the referee the whole or any part of the matter referred for a further report;
- (d) decide any matter on the evidence taken before the referee, with or without any additional evidence;

and shall make any such order or give such judgment as it thinks fit.

383F Arbitration by consent

(1) Notwithstanding rule 383A, the parties may agree to arbitration of their dispute or any part of it under the Arbitration Act 199- at any time during the course of court proceedings.

(2) If an arbitration agreement is entered into in the course of a court proceeding the court shall stay the proceeding unless it finds that the agreement is null and void, inoperative or incapable of being performed.

(3) Article 8 of Schedule 1 of the Arbitration Act 199- (Arbitration agreement and substantive claim before court) does not apply to an arbitration agreement entered into under this rule.

109 These rules would authorise the court to refer any question or proceedings to a referee for a report which the court may reject or adopt in whole or in part. The provisions would supplement rules 384-405 of the High Court Rules dealing with accounts and inquiries in a more limited category of cases, namely those requiring a simple financial statement. The main differences between the proposed new provisions and the present rules are, first, that the referee could be asked to report on any factual issue, secondly, the report could be made by any expert, and, thirdly, the referee's report would not be binding on the court. The referee process would be an adjunct to the processes of the court, although a presumption in practice in favour of adoption of the report of a referee would be important. The parties would retain the ability to agree to have their dispute arbitrated.

110 The Law Commission recommends that rules on references along these lines should be added to the High Court and District Court Rules. A consequential change to the jurisdiction of Masters may also be required and is provided for in Schedule 4 to the draft Act.

111 The Law Commission is aware that there have been further developments in New South Wales with the commencement in 1990 of the Courts Legislation (Procedure) Amendment Act 1989, providing for compulsory arbitration of Supreme Court civil proceedings in that State. A note in (1990) 64 Australian Law Journal 317, 318, recorded the following description of the new system:

The arbitrator would first attempt conciliation, and if that failed, would hear the case and make the award. The award automatically became the decision of the court unless either party applied for a rehearing before the court within 28 days. A party which failed to attend the arbitration hearing and to satisfy the court that there was a good reason for non-participation, would be unable to obtain a rehearing. Hearings would be held in court-designated accommodation, with an arbitrator listed for a particular day. Complex questions of law or fact which were likely to take a long time to hear would not be referred to arbitration.

The note went on to record that the Chief Justice of New South Wales had appointed 18 arbitrators for the purposes of the new

system, including 10 Queen's Counsel. The Law Commission considers that this development should be monitored carefully in New Zealand over a reasonable period for possible future application here, but that for the time being the measures recommended above are sufficient.

STATUTORY REFERENCES

112 Section 25 of the 1908 Act provides that it is to apply

to every arbitration under any Act ... as if the arbitration were pursuant to a submission [ie an agreement to arbitration] except insofar as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act.

Section 20 of the 1938 Amendment Act is to the same effect, with the express exclusion of certain of its provisions. The 1988 discussion paper indicated a tentative preference for the rationalisation of the statutory provisions, which it listed, by distributing some of them to the courts or to administrative tribunals. A principal basis for such a reallocation would be the lack of a consensual basis for the particular statutory process. Further, the State should in general impose on parties to disputes arising under statutes, as the means of resolving those disputes, only official bodies such as courts and statutory tribunals. The Legislation Advisory Committee adopted a similar approach in its report on *Administrative Tribunals* (Report No 3, February 1989) para 96 and Appendix 4, published shortly after our discussion paper. The Commission provided copies of that report to a number of those consulted for comment. Appendix E contains a reasonably comprehensive list of the enactments which refer disputes arising under them to "arbitrators". This list incorporates and updates the lists in our discussion paper and the LAC report.

113 The responses to the discussion paper and the LAC report were mixed. The Ministry of Commerce, for instance, agreed that it would be difficult for a law relating to arrangements based on the consent of the parties to properly provide for cases where an arbitral process is being imposed by statute. But on the other hand arbitration, it said, might be the most efficient (ie quickest and cheapest) method of

resolving the particular dispute concerned. Mr I L McKay of Kensington Swan, Wellington, and now a Judge of the Court of Appeal did not think

that the mere fact that the element of agreement is lacking should be a reason for avoiding arbitration. The better test is whether a fair and acceptable resolution of the issue is more likely to be obtained by arbitration than by reference to a court.

114 Several of the submissions stressed the need to examine the advantages of the different methods of dispute resolution in the particular context while keeping the above general matters in mind. Some also mentioned the virtues of conciliation and informal arbitration. For instance Mr Justice Andrew Rogers suggested that

in an appropriate case [involving the fixing of compensation] Parliament should consider appointing a person who may, applying his or her expertise without regard to the law of evidence and without legal representation, and after exhausting the processes of conciliation, make an appropriate quantification. This is what Parliament really had in mind when it called for quantification and, if it remains of that mind, it should clearly say so.

As he concluded, there is a danger that by invoking arbitration Parliament merely substitutes one formal structure for another.

115 The Commission has considered the matter further and has consulted with the Legislation Advisory Committee. The Commission, like the Committee, sees the force of the argument that arbitration will sometimes have real practical advantages for settling some disputes arising under statutes even if the matter is not submitted by agreement. Further, in some cases there will in fact be a consensual element. Accordingly, the Commission has included in the draft statute a provision to similar effect to that included in the 1908 and 1938 Acts (see s 7 and the commentary in Chapter VII, paras 219-223). What is required in each particular statutory area is an assessment of the general principles and the aptness of the different methods of dispute settlement. That assessment should be undertaken when methods are being considered for inclusion in new or revised statutes.

116 The Law Commission also makes some more specific proposals and comments on the legislative choice between court, tribunal and arbitration:

- The choice of the statutory language should be made carefully and consistently. While some statutes make it explicit that the arbitration they provide for is to be considered “a submission” and that the Arbitration Act accordingly applies, others leave the matter in doubt. So several enactments relating to licensing and education simply provide for decisions to be taken by an “arbitrator” without making it clear whether the 1908 Act is or is not to apply. The person might equally have been called a tribunal or authority, or indeed not have been given any title at all; that is especially the case if the appointment is made by a person not involved in the dispute. Given the provisions of s 25 of the 1908 Act and the proposed replacement, the word “arbitration” or “arbitrator” should be avoided in statutes unless the intention is to invoke the general law of arbitration, or unless the particular statute sets up a complete regime.
- Some statutory arbitrations are comparable to those considered in the first part of this chapter: a person with a power of decision might be empowered to refer an issue, with or without the consent of the parties, to an “arbitrator” who is to report back. The recommendation which we made earlier equally applies: “referee” is the preferable word (para 104).
- Several of the provisions are based on agreements between the disputing parties, for instance legislation relating to building societies and credit unions, or legislation (especially local Acts) incorporating agreements between public bodies. Arbitration is more appropriate in these cases.
- A common subject matter of the statutory arbitration provisions, as of regular arbitration, is valuation—for instance of leases or licences. The relevant processes under those particular statutes may, as well, involve a consensual element. The experience of the land valuation tribunals should also be kept in mind.

- A review of existing provisions (including those in the area of local government) should take account of their historical origin. They can sometimes be explained in the words of the submission made to the Commission by Professor Ross Cranston of the University of London:

statutory arbitration in English history was introduced in 19th century compulsory purchase statutes on a basis that the issues, particularly on valuation, were not appropriate for courts. Arbitration, despite the general distrust of it then current was the only obvious alternative. Tribunals had not then been “invented”.

- Sometimes there will be a public interest element in the decision under the statute that will make a private arbitration with its consensual emphasis inappropriate. This is of course a specific aspect of arbitrability which is discussed in Chapter VII, paras 224-234.

117 Accordingly, the Law Commission recommends that those considering including provisions for statutory arbitration in new or revised legislation examine the advantages and disadvantages of the range of methods of dispute resolution. When appropriate, the choice of method should also be made by reference to the criteria for the allocation of public decision-making power proposed by the Legislation Advisory Committee in its Report on *Administrative Tribunals*, paras 37-55 and endorsed by the Law Commission in its Report on *The Structure of the Courts* (NZLC R7 1989) paras 136-137 and Appendix I. Cabinet directions require that those proposing relevant legislation apply those criteria. In particular weight should be given to the fact that the law of arbitration is written on the basis that the parties have consented to that method of decision.

VI

Treaties on Arbitration

118 New Zealand is party to four multilateral treaties regulating arbitration between private parties and between private parties and States. (It is also party to treaties relating to the arbitration of disputes between States alone. Those treaties are not relevant to this Report.) The treaties are

- the Geneva Protocol on Arbitration Clauses 1923
- the Geneva Convention on the Execution of Foreign Arbitral Awards 1927
- the (New York) Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958
- the Convention on the Settlement of Investment Disputes between States and Nationals of other States 1965

119 The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 is intended to give effect in the law of New Zealand to the 1923 and 1927 instruments, the Arbitration (Foreign Agreements and Awards) Act 1982 to the 1958 Convention, and the Arbitration (International Investment Disputes) Act 1979 to the 1965 Convention. The English texts of the four treaties are scheduled to the relevant Acts and except for the 1965 Convention are included in Schedule 3 to the draft Act as set out in Chapter I.

120 The draft Act would repeal the 1933 and 1982 Acts on the basis that it will itself give full effect in New Zealand law to the terms of the Geneva and New York Conventions. This chapter first explains how the draft Act would implement those instruments. The chapter secondly explains the proposed amendments to the 1979 Act which are put forward with the purpose of giving full effect in the law of New Zealand to the 1965 Convention.

THE 1923, 1927 AND 1958 CONVENTIONS

121 The broad explanation for the conclusion that the proposed new statute will give effect in the law of New Zealand to the three treaties is that the UNCITRAL Model Law builds on them, especially on the 1958 Convention which in turn was designed to develop and largely to replace the two earlier instruments. The Model Law does of course have a wider scope since it also regulates the setting up and operation of arbitration.

122 The 1958 Convention expressly provides that the Geneva texts cease to have effect between Contracting States on their becoming bound by the 1958 Convention and to the extent that they are bound by it (article VII(2)). Eighty five states are party to the 1958 Convention and only 36 to the 1923 Protocol (as at February 1991). Nevertheless, eight countries are listed by the United Nations as having become parties to both the earlier treaties but not to the 1958 Convention and another four are parties to the 1923 Protocol alone.

123 That fact plus the implication in the 1958 Convention itself that the earlier instruments might still have effect even for pairs of States bound by it mean that the Geneva treaties must be considered here along with the 1958 Convention. (Those possibilities of continued effect presumably explain why the United Kingdom and New Zealand when enacting legislation to implement the 1958 Convention also kept in force the legislation implementing the earlier treaties. That continuation is qualified by the fact that neither maintained the distinct statutory provisions requiring the stay of court proceedings relating to arbitrable matters subject to the 1923 Protocol, notwithstanding the fact that the 1923 and 1958 provisions are worded differently, 1923 article 4, 1958 article II(3); the statutory provisions also differed; 1933 Act (NZ) s 3, 1982 Act (NZ) s 4; and Arbitration Act 1950 (UK) s 4(2) and 1975 (UK) s 1.)

124 The essence of the three treaties is that the law of each State which is Party to them is to provide as follows:

- agreements to arbitrate are binding (1923 and 1958);
- court proceedings brought in respect of a dispute which is subject to an arbitration process are to be stayed if a party requests (1923 and 1958);
- foreign arbitral awards are to be recognised and enforced (1927 and 1958).

We now compare, by reference to those three matters, the provisions of the proposed Act (especially the adapted UNCITRAL Model Law set out in Schedule 1 to the draft Act) with the provisions of the three Conventions. We then comment on the scope of application of the Conventions and the draft Act.

Binding force of arbitration agreements

125 The 1923 Protocol and 1958 Convention each require the Contracting Parties to recognise the validity of arbitration agreements which fall within their scope (article 1 and article II). That recognition has for some time been implicit in the statutory law of arbitration and that will continue in the proposed new statute. The recognition is not for instance made express in the provisions of the 1933 and 1982 Acts giving effect to the Geneva and New York treaties. Rather, in the earlier statutes and in the proposed one, it is given specific content and express support in the statutory provisions for the operation of the arbitral process, especially those providing (1) for the stay of court proceedings which are brought in respect of matters which fall within the arbitral obligation and (2) for the recognition and enforcement of arbitral awards. There is now thought to be no need for separate express recognition of the binding force of the agreement to arbitrate. The proposed Act will make no change to that general position. We now turn to those specific issues of stay and enforcement.

Stay of court proceedings brought in respect of an arbitrable matter

126 Even if the arbitration agreement is binding in law, its effect could be nullified if a party to the agreement were able to bring court proceedings and the court were able or even required to decide the dispute which, the parties agreed, was to be arbitrated. The 1923

Protocol requires tribunals (courts) of the Contracting States on being seized of a dispute subject to an arbitration agreement to refer the parties, on the application of either of them, to the decision of the arbitrators (article 4). The 1958 Convention imposes the same obligation (article II(3)). (We shall see that the territorial scope of the two provisions differs, with the 1958 Convention having a wider application, para 148.) Although the Model Law is slightly more elaborate (by requiring the request to be made before the requesting party files the first substantive pleading), it is to the same effect (article 8). That extra requirement is a sensible application of the principle of waiver. If a party which could have applied to require a matter to be referred to arbitration fails to do that and participates in the national court process it can properly be held to that election.

127 All three provisions recognise that there are limits to the propositions they state with the consequence that in some cases the court proceeding should continue and the matter should not be referred to arbitration. Under the 1923 Protocol, article 4, the competence of the national court is not prejudiced if “the agreement or arbitration cannot proceed or [has] become inoperative”; and under both the 1958 Convention, article II(3), and the Model Law, article 8, there is no reference if the court finds that the agreement is “null and void, inoperative or incapable of being performed”. The latter formulas appear indistinguishable from the 1923 one, and the New Zealand and United Kingdom legislation did not make distinct provision in respect of the stay provision in the 1923 Protocol once legislation to give effect to the 1958 Convention was enacted (para 123 above). Accordingly we conclude that article 8 of the Model Law (in Schedule 1 to the draft Act) will give effect in New Zealand law to the 1923 and 1958 treaty provisions requiring the stay of court proceedings and placing limits on that requirement.

128 As discussed in the commentary to article 8, we propose an elaboration of the grounds for refusing a stay: that there is not in fact any dispute between the parties with regard to the matters agreed to be referred. This addition makes explicit in article 8 what has already been stated in article 7 when read with s 4; it emphasises the value of summary judgment processes in the court when there is not a real dispute between the parties and, for instance, debtors might be trying to use arbitration simply to delay meeting their debts. That elaboration does not, in our view, widen the power of the courts to

refuse a stay and allow the court proceedings to continue notwithstanding an agreement to arbitrate.

Recognition and enforcement

129 The 1927 and 1958 Conventions and the UNCITRAL Model Law all provide that arbitral awards made in other countries are to be recognised as binding and are to be enforced. The texts lay down procedures to facilitate those consequences of the arbitral process (such as the supply of a certified copy of the award and of the arbitration submission), and they place limits on recognition and enforcement (such as the invalidity of that submission).

130 In addition both the 1927 and 1958 instruments enable interested parties to avail themselves of awards in the manner and to the extent allowed by the law or the treaties of the country where the award is sought to be relied on (1927 article 5 and 1958 article VII(1)). That more generous treatment might be in the procedure or in the narrowing of the grounds for recognition. One example of it appears in the fact that the 1927 provisions for non-recognition are obligatory (recognition and enforcement *shall* be refused in the prescribed situations), while, by contrast, the 1958 and UNCITRAL provisions are permissive. The later provisions recognise that if the prescribed situation (for instance a failure to comply with procedural rules) had no impact in the particular matter the award might still be recognised and enforced (compare 1927 articles 1 and 2 with 1958 article V and UNCITRAL article 36). A further way in which the newer provisions are easier for those wishing to enforce an award is in the onus they place on the parties in respect of some grounds for non-enforcement (compare the explicit provision of article V of the 1958 Convention and article 36(1)(a) of the Model Law with article 1 of the 1927 Convention). The procedural requirements under the later instruments are also easier to satisfy.

131 A comparison of the provisions of the draft Act relating to recognition and enforcement with the relevant provisions of the 1927 and 1958 treaties begins with the policy of those responsible for preparing the Model Law. That policy was that the Model Law should be in full harmony with the 1958 Convention, Secretariat *Commentary* to article 35, para 1.

132 *The procedure for enforcement:* article 35 follows the 1958 Convention, article IV. Recognition (as opposed to enforcement) does not require any particular process (although there is of course a requirement of proof) and in that sense the proposed enactment is less onerous than the 1958 Convention. There is also a relaxation in the requirement for the certification of a translation of an award which is being enforced. The amended version of article 35(2) proposed in the Act also takes account of the possibility of an arbitration based on an oral agreement.

133 Article 36 of the Model Law sets out exhaustively the grounds for refusing recognition or enforcement of an arbitral award. As is to be expected given the governing policy of full harmony, article 36 is closely modelled on article V of the New York Convention, while going further than it in applying not just to awards made outside the state in which it is being invoked but also to awards made within that state. In the words of the UNCITRAL Secretariat, article 36(1) “adopts almost literally the well known grounds set forth in article V of the 1958 New York Convention”, *Commentary*, article 36, para 1. Given that almost complete coincidence, it is convenient in the following discussion to compare the 1927 text with the other two.

134 The seven grounds for non-recognition in article 36 of the UNCITRAL law (set out in Schedule 1 to the draft Act) and article V of the 1958 Convention (set out in Schedule 3) are now compared with the 1927 grounds. It will be seen that the conclusion is that the UNCITRAL grounds for setting aside awards are no wider than those in the 1958 and 1927 provisions and in some areas are narrower than those of 1927. To the extent that the new grounds are narrower and the award is accordingly more easily recognised and enforced, the 1927 Convention does of course allow that.

135 *The invalidity of the submission agreement:* 1927 article 1(a), 1958 article V(1)(a), and UNCITRAL article 36(1)(a)(i). The 1927 text refers simply to the validity of the submission under the law applicable to it. The 1958 Convention expands that last phrase by referring to the law to which the parties have subjected it or, failing any indication, to the law of the place of the arbitration, and it also makes a distinct reference to the capacity of the parties *under the law applicable to them* (article V(a)). The UNCITRAL text dropped the emphasised reference to the law applicable to capacity. That reference was thought to be either incomplete or misleading. Its removal

was considered not to introduce any substantive change from the 1958 text, Holtzmann and Neuhaus 1058-1059. That can also be said, we consider, about the elaboration of the 1927 reference to the validity of an agreement to include, in the 1958 and UNCITRAL texts, the competence of the parties. We do not see that as widening the ground for attack on the award.

136 *Failure to give notice to party*: 1927 article 2(b), 1958 article V(b), and UNCITRAL article 36(1)(a)(ii). Except for an inconsequential verbal difference the 1958 and UNCITRAL texts are identical. In not allowing a general argument of inability of a party to present its case, the 1927 provision may be narrower and appears to present a problem. But two other 1927 grounds which are more extensive than the later ones are more than adequate to cover any difference. They require non-recognition if the award has not been made in accordance with the relevant procedural law or if recognition or enforcement is contrary to the principles of the law of the country where recognition or enforcement is being sought (article 1(c) and (e)).

137 *Ultra vires award*: 1927 article 2(c), 1958 article V(c), UNCITRAL article 36(1)(a)(iii). The 1958 and UNCITRAL provisions are identical. The 1927 provision is to the same effect with one exception. Unlike the later texts, it does not allow the recognition and enforcement of valid parts of an award which can be separated from the parts falling outside the scope of the submission. That widening of recognition and enforcement is of course permitted by the 1927 Convention.

138 *Unlawfully constituted tribunal, unlawful procedure*: 1927 article 1(c), 1958 article V(d), UNCITRAL article 36(1)(a)(iv). Again the 1958 and UNCITRAL provisions are identical. The 1927 provision covers at least the same ground as the later provisions but again may allow a broader argument for non-recognition (the Award was not made by the tribunal provided for). If so the narrowing in the later provisions is allowed by the 1927 Convention.

139 *Award not yet binding*: 1927 articles 1(d) and 2(a), 1958 article V(e), UNCITRAL article 36(1)(a)(v). The 1958 and UNCITRAL texts are essentially identical. The wording of the two relevant 1927 provisions differs but is to the same effect.

140 *Non arbitrability*: 1927 article 1(b), 1958 article V(2)(a), UNCITRAL article 36(1)(b)(i). The 1958 Convention and UNCITRAL provisions are identical in effect. The 1927 text uses the same basic wording—"capable of settlement by arbitration".

141 *Public policy*: 1927 article 1(e), 1958 article V(2)(b), UNCITRAL article 36(1)(b)(ii). All three texts allow refusal of recognition or enforcement because recognition or enforcement would be contrary to "the public policy" of the State where the award is relied on. As noted above, para 136, the 1927 provision also has a wider reference to "the principles of law of the country". The proposed statute spells out the reference to public policy in a declaratory way by including fraud, corruption and breach of natural justice. All three texts by their reference to the public policy of the State where recognition or enforcement is sought leave some room for that State to develop the broad concept. In addition, UNCITRAL recognised that "public policy" can cover fundamental principles of law and justice in procedural respects, corruption and fraud, Holtzmann and Neuhaus 914. We propose that the elaboration be made explicit in article 36 and also in article 34 (see also paras 403-404 and 411).

142 All three instruments provide, in consistent terms, for the adjournment of enforcement proceedings when proceedings have been brought in the appropriate institutions to set aside the award, 1927 article 3, 1958 article VI and UNCITRAL article 36(2).

143 Accordingly the Law Commission concludes that the provisions of articles 35 and 36 of Schedule 1 will give full effect in New Zealand law to the provisions of the 1927 and 1958 Conventions which (1) require the recognition and enforcement of awards and which (2) state exclusive grounds for non-recognition and non-enforcement.

Scope

144 We now consider the scope, especially the territorial scope, of application of the provisions about stay and recognition and enforcement (and the limits on recognition and enforcement). The stay and recognition provisions in articles 8, 35 and 36 of Schedule 1 apply to *all* arbitrations subject to the draft Act. In that they conform with (and in part go wider than) the three treaties. The grounds for non-recognition can however be supplemented, in terms of Schedule 2, by

wider rights of appeal. Those supplementary rights could put in jeopardy the compliance by New Zealand law with the 1927 and 1958 Conventions since they involve wider grounds for upsetting awards than the exclusive grounds which the Conventions stipulate. But that concern is answered by the provisions of s 6(2)(a) and (3) of the draft Act. The effect of those provisions is as follows:

- That arbitrations which fall within the scope of the 1927 Convention are subject to that wider power of appeal *only* if the parties agree: the Convention does not limit their freedom to contract in such a way.
- That foreign arbitrations—all those falling under the recognition provisions of the 1958 Convention—can be questioned *only* on the grounds listed in article 36 and not more broadly.

145 In respects other than territorial, the scope of the provisions of the draft Act and in particular of Schedule 1 is at least as comprehensive as that of the three treaties. Thus the draft extends to all legal disputes which can be subject to arbitration (and not simply to commercial matters), to oral arbitration agreements, and to arbitrations undertaken by permanent arbitral bodies. That scope can be quite properly limited by other specific treaties (such as ICSID). Any statute which imposes a limit on the arbitration process would, of course, have to be consistent with the treaty provisions. But even in that case the treaties also recognise that arbitrability is a matter for the state where recognition or enforcement is sought; 1927, article 1(b) and 1958, article 5(2)(a).

146 To recapitulate, the Law Commission concludes that the provisions of the draft Act relating to the binding force of arbitration agreements, the obligatory staying of national court proceedings in favour of arbitral proceeding, and the recognition and enforcement of arbitral awards (including the grounds for non-recognition and refusal to enforce) incorporate into the law of New Zealand the requirements of the 1923 Protocol, the 1927 Convention and the 1958 Convention.

147 There is one other aspect of the geographical scope of coverage of the draft Act compared with that of the treaties and the present New Zealand legislation that remains to be considered. As mentioned, the draft Act has wider territorial scope than the other instruments. Insofar as it can, the draft Act applies to arbitrations

wherever they occur or are to occur: cl 6. It is not limited, for instance, to arbitrations in the territory of a State Party to one of the Conventions or between parties resident or doing business in different States Parties to the Conventions.

148 The treaties and the existing implementing legislation have varying territorial application. The requirement to stay proceedings brought in respect of arbitral matters applies *wherever* the arbitration is to take place and in the case of the 1958 Convention *wherever* the parties are resident (while residence is a factor in the 1923 Protocol), 1923 article 4 and 1958 article II(3). Section 4 of the Arbitration (Foreign Agreements and Awards) Act 1982 which is designed to give effect to those two provisions empowers the stay of court proceedings in respect of arbitrations "in any country other than New Zealand". (That provision complements s 5 of the 1908 Act which empowers stays in respect of arbitrations *in* New Zealand. Between them the two provisions produce a universal territorial scope.) That is to say, in respect of the stay power, the proposed Act has the same unlimited territorial scope as the present law and the 1958 Convention.

149 It is in respect of recognition and enforcement that the territorial scope of the draft Act is broader than that of the present legislation. The obligation of recognition and enforcement under the 1927 Convention is limited to arbitrations between persons subject to the jurisdiction of different Contracting States, 1927 article 1 referring to 1923 article 1. The recognition and enforcement provisions of the 1958 Convention do apply generally to awards made in the territory of a state other than the state in which recognition or enforcement is sought, article I(1). However a Contracting State when becoming bound by the Convention may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State, article I(3). New Zealand did make that declaration when it acceded to the 1958 Convention in 1983 and the 1982 Act is limited accordingly, ss 5 and 2 ("Convention award").

150 The disparity in territorial scope between the stay and recognition provisions is one reason why we consider that the recognition and enforcement provisions should have general scope: it is anomalous that legislation should direct the New Zealand courts to stay local court proceedings in favour of foreign arbitration proceedings wherever they are happening or are to happen but should then

require recognition or enforcement of only some of the awards resulting from such proceedings.

151 Second, the common law provides in any event for the recognition and enforcement of foreign arbitral awards wherever they take place by means of an action on the award, Cheshire and North, *Private International Law* (11th ed 1987) 435-437. Further the United Kingdom version of the Arbitration Act 1908 s 13 has been read as capable of facilitating the execution of non-convention foreign awards as well as national awards, *Dalmia Cement v National Bank of Pakistan* [1975] QB 9, 23.

152 Third, 85 states are now parties to the 1958 Convention and New Zealand has obligations as well to a further eight others which are parties to the 1927 Convention but not to the 1958 one (para 122 above). The prospect of the recognition or enforcement of an award made in a non-Convention country arising here is accordingly remote, but that is not a sufficient reason for not providing for that. Fourth is the example of many of the parties to the Convention such as Austria, Australia, Italy and Spain. Fifth, a possible consequence of the limited territorial approach is the reciprocal non-enforcement of New Zealand awards elsewhere in the world.

153 The main argument for an unrestricted geographic approach to recognition and enforcement returns to a basic theme of this Report. The parties have agreed to the process of arbitration. They have agreed to the arbitrator (or at least to a process for the arbitrator's appointment). They have agreed to the relevant procedural and substantive law. And they have agreed to or provided for the place of arbitration. There are, as well, various safeguards in the recognition provisions to ensure that the agreement is real and relevant, that the arbitral process is fair, and that the award is valid. That combination of consent and safeguards appears to us to make the place of the arbitration of no real significance. Arbitral awards can be seen as distinct from the judgments of foreign courts where *State* rather than consensual institutions are involved, where one party may be an unwilling participant in the process, and where reciprocal assessment of those institutions may have a significant role in the decision of a Government to provide for recognition and enforcement (although we wonder how significant such an assessment can be in many situations). Arbitration, by contrast, is the parties' creation. Furthermore, under the 1958 Convention, the New Zealand Government can no

longer exercise an effective reciprocal control since any State can become party to the Convention without the New Zealand authorities being able to make any kind of reciprocal judgment about its system of arbitration. That has also been the case under the 1927 Convention. But such a judgment would in any event be impossible or near impossible since arbitration varies principally according to the decisions taken and agreements reached by the parties about the arbitrator, the relevant law and the procedure to be followed; and in any event, to repeat the point, particular judgments about the adequacy of the process followed in reaching the award whose enforcement is sought can still be made after the event by references to the rather broad standards in articles 34 and 36. If this view is adopted in legislation, then New Zealand could withdraw the territorial limit attached to its acceptance of the 1958 Convention.

THE ICSID CONVENTION 1965 AND THE 1979 ACT

154 The Arbitration (International Investment Disputes) Act 1979 is an Act, according to its title, "to implement [the] Convention on the settlement of investment disputes between States and nationals of other States" opened for signature in Washington on 18 March 1965. (The Convention, prepared under the auspices of the World Bank, is often referred to as ICSID.) New Zealand ratified the Convention and thereby became bound by it in 1980, following the enactment of the 1979 Act. Ninety states are now party to the Convention. The general reason for the amendments proposed in Schedule 4 to the draft Arbitration Act is that in its present form the 1979 Act does not give full effect to the Convention. It gives powers to the New Zealand courts to prefer national court proceedings to Convention arbitrations and powers to refuse to recognise and enforce awards given under the Convention. The very existence of those powers is inconsistent with the Convention and they are in any event too broad. The Act does not recognise adequately the purpose of delocalising and internationalising the arbitral processes set up under the Convention by the agreement of the parties—the contracting State and the investor who is a national of another contracting State.

The 1965 Convention

155 The preamble to the Convention refers to the role of private international investment in meeting the need for international co-operation for economic development. While disputes about such investment would usually be subject to national legal processes, international conciliation or arbitration may be appropriate in certain cases, particularly those involving a contracting State and the nationals of another contracting State if they so agree. The preamble goes on to emphasise that consent to the arbitration process provided for in the Convention is binding, with the consequence that any arbitral award is to be complied with. That consent is not however given simply by the State becoming party to the Convention; there must as well be the distinct consent of that State, along with the foreign national, in the particular investment agreement.

156 The substantive provisions of the Convention give specific content to that purpose of creating an international arbitral system largely divorced from national legal processes. So, article 25(1) provides that once the foreign investor and the host State have consented by means of the particular investment agreement to the jurisdiction of the International Centre established by the Convention they cannot withdraw their consent unilaterally. Further,

consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration *to the exclusion of any other remedy*. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention. [article 26 emphasis added]

The report of the Executive Directors of the World Bank on the Convention states expressly what appears to be clearly implied:

It may be presumed that when a State and an investor agree to have recourse to arbitration, and do not reserve the right to have recourse to other remedies or require the prior exhaustion of other remedies, the intention of the parties is to have recourse to arbitration to the exclusion of any other remedy. [quoted by C F Amerasinghe, *Local Remedies in International Law* (Grotius Cambridge 1990) 267]

157 The Secretary-General of the Centre is bound to register any request for arbitration made by the Contracting State or the foreign

national unless he finds that the dispute is manifestly outside the jurisdiction of the Centre (article 36(3)), and the tribunal set up to deal with a request is the judge of its own competence (article 41). According to article 44, any arbitration proceeding shall be conducted in accordance with the relevant provisions of the Convention. Any dispute between the Contracting States concerning the interpretation or application of the Convention which is not settled by negotiation shall be referred to the International Court by the application of any party to the dispute unless they agree to another means of resolving it (article 64). All of those provisions strongly indicate that national courts will have little if anything to do with an issue which falls within the ICSID arbitration process—leaving aside the matter of enforcement of the award, paras 164-171 below. In the context of the provisions of the Convention, accepted by the relevant host State and the State of the nationality of the investor, the parties to the particular investment agreement (including that host State) have by that further consent subjected themselves to a largely exclusive international process.

The power to stay (or not) national court proceedings

158 Accordingly, it is surprising to find that the 1979 Act expressly contemplates that a party to proceedings under the Convention might bring legal proceedings in New Zealand courts against another party to the Convention proceedings “in respect of any matter to which the proceedings pursuant to the Convention relate”. If that happens, any party to the domestic legal proceedings may apply to the High Court to stay the proceedings and

the Court *may*, if satisfied that there is *no sufficient reason* why the matter *should not* be dealt with under the Convention, make an order staying the legal proceedings. [s 8(1) emphasis added]

159 This statutory power to stay the local court proceedings is available only if the Convention arbitration proceedings were commenced ahead of the domestic legal proceedings. The power is not available in the situation where the domestic litigation is commenced first. Stay proceedings are ordinarily available to protect arbitration processes which have not yet begun as well as those which have, eg Arbitration Act 1908 s 5; Arbitration Clauses (Protocol) and the

Arbitration (Foreign Awards) Act 1933 s 3 (now repealed); Arbitration (Foreign Agreements and Awards) Act 1982 s 4; Arbitration Act 1950 (UK) s 4; Commercial Arbitration Act 1984 (NSW) s 53. As noted earlier, the 1933 and 1982 Acts give effect to treaty provisions relating to a wide range of arbitrations. The provisions of articles 26 and 41 of the 1965 Convention and the character of the ICSID process strongly argue that the prospect of national courts exercising jurisdiction in respect of ICSID matters should be narrower than in cases arising under the other statutes. But the 1979 Act is to the contrary. That contrast would be the more striking with the comprehensive terms of article 8 of Schedule 1 becoming generally applicable to all other arbitrations including purely local ones.

160 Next, the provision enables but it does not require the Court to order a stay if the relevant circumstances are made out. The 1982 Act by contrast is mandatory as was the equivalent provision in the 1933 Act. So too is the relevant provision of the Model Law, article 8. In the one case in which the provision has been invoked the Court made it express that even although the parties had agreed (in the original investment agreement) to send the particular dispute before the Court to the Centre, "there remains reserved in these Courts the right to refuse a stay of proceedings by virtue of the provisions of s 8". The Court did indicate some limits on that discretion and in fact it did order a stay of the local proceedings, *Attorney-General v Mobil Oil NZ Ltd* [1989] 2 NZLR 649, 663-668. But the discretion is there nonetheless and allows (indeed even requires) the Court to address matters which were essentially settled by the Government and Parliament when they ratified and implemented the Convention. The process also requires the Court to make a ruling on the Centre's jurisdiction; compare articles 26, 36(3) and 41 of the Convention referred to in paras 156 and 157 above. Some significance is to be given to the fact, as noted by a former Secretary-General to the ICSID Centre, that the *Mobil* case is the only case of those which have come before ICSID in which the State Party to the proceeding, on the basis of the 1979 Act, did not respect the exclusive character of the ICSID Convention, Aron Broches, *A Guide for Users of the ICSID Convention*, paras 32-37, given to the International Trade Law Conference, Australian Attorney-General's Department, 1-2 September 1990, Papers 11, 24-26.

161 Third, the standard for decision is a broad one. The section enables the Court to make a choice between itself and the Centre

even although the Centre has jurisdiction: by contrast the Convention gives the Centre and Tribunal exclusive jurisdiction unless the Contracting State requires exhaustion of domestic remedies as a condition of its consent to arbitration under the Convention (article 26). That requirement would have to be included in the investment agreement and it would only postpone and would not replace the Centre's jurisdiction.

162 The relevant Australian statute contains no express provision dealing with stay at all. It simply says that the relevant parts of the Convention are part of the law of Australia, International Arbitration Act 1974 s 32 as enacted by the ICSID Implementation Act 1990 s 4. The United States Act, like the Australian one, contains no express provision. The relevant treaty provisions became part of the United States law on ratification by the United States in 1966, Convention on the Settlement of International Disputes Act 1966 now codified in 22 USC 1650-1650a.

163 It would be possible to draft a provision requiring the stay of court proceedings with a more precise standard for decision. But the Commission considers that the preferable course is to deal with the question in the way that Australia and the United States have, leaving the matter to be dealt with directly under the provisions of the Convention which are made part of the law of New Zealand. The issues could of course still arise in a New Zealand court. If a party to a dispute relating to the investment agreement brought proceedings there, it would always be open to the other party to argue that the matter does fall or even appears to fall within the scope of the ICSID arrangement and to request the proceeding to be stayed. Such a request would be based on and would have to be decided in accordance with the provisions of the 1965 Convention (now part of the law of New Zealand) which confer authority, first, on the Secretary-General to make a very preliminary ruling and second, on the relevant tribunal to make a final ruling on questions of jurisdiction. To repeat, the consent of the parties to the ICSID procedure is consent to the arbitration to the exclusion of any other remedy (although the Contracting State can in consenting to arbitration require the exhaustion of its domestic remedies). The matter is not one which should be handled by national courts—unless of course it is crystal clear that the dispute falls completely outside the Convention process.

Recognition and enforcement of awards

164 Article 53(1) of the Convention gives content to the preambular statement (mentioned in para 155) of the obligation of the parties to comply with the arbitral award:

The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(The remedies provided in the Convention are summarised in para 166.) Accordingly, in terms of the first sentence of article 54(1),

Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State.

Paragraph 2 requires the party seeking recognition or enforcement to provide a copy of the award to the competent court designated by the State for this purpose. Under para 3, the execution of the award is governed by the law covering the execution of judgments in force in the State. Those provisions, according to article 55, are not to be construed as derogating from the law in any contracting State relating to the immunity from execution of that State or of any foreign State.

165 Section 4 of the New Zealand Act provides for the registration of awards made under the Convention, in terms consistent with those provisions. Section 5(1) follows, stating that a registered award has the same force and effect, for the purpose of execution of its pecuniary obligations, as a judgment of the High Court. (It could perhaps go further and refer to a "final" judgment of the High Court.) It is subs (2) of s 5 which causes the difficulty for it provides that

The High Court may stay execution of an award registered in the High Court if

- (a) Enforcement of the award has been stayed (whether provisionally or otherwise), or annulled, pursuant to the Convention; or

- (b) An application has been made pursuant to the Convention which, if granted, might result in a stay or enforcement of the award; or
- (c) It is contrary to the law of New Zealand.

166 Article 53(1), quoted in para 164, provides that the award is not subject to any appeal or to any other remedy *except those provided for in this Convention*. Those remedies are (1) interpretation or (2) revision of the award, preferably by the original tribunal or, if that is not possible, by a new tribunal (articles 50 and 51), or (3) annulment by an ad hoc Committee set up within the ICSID system (article 52). Revision can be sought on the ground of discovery of some significant fact, and annulment on five prescribed grounds:

- (a) the tribunal was not properly constituted;
- (b) the tribunal has manifestly exceeded its powers;
- (c) there was corruption on the part of a member of the tribunal;
- (d) there has been a serious departure from a fundamental rule of procedure; or
- (e) the award has failed to state the reasons on which it is based.

The interpretation, revision, and annulment provisions each empower the relevant ICSID body to stay enforcement if the circumstances require, and the revision and annulment articles entitle the applicant to a provisional stay until the bodies rule on the request for a stay (articles 50(2), 51(4) and 52(5)).

167 The significant points about these provisions, so far as s 5(2) of the 1979 Act is concerned, are that

- (1) any review power and stay power is exclusively in the hands of the ICSID bodies (and the provisional stay power in the hands of the parties) and not of the national courts, and
- (2) the grounds do not include a breach of the law of a contracting State.

It is relevant to that second point that part of the purpose of the Convention is to enable the lessening or even the denial of the significance of national law in the protection of foreign investment. It is also relevant to the stay question discussed earlier that the Court in

the *Mobil* case thought that the power conferred by s 5(2)(c) weighed on the side of allowing the High Court proceedings to continue, [1989] 2 NZLR 649, 665.

168 Again other statutes provide better models, consistent with the Convention. The Australian International Arbitration Act 1974 contains the following two provisions:

33 Award is binding

- (1) An award is binding on a party to the investment dispute to which the award relates.
- (2) An award is not subject to any appeal or to any other remedy, otherwise than in accordance with the Investment Convention.

35 Recognition of awards

- (1) The Supreme Court of each State and Territory is designated for the purposes of Article 54.
- (2) An award may be enforced in the Supreme Court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of the State or Territory.

The explanatory note to the relevant Bill emphasises the exclusive character of the Convention process; s 33 would ensure that the objectives of the Convention will not be able to be frustrated through ancillary litigation (Parliament of the Commonwealth of Australia, House of Representatives—*ICSID Implementation Bill 1990, Explanatory Memorandum*, circulated by authority of the Attorney-General the Honourable Michael Duffy MP (1990) 7).

169 The United States Act likewise provides that

The pecuniary obligations imposed by [a Convention] award shall be enforced and shall be given the same full faith and credit as if the award were a final judgment of a court of general jurisdiction of one of the several States. [22 USC 1650a]

The Federal Arbitration Act (with its review and appeal provisions) is expressly made not applicable to the enforcement of Convention

Awards. The Australian Act similarly provides that other laws relating to the recognition and enforcement of arbitral awards do not apply to a Convention award, or to a dispute within the jurisdiction of the Centre (s 34). (See also s 9 of the New Zealand Act and s 3(2) of the United Kingdom Act.) The Australian explanatory note again refers to the rationale behind the proposed s 34 as being the exclusive character of the Convention remedy. The United Kingdom Act similarly provides that a Convention award is to be registered at the request of a person seeking its recognition or enforcement, and that, for the pecuniary obligations it imposes, it is of the same force and effect as a judgment of the High Court (Arbitration (International Investment Disputes) Act 1966 ss 1-2; the provisions are reflected in ss 4, 5(1) and 6 of the New Zealand Act).

170 Those provisions, by the absence of any provision equivalent to s 5(2) of the New Zealand Act, confirm the plain meaning of the Convention provisions: the only review mechanisms are those international ones which the Convention allows. Accordingly s 5(2) should be repealed.

171 The Law Commission's general conclusion is that the substantive part of the 1979 Act should be rewritten in terms such as those set out in Schedule 4 to the draft Act. The proposed amendment follows in essence the Australian provisions: the relevant provisions of the Convention are made part of New Zealand law. The use of this direct legislative technique, first, removes the confusion which can be introduced by legislative wording which parallels but differs from the wording of the Convention, and, second, to the extent that matters might arise in New Zealand courts, enables the more ready use of interpretations of the Convention given elsewhere. So there are already relevant decisions of Belgian, French, Swiss and United States courts, as well as the awards given by the tribunals set up under the Convention. The proposed amendments are set out in Chapter VII, in Schedule 4 to the draft Act.

VII

A Commentary on the Draft Act

172 There is already a large body of literature on the law, practice and reform options in relation to arbitration (see the bibliography in Appendix C). As the Law Commission has reviewed all aspects of the topic, it would be possible to produce a report of encyclopaedic size and detail, canvassing the arguments on every issue. We see little value in taking that course, and have sought to keep this Report within reasonable boundaries of size and detail. The device of a commentary on recommended statutory provisions assists that objective, and has been used often by the Commission and other law reform agencies.

173 This chapter contains commentary on each of the provisions recommended as part of a new Arbitration Act. The tables of contents for the Act and for Schedules 1 and 2 are included in the reproduction of the draft Act (without commentary) at the end of Chapter I. Readers of this Chapter should bear in mind that the draft Act is made up of sections, Schedule 1: Rules governing arbitration generally (essentially the UNCITRAL Model Law) of articles, and Schedule 2: Additional optional rules governing arbitration of clauses. Schedule 3 (included in Chapter I) sets out the three arbitration treaties (discussed in Chapter VI) and Schedule 4 (in this Chapter) contains the proposed amendments to other enactments.

174 The main substantive provisions of the draft Act are those in Schedule 1 corresponding for the most part to the provisions of the UNCITRAL Model Law and governing both international and domestic arbitration. In commenting on those provisions, we have, in general, avoided repetition of the article-by-article commentaries in the two important UNCITRAL documents reproduced in Appendix D to this Report (see para 8) and of the discussions of some broader issues which appear in earlier chapters. This chapter tends to focus on what is included rather than what is not. Nevertheless, in some cases it is necessary to refer to the origins of, or the intentions underlying, provisions of the Model Law in order to explain the Law Commission's reasons for recommending that they be supplemented or amended.

175 In outlining the origins of various provisions we propose, this chapter will underline our debt to legislation implementing or based on the Model Law as proposed or adopted by law reform agencies or legislatures elsewhere, in particular Alberta, Australia, British Columbia, California, Canada (federal), Hong Kong, Quebec and Scotland.

176 The draft Act has drawn, for example, on the (Canadian) Commercial Arbitration Act 1986 and the (Australian) International Arbitration Amendment Act 1989. As the Australian Act amended and retitled a 1974 Act, we refer to the sections as inserted into the (amended) 1974 Act by the 1989 Act, and for convenience refer to that Act as the "IAA (Aust)". The uniform arbitration statutes enacted in 1984 in all the Australian states (except Queensland) are referred to in this chapter as "UCAA (Aust)".

177 Our draft Act has a different scope from the IAA (Aust)—in applying to domestic arbitration and replacing the existing arbitration statutes—and necessarily includes provisions not found in the IAA (Aust). Nevertheless, that Act has been a valuable source.

178 Two matters which we considered for inclusion in the draft Act were confidentiality in court proceedings related to arbitration, and arbitrators acting as conciliators. Both of those were recommended and implemented in Hong Kong as sections of the revised Arbitration Ordinance (the Model Law in its unmodified form appears as the Fifth Schedule to the Ordinance). We discuss these topics in the commentaries on articles 24 and 30 of Schedule 1.

THE SCHEME OF THE DRAFT ACT

179 In this commentary (and in the Report as a whole), we use the term “the draft Act” to mean the proposed statute and all its schedules. The term “Act” when used alone refers to the Act as distinct from the Schedules.

180 The draft Act enacts, as the law of New Zealand, the provisions set out in Schedule 1, corresponding to those of the UNCITRAL Model Law with some additions and amendments. This approach may be contrasted with that adopted in the IAA (Aust) which gave the UNCITRAL Model Law in its original form the force of law in Australia (s16(1)) and supplemented or amended its provisions separately in the later provisions of that Act.

181 The difference is one of drafting technique rather than substance. Our approach has two consequences. First, it has made it possible to write directly into the text of the Model Law—retitled as Rules Governing Arbitration Generally—all modifications proposed for both international and domestic arbitration, and also to spell out there the powers of the New Zealand courts to support arbitration in the ways expressly contemplated by the Model Law. Secondly, the operative provisions about the scope of application in article 1 of the Model Law have been moved into the Act itself where, on this approach, they more properly belong.

182 Changes by way of deletion from the Model Law have been shown as deletions from the text of Schedule 1, so that the numbering of the articles of the Model Law can be maintained, to facilitate reference to the UNCITRAL commentaries. Both the Act itself and Schedule 2, containing the rules which apply to international and domestic arbitration, on an opt in and opt out basis, have been made compatible, in structure and terminology, with the provisions of Schedule 1. So far as possible, the language of Schedule 1 has been kept intact, so that, by adopting rather than adapting the Model Law, the New Zealand law governing arbitration will be harmonised to the greatest possible extent with the international model. We shall be able to draw on the growing international experience of the Model Law.

183 Apart from its formal or declaratory provisions and its main operative provisions providing that the rules governing arbitration are those set out in the Schedules, the Act contains a small number of

provisions which contribute to the framework of New Zealand arbitration law. These provisions clarify the position with respect to the arbitrability of disputes and the powers and liabilities of arbitrators.

184 These provisions find a place in the Act itself rather than the schedules for one of two reasons. In most cases they govern arbitration generally but cannot conveniently be associated with any provision of the Model Law. In one other case (s 9: Consumer arbitration agreements), the provision is likely in practice to govern only domestic arbitration but should not be susceptible to the opting out from Schedule 2 permitted by s 6(2).

185 The provisions of Schedule 2, in language and in structure, have been related to the rules in Schedule 1, with the object of avoiding undisclosed inconsistencies which might pose later problems for arbitral tribunals or the courts. These provisions fall into three categories.

186 First, where the Model Law contemplates that a matter is to be governed by the agreement of the parties, but there are fall-back provisions applying in the absence of agreement, Schedule 2 sets out provisions which are to be implied as terms of that agreement (unless the parties agree otherwise). This technique leaves intact the residual powers of the arbitral tribunal, and does not cast doubt, by reason of any adverse inference, on the scope of those powers even when Schedule 2 does not apply to the arbitration in question.

187 Second, in matters where the Model Law is silent, as, for example, in relation to the consolidation of arbitral proceedings, the provisions of Schedule 2 can operate as simple add-ons to Schedule 1. The opt in and opt out mechanism under s 6 of the Act gives the parties the necessary freedom of choice about using these provisions.

188 Third, some provisions of Schedule 2 are inconsistent with provisions of Schedule 1. For example clause 5, allowing an appeal on a matter of law arising out of the arbitration, is inconsistent with articles 5 and 34 of Schedule 1 restricting the role of the courts, generally, and in setting aside awards. In cases of that kind the overriding effect of Schedule 2 has been expressly stated. But the parties remain free to opt into or opt out of the overriding provisions.

189 As the draft Act will continue to give effect to New Zealand's obligations as a contracting party to three international treaties on

arbitration, the texts of which are at present appended to Acts now being repealed, those texts are set out in Schedule 3. Schedule 4 sets out the amendments to other Acts consequential on the replacement of the Arbitration Act 1908 by the draft Act. It also amends the Arbitration (International Investment Disputes) Act 1979 so as to give full effect to the relevant international convention (see Chapter VI).

THE SECTIONS OF THE ACT

1 Purposes

The purposes of this Act are

- (a) to encourage the use of arbitration as an agreed method of resolving commercial and other disputes;
- (b) to promote international consistency of arbitral regimes based on the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985;
- (c) to promote consistency between the international and domestic arbitral regimes in New Zealand;
- (d) to redefine and clarify the limits of judicial review of the arbitral process and of arbitral awards;
- (e) to facilitate the recognition and enforcement of arbitration agreements and arbitral awards; and
- (f) by so doing, to give effect to the obligations of the Government of New Zealand under the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) (the English texts of which are set out in Schedule 3).

190 The first section of the draft Act is of considerable importance in articulating the overall objectives of the statute and in providing an indication of the “spirit” underlying its enactment. It will be relevant when particular provisions of the Act have to be interpreted by parties, lawyers, arbitrators or judges.

191 Our preference for a purpose clause rather than a preamble or extended title has been reflected in the draft legislation included in

our earlier reports. In particular, we discussed this matter in our recent Report No 17, *A New Interpretation Act* (NZLC R17 1990) para 70:

The practice of including preambles, even if long established, is now unusual. Statutes do increasingly now include an express statement of purpose. We propose one for the present Bill and their regular enactment. The Clerk of the House similarly proposes that Standing Orders require that every principal Bill (that is Bills other than amending Bills) should contain a purpose clause. That would help both parliamentary consideration and the Bill's interpretation. There would be greater focus on Parliament's specific statements and less on material which is more general or less authoritative. We agree with that proposal and so recommend.

192 Dealing with each of the stated purposes in turn:

- (a) This paragraph summarises the basic thrust of the draft Act which is intended to increase awareness, ease of use, and actual use of the arbitral process as a means of resolving disputes.
- (b) The December 1985 resolution of the United Nations General Assembly not only endorsed the UNCITRAL Model Law but included a recommendation that all countries consider giving effect to that Model Law. The enactment of the draft Act would represent a positive and direct response to that recommendation, and an endorsement of the reasons recorded in the earlier part of the resolution (reproduced in Chapter III).
- (c) This paragraph indicates the underlying policy decision, reflected in the structure of the draft Act, that it is desirable to have both a distinction and a high degree of consistency between the rules governing international and domestic arbitrations. The essential basis for this consistency is the UNCITRAL Model Law which governs both types of arbitration.
- (d) This paragraph indicates the generally limited scope for later challenges in court proceedings to awards given in a properly constituted arbitration.
- (e) This paragraph indicates a primary purpose of both the international and domestic arbitration regimes—the

recognition and enforcement of arbitration agreements and arbitral awards.

- (f) This paragraph records that, in providing for the recognition and enforcement of arbitration agreements and arbitral awards, the draft Act gives effect to New Zealand's obligations under three of the treaties relating to arbitration by which the Government is bound and refers to the fact that the English texts of the relevant treaties are reproduced in Schedule 3.

193 This section is more detailed than the long title in the IAA (Aust), reflecting the wider scope of the draft Act.

2 Entry into force

This Act comes into force on— 199-.

194 A period of at least three and perhaps six months between enactment and commencement of a new Act would provide an appropriate opportunity for all those who are, or are likely to be, involved in arbitrations in New Zealand to familiarise themselves with what would be a fundamentally rewritten legislative framework. See also the transitional provisions in s 14.

3 Crown to be bound

This Act binds the Crown.

195 This provision is designed to overcome the current and traditional rule that the Crown is not bound by a statute unless the statute expressly provides for that, as many modern statutes do. In Chapter IV of our recent Report No 17, *A New Interpretation Act* (NZLC R17 1990), we discuss and recommend the reversal of the traditional rule. This is consistent with s 24 of the 1908 Act and s 2B of the IAA (Aust). In general terms, it places the Crown in the same position as any other party to an arbitration.

196 The section does not re-enact the reference to the special position of the Crown in relation to the enforcement of judgments and awards to be found, presumably from an abundance of caution, in s 3(2) of the Arbitration (International Investment Disputes) Act 1979 and s 3(2) of the Arbitration (Foreign Agreements and Awards) Act 1982. (Those provisions do not address the position of foreign

state immunity from execution.) There is no corresponding provision in the Arbitration Act 1908 which also binds the Crown (s 24). Section 24 of the Crown Proceedings Act 1950 makes it clear, however, that, although the Crown is bound by the new Arbitration Act as by the old, the restriction on the enforcement of judgments against the Crown will continue to apply to the enforcement of an arbitral award when entered as, or incorporated in, a judgment. See also s 3(2)(b) of the 1950 Act.

4 Definitions

In this Act

arbitral tribunal means a sole arbitrator or a panel of arbitrators;

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

arbitration agreement means 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;

award means a decision of the arbitral tribunal on the substance of the dispute and includes any interim, interlocutory or partial award;

party means a party to an arbitration agreement, or, in any case where an arbitration does not involve all of the parties to the arbitration agreement, means a party to the arbitration.

197 Because the draft Act and its schedules form an integrated whole, its language and terminology have been kept consistent. For convenience, s 4 contains the definitions of **arbitration** and **arbitral tribunal**, taken from article 2 of the Model Law, and the definition of **arbitration agreement**, taken from the first sentence of article 7(1). These are all terms used in more than one section of the Act itself as well as in Schedules 1 and 2.

198 The term “international arbitration” is used only in s 6(2) of the Act where there is a cross-reference to the definition of that term in article 1(3) of Schedule 1. It should be noted that as a governing phrase, “international arbitration”, involves a deliberate omission of the reference to “commercial” in the Model Law. See the commentary on article 1. The scope of the draft Act remains limited by the

provisions about arbitrability (see s 8, below) which would generally exclude, say, criminal and most, if not all, family law disputes.

199 Although the term “domestic arbitration” is used in this Report to describe arbitrations that are not “international”, we have not used the term in drafting. At one stage in our preliminary work, we proposed that non-international arbitrations be described as “standard” rather than “domestic”. The general response from those we consulted was that “standard” could cause confusion. Thus, after making express provision, where necessary, both for “international arbitrations” and for arbitrations that are not necessarily “international” in terms of the Model Law, but are covered by the 1923 Protocol or the 1927 Convention (or both) (see s6(2)(a)(ii)), we have simply referred to “every other arbitration”.

200 The term “arbitration” is not defined in functional terms, and the definition of “arbitration agreement” similarly refrains from describing the nature of the arbitral process. Although the Quebec legislation comes closer to a definition of “arbitration” in defining “arbitration agreement” in terms of a submission “to decision by one or more arbitrators to the exclusion of the courts” (article 1926.1), we believe that the concept is well enough understood not to require such a definition.

201 The reference to “disputes” raises a query whether an arbitration agreement extends to determination of “any question or matter”, which is included in the definition of “submission” in s 2 of the 1908 Act. We believe that a “question or matter” which is referred to arbitration but is not the subject of a present dispute would be so referred because it is foreseeable that, in the absence of a determination, a dispute might arise, and thus the same effect is achieved by the words “disputes ... which may arise”. In other words, the words “may arise” refer not only to time but to a different relationship between the parties, for example, a change from mere contracting parties to parties in dispute.

202 A definition of **award** has been included, for the purposes both of the Act itself and Schedules 1 and 2, following precedents set in the legislation adopting the Model Law in British Columbia and California. The definition we recommend is taken from s 1297.21 of the California legislation and differs from the British Columbia legislation only in the inclusion of the words “interlocutory, or partial”. This definition makes it clear that an arbitral tribunal may issue an

interim award. It also reflects a distinction between an award on the substantive merits of a dispute as against a procedural order, although our recommendation for a new article 17(2) involves a pragmatic departure from that distinction. (That departure does not expand the meaning of the term “award” but, for the purposes mentioned in that article, assimilates orders made by an arbitral tribunal for interim measures to an award on an “as if” basis.)

203 We have added a new definition of **party** which is, as far as we know, without precedent. Nevertheless it seems usefully to spell out what is implicit in the Model Law. The expression “parties to an arbitration agreement” makes its appearance early, in subpara (a) of the definition of international arbitration in article 1(3). Thereafter the term “parties” is used without more. But it seems obvious from the context that, in the comparatively rare case where there are more than two parties to an arbitration agreement but not all of them are involved in a particular arbitration, only those who are parties to the arbitration have the rights and duties set out in the Model Law. We think there are advantages in making this explicit.

204 On the other hand, we see no need to spell out that, when there are more than two parties to an arbitration, a reference to a party in the singular connotes all other parties in the same position, for example all who are claimants or respondents for the purposes of article 25. This is in accordance with the standard rule on interpretation in s 4 of the Acts Interpretation Act 1924 and recommended by the Law Commission for re-enactment, in slightly reformulated terms, as s 23 of a new Interpretation Act (NZLC R17).

5 Interpretation

The material to which an arbitral tribunal or a court may refer in interpreting this Act includes the documents relating to the Model Law referred to in section 1(b) and originating from the United Nations Commission on International Trade Law, or its working group for the preparation of the Model Law.

205 Such an express statutory statement of the relevance of the drafting history (*travaux préparatoires*) of an international text implemented by the statute is rare, perhaps unprecedented in New Zealand. (For a related, slightly different provision see the Customs Act 1966 s 12D enacted in 1988.) We have included it for several

reasons. First, it emphasises the international origin and context of the statute, eg *Brown Boveri v Baltic Shipping Co* (1990) 93 ALR 171, 174-177, NSWCA. Second, consistently with the indication given by the General Assembly of the United Nations (para 22), it reminds those interpreting the resulting legislation that that preparatory material may be helpful. Third, it is consistent with the practice of courts in New Zealand and elsewhere which have from time to time used such material, eg *King-Ansell v Police* [1979] 2 NZLR 531, 540 CA; *Commissioner of Inland Revenue v JFP Energy Incorporated* [1990] 3 NZLR 536, 540, CA; *New Zealand Maori Council v Attorney-General* [1987] 1 NZLR 641, 714; *Fothergill v Monarch Airlines* [1981] AC 251, 276-278, 281-283, 294-296, 302, cf 287-289; and *Commonwealth v Tasmania* (1983) 158 CLR 1, 93-96, 134, 172-177, 191-183, 223-224, 228. Carl-August Fleischhauer, Legal Counsel to the United Nations, in his foreword to Holtzmann and Neuhaus, refers to a 1987 Quebec decision which uses the UNCITRAL preparatory work. Fourth, provisions to the same effect are included in the Australian, Hong Kong, United Kingdom (Scotland) and Canadian federal and provincial legislation and an omission here might suggest an adverse inference.

206 Overall, the purpose is to encourage an interpretation unconstrained by technical rules, but on broad principles of general acceptance, *James Buchanan and Co Ltd v Babco Forwarding and Shipping (UK) Ltd* [1978] AC 141, 152. To help facilitate that in a practical way the Report sets out the UNCITRAL Report and the Analytical Commentary in Appendix D.

207 The significance of the drafting history should not be overstated. The draft Act is designed to be self-contained and to suffice in all but the most difficult of cases. As we have recently said, the user of the statute book should in general be able to place heavy reliance on it. Extended references to material beyond its text should not be common, *A New Interpretation Act* (NZLC R17 1990) para 126. In the few cases in which difficult points of interpretation do arise, the history may, however, help answer the difficulty and provide internationally consistent interpretation of the Model Law.

208 The Commission considered including in the proposed Act an express reference to this Report as is found in the Hong Kong Ordinance giving effect to the Model Law. We decided against that for the

reasons which we recently gave in a more general context in recommending against a general provision about the use that can be made in interpretation of material beyond the text of the enactment in issue: the courts are already making careful use of such material and legislation would not assist (NZLC R17 paras 100-126).

6 Rules governing arbitration

(1) If the place of arbitration is in New Zealand, the arbitration is governed

- (a) by the provisions of Schedule 1, and**
- (b) by those provisions of Schedule 2 (if any) which apply to that arbitration under subsection (2).**

(2) A provision of Schedule 2 applies

- (a) to an arbitration referred to in subsection (1) which**
 - (i) is an international arbitration as defined in article 1(3) of Schedule 1, or**
 - (ii) is covered by the provisions of the Protocol on Arbitration Clauses (1923) or the Convention on the Execution of Foreign Arbitral Awards (1927), or both,****only if the parties so agree, and**
- (b) to every other arbitration referred to in subsection (1), unless the parties agree otherwise.**

(3) If the place of arbitration is not in New Zealand, or is still to be agreed or determined, that arbitration is governed by the provisions of articles 8, 9, 11(6), 35 and 36 of Schedule 1, so far as those provisions are applicable in the circumstances.

209 This section provides the legislative link between the Act itself and Schedules 1 and 2. As its heading suggests, it is the main operative provision of the Act, stipulating the rules that are to govern arbitration in every case where the New Zealand law of arbitration is to be applied.

210 Reflecting our central recommendation that the Model Law should apply to domestic as well as to international arbitrations, s 6(1)(a) provides that all arbitrations are governed by Schedule 1 if the place of arbitration is in New Zealand. This provision absorbs one of the main scope provisions of the Model Law (article 1(2)).

211 Section 6(1)(b) and (2) capture the essential flexibility or party autonomy which is to regulate the application of the additional rules in Schedule 2 and provide for the different options which are to govern international and domestic arbitration. As explained in paras 185-189, some provisions of Schedule 2 do not involve any inconsistency with those of Schedule 1, but, where there is an inconsistency, it is expressly provided that the Schedule 2 provision prevails.

212 Section 6(2)(a)(i) applies to international arbitration as defined in article 1(3) of the Model Law. New Zealand's obligations under the 1923 Protocol and the 1927 Convention have been accommodated by applying the same rules to the arbitrations covered by those instruments (s 6(2)(a)(ii)). Parties to this enlarged range of "international" arbitrations are bound by a provision of Schedule 2 only if they so agree (opt in) under s 6(2)(a).

213 Section 6 does not contemplate that the parties to an international arbitration agreement can contract out of the draft Act altogether, unlike s 21 of the IAA (Aust). That difference is based on the inherent flexibility of Schedule 1 (essentially the Model Law) and on the need under the IAA (Aust) to enable parties to contract into an entirely separate domestic arbitral regime.

214 Thus, if parties agree to arbitrate according to specific terms or institutional procedures, for example the rules of the International Chamber of Commerce, those terms or procedures would almost certainly fit within the Model Law and the choices it provides for parties. However, in the event of any inconsistency, the draft Act would prevail.

215 Section 6(2)(b) is the corollary of s 6(2)(a) and provides the legislative basis for non-international arbitrations to be governed by a modified and supplemented version of the Model Law: Schedule 1 read together with Schedule 2. As with international arbitrations s 6(2)(b) is presumptive in that it permits parties to an arbitration agreement to agree to opt out of some or all of the provisions of Schedule 2 (and in that case the relevant provisions of Schedule 1 would apply as they stand).

216 Section 6(3) picks up, and slightly widens, the exceptions provided for in article 1(2) of the Model Law requiring the application of the listed provisions of the Model Law even though the place of arbitration is outside New Zealand. These exceptions apply to the

articles of Schedule 1 which require the recognition and enforcement in New Zealand of “foreign” arbitration agreements and arbitral awards, or provide for court support of the arbitral process where the arbitration takes place outside as well as within New Zealand, or where the place of arbitration has still to be agreed or determined.

217 Section 6 does not reproduce the element of article 1(1) of the Model Law limiting its provisions to “commercial” arbitration. See para 281.

218 The effect of s 6 is to prevent parties to both “international” and non-international arbitrations from effectively contracting out of the draft Act beyond the scope given for this by s 6(2). The separate and rather obscure common law rules relating to arbitrations, which presently apply to unwritten arbitration agreements, would cease to have any significance. The consequence of this limitation is that an agreement to have a dispute determined by some third party otherwise than in accordance with s 6 will not be effective in the sense that the determination will not be enforceable against an unwilling losing party if the basic requirements of the draft Act, notably those implicit in articles 34 and 36 of Schedule 1, have not been complied with. Although this proposition may be seen as limiting freedom of contract, the flexibility of the draft Act is such that it is difficult to conceive of credible reasons for parties seeking to contract out of the draft Act completely.

7 Arbitration under other enactments

(1) Nothing in section 6 affects any other enactment providing that any arbitration is governed, in whole or in part, by provisions other than those of Schedule 1 and, to the extent that they would otherwise apply, those of Schedule 2.

(2) No agreement of the parties under section 6(2) shall be of any effect if it is inconsistent with any enactment referred to in subsection (1).

(3) For the purposes of applying the provisions of Schedule 1 and Schedule 2 (so far as those provisions are applicable) to the arbitration of any question required by any other enactment to be determined by arbitration, those provisions shall be read as if

(a) that other enactment were an arbitration agreement,

- (b) the arbitration were under an arbitration agreement, and**
- (c) the parties to the dispute were parties to an arbitration agreement,**

subject, however, to the provisions of that enactment.

219 Section 7(1) picks up the second part of article 1(5) of the Model Law and widens it by excluding the application not only of Schedule 1 but also of Schedule 2 to the extent that another enactment provides that any arbitration is governed by other provisions. This exclusion encompasses the exception in article 1(1)(a) of the Model Law for those cases where an arbitration is to be conducted in accordance with an agreement in force between New Zealand and any other State or States. Under New Zealand law no such agreement will have any effect unless it is embodied in or given the force of law by an enactment. The Arbitration (International Investment Disputes) Act 1979 is an example of an enactment coming within s 7(1). It gives effect to the Convention on the Settlement of Investment Disputes between States and Nationals of other States, and applies a wholly separate and comprehensive arbitration regime (see Chapter VI).

220 Section 7(2) is consequential, providing that no agreement opting in or opting out of Schedule 2 may be inconsistent with an enactment whose effect is either to exclude or to require the application of that Schedule.

221 Section 7(3) is modelled on s 3(4) of the UCAA (Aust) and carries forward the effect of s 25 of the 1908 NZ Act. The same rules will generally apply to an arbitration required under an enactment as would apply to a domestic arbitration.

222 Although an arbitration required by statute is not based on agreement, the procedures contained in the draft Act include a framework of default rules which apply in the absence of agreement between the parties once the arbitration is commenced. Accordingly, recalcitrant parties to a statutorily directed arbitration will be unable to avoid the mandatory and default rules in the draft Act. Conversely, if the parties to a statutorily required arbitration do wish to agree on aspects of the procedure, as permitted by the draft Act, such agreements will be effective.

223 A general discussion of the question of statutory references to arbitration is included in Chapter V of this Report.

8 Arbitrability of disputes

(1) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction in respect of any matter on the High Court or a District Court but does not refer to the determination of that matter by arbitration does not, of itself, indicate that a dispute about that matter is not capable of determination by arbitration.

224 The draft Act contains no express jurisdictional limits, such as applying only to “commercial” arbitration (as in the unmodified Model Law). This leaves questions about arbitrability: what kinds of disputes must be resolved by the courts or some other tribunal given the responsibility by a statute, rather than by arbitration?

225 The Model Law does not deal directly with the question of the criteria for determining the arbitrability of disputes, no doubt because it could arise in several different contexts, and the answer might be different, depending on the law to be applied.

226 First, the arbitrability of a dispute could be raised as a question going to the validity of the arbitration agreement. This question could be put to the arbitral tribunal under article 16 of Schedule 1 (Competence of arbitral tribunal to rule on its jurisdiction) or articles 34(2)(a)(i) or 36(1)(a)(i) (Grounds for the setting aside of an arbitration agreement and the non-recognition or non-enforcement of an arbitral award), or clause 4 of Schedule 2 (Determination of preliminary point of law). Articles 34(2)(a)(i) and 36(1)(a)(i) make it clear that validity is to be determined under the law to which the parties have subjected the agreement, or, failing any indication on that point, under the law of New Zealand.

227 Second, the question of arbitrability could arise when a court is asked, under article 8, to stay a legal proceeding and refer the parties to arbitration. It is a ground for refusing a stay that the court finds

“that the agreement is null and void, inoperative, or incapable of being performed”. There appears to be general agreement that an agreement to arbitrate a non-arbitrable dispute is “normally” null and void, but the question whether this involves the application of the forum law on non-arbitrability or some other law was left unresolved by the Model Law (Holtzmann and Neuhaus, 304).

228 In these two cases, therefore, the arbitral tribunal or the courts may or may not be required to apply the law of New Zealand in deciding whether a dispute is arbitrable. In a third situation, however, it is expressly stated that the law of New Zealand applies. Under article 34 (2)(b), and the parallel provision in article 36(1)(b), the High Court may set aside or refuse to recognise or enforce an award if

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of New Zealand; or
- (ii) the award is in conflict with the public policy of New Zealand.

The first ground reflects the first part of article 1(5) of the Model Law which provides that it does not affect any other law of the State concerned by virtue of which certain disputes may not be submitted to arbitration. The provision appears to be comprehensive in embracing every ground of non-arbitrability, but if there were to be any doubt on this point, the power to set aside or to refuse recognition or enforcement to any award on the ground that it is in conflict with the public policy of New Zealand should fill any gap.

229 In our 1988 discussion paper we suggested there might be statutory clarification of the issue of arbitrability. There was some support for this in the submissions and comments received, in particular for the idea that the scope of matters which cannot be arbitrated should be kept to a minimum following the trends in the United States courts: see *Shearson/American Express Inc v McMahon* (1987) 482 US 220; 96 L Ed 2d 185. Quebec provides one precedent in its 1986 legislation, which essentially adopted the Model Law for both international and domestic arbitration, in a new article 1926.2 of the Civil Code:

Disputes over the status or capacity of persons, family matters or questions of public order cannot be submitted to arbitration.

230 However problems arose when we attempted to set out an arbitrability rule in statutory form. A draft provision circulated in December 1989 received a number of criticisms, suggesting that a list approach, stating matters which cannot be arbitrated, is too rigid. In the end we decided to retain only general provisions in favour of arbitrability bolstered by the express policy of the draft Act to encourage arbitration. In the case of Acts which do not specify whether their provisions can be arbitrated (for instance, the Fair Trading Act 1986), the presumption would be for arbitrability. In addition, the draft Act does not reproduce s 16 of the Arbitration Amendment Act 1938 which makes arbitrability of fraud issues subject to the discretion of the court, although in recent years that has been exercised in a liberal fashion: *Cunningham-Reid v Buchanan-Jardine* [1988] 1 WLR 678. In the discussion paper we questioned why fraud should not be arbitrable, in the same way as misrepresentation and negligence, when it essentially involves a private claim between individuals, and we have found no reason to depart from that view.

231 In essence, the approach to arbitrability favoured by the Law Commission, and reflected in s 8, is that, as a matter of New Zealand law, any dispute which can be settled between the parties by direct agreement should be able to be determined by arbitration. Neither form of agreement-based result will be valid where the agreement is contrary to public policy or any other enactment provides that such a dispute may not be submitted to arbitration.

232 In the absence of an express statutory provision excluding arbitration (such as s 16 of the Disputes Tribunals Act 1988), the two grounds are likely to overlap. The fact that a statute attributes particular consequences to its contravention or provides a particular forum for the resolution of disputes where contravention is alleged may suggest that those disputes are not arbitrable, and public policy may reinforce the exclusion of recourse to a private process to obtain a remedy. So, for example, it could be expected that a dispute about sharing the proceeds of a crime, or about an anti-competitive arrangement contravening the Commerce Act 1986, would be found not to be arbitrable at New Zealand law.

233 The drafting of s 8(1) reflects the approach of s 5 of the Illegal Contracts Act 1970, and expresses a presumption in favour of arbitration. The subsection absorbs article 1(5) of the Model Law which

has therefore been omitted from Schedule 1. Section 8(2) is designed to diminish the force of a general jurisdiction provision (a statute conferring jurisdiction and powers on the High Court or a District Court or the courts generally), leaving the issue of arbitrability to be approached in the terms of s 8(1).

234 In as much as the statutory test of arbitrability turns in part on public policy, its application under article 34(2)(b)(ii) or 36(1)(b)(ii) of Schedule 1 will involve some overlap with the second ground on which the High Court may set aside or refuse to recognise or enforce an arbitral award. It seems unnecessary in the present context to spell out any particular matters which may be relevant in determining whether an award is contrary to the public policy of New Zealand. But compare articles 34(6) and 36(3) and the commentary in paras 403-404 and 411.

9 Consumer arbitration agreements

(1) Where

- (a) a contract contains an arbitration agreement, and**
- (b) a person enters into that contract as a consumer,**

the arbitration agreement is enforceable against the consumer only if the consumer, by separate written agreement, certifies that, having read and understood the arbitration agreement, the consumer agrees to be bound by it.

(2) For the purposes of this section, a person enters into a contract as a consumer if

- (a) that person enters into the contract otherwise than in trade, and**
- (b) the other party to the contract enters into that contract in trade.**

(3) Nothing in subsection (1) applies to a contract that is not governed by the law of New Zealand.

(4) For the purposes of article 4 of Schedule 1, subsection (1) shall be treated as if it were a requirement of the arbitration agreement.

(5) Unless a party who is a consumer has, under article 4 of Schedule 1, waived the right to object to non-compliance with subsection (1), an

arbitration agreement which is not enforceable by reason of non-compliance with subsection (1) shall be treated as inoperative for the purposes of article 8(1) of Schedule 1 and as not valid under the law of New Zealand for the purposes of articles 16(1), 34(2)(a)(i) and 36(1)(a)(i) of Schedule 1.

235 Our approach to arbitration is premised on a recognition of its contractual nature. The general law of contract assumes that parties who have voluntarily undertaken obligations as part of a bargain or agreement should be held to those obligations or pay damages should they breach them. That assumption accords with reality and expectations in the case of a transaction between two business parties but is often criticised as inappropriate for consumer transactions. The topics of inequality of bargaining power, standard form contracts (also known as contracts of adhesion), and the absence of true consent remain contentious and the subject of divided opinions within the ranks of policy makers and legal commentators and academics. The Commission last year published a discussion paper on them, *"Unfair" Contracts* (1990 NZLC PP 10).

236 The Model Law makes only limited provision for the protection of weaker contracting parties. Doctrines such as fraud, duress and unconscionability could be invoked as grounds for a court to refuse a stay of its proceedings, or for a tribunal to refuse to accept jurisdiction—since its power under article 16 specifically includes “any objections with respect to the existence or validity of the arbitration agreement”. However it is important to appreciate that both existing arbitration law and articles 16 and, implicitly, 7(1) and 8 of Schedule 1 are premised on an arbitration agreement being severable from the contract of which it forms part. The validity of the arbitration agreement can be attacked only if the grounds for attack specifically affect the agreement itself—and not just the contract in general. Thus the common law doctrines provide only limited protection against enforcement of an arbitration agreement.

237 As noted in our 1988 discussion paper, the existing law includes two statutory provisions which reflect a consumer protection philosophy overriding the ordinary assumptions of contractual arbitration. The first is s 16 of the Disputes Tribunals Act 1988 which allows such tribunals to maintain their jurisdiction over disputes involving small sums (presently \$3000, or, by agreement, up to \$5000) notwithstanding an arbitration clause. Given that access to

such tribunals involves minimal cost (the current fee is \$20 if the amount sought is \$1000 or more, otherwise \$10), the involvement of lawyers is at least discouraged, and that there is no arbitrator to be paid, there can be little quarrel with that provision.

238 The second existing provision which reflects a consumer protection philosophy in arbitration is s 8 of the Insurance Law Reform Act 1977 which makes an arbitration clause in an insurance contract enforceable only if the insured chooses to let an arbitration proceed. As noted in our discussion paper (at para 58) we found this provision somewhat anomalous given its limited scope. Although our consultation suggested that this provision has not substantially affected practices in the insurance industry, there is some irritation within the industry at being singled out, and there was a general endorsement of the proposition that the consumer protection issue should be addressed more broadly and directly.

239 In attempting to deal with this, we have had regard to legislative developments in a number of other jurisdictions, and have sought to ascertain the underlying difficulties. A useful summary of the arguments against the use of arbitration clauses and standard form contracts is contained in a note on the UK Consumer Arbitration Agreements Act 1988 by Geraint G Howells (1989) 10 Company Lawyer 20:

The objection is to small print clauses which make arbitration a compulsory alternative to the courts. The average consumer is unlikely to read these clauses, if he does read them he will probably not understand them and even if he does object to the clause he is unlikely to be able to buy the goods or services without accepting the clause. ... Where [such clauses] apply ... consumers cannot go to the courts and are left to use the arbitration procedure which may be prohibitively expensive with arbitrator charges being in excess of £200 per day. Thus, if the dispute is a relatively small amount, arbitration may be an unrealistic option

The problem of arbitration clauses imposing onerous costs on the consumer who seeks redress ... is not the only issue at stake. ... Consumers may want to go to the courts to publicise a complaint, to test an issue of principle, or simply because they have more confidence in the court system than in the

arbitration scheme. The consumer's choice should be respected.

240 The Consumer Arbitration Agreements Act 1988 (UK) provides that, where a person enters into a contract as a "consumer" an arbitration cannot be enforced against that consumer except

- (a) where the consumer has given written consent after the dispute has arisen, or
- (b) where the consumer has submitted to arbitration under the clause (whether in respect of the present or another dispute), or
- (c) where the court makes an order that it is not detrimental to the interests of the consumer for the dispute to be referred to arbitration having regard to, in particular, the availability of legal aid and the expense which may be involved in arbitration.

241 Section 3 of the 1988 UK Act deals with the difficult question of what constitutes a "consumer":

- (1) ... a person enters into a contract "as a consumer" if

- (a) he neither makes the contract in the course of a business nor holds himself out as doing so; and
- (b) the other party makes the contract in the course of a business; and
- (c) in the case of a contract governed by the law of sale of goods or hire-purchase, or by s 7 of the Act of 1977, the goods passing under or in pursuance of the contract are of a type ordinarily supplied for private use or consumption;

but on a sale by auction or by competitive tender the buyer is not in any circumstances to be regarded as entering into the contract as a consumer.

- (2) In subsection (1) above

"business" includes a profession and the activities of any government department, Northern Ireland department or local or public authority; and

“goods” has the same meaning as in the Sale of Goods Act 1979.

- (3) It is for those claiming that a person entered into a contract otherwise than as a consumer to show that he did so.

242 The scope of the 1988 UK Act has been extended to business buyers of consumer goods as a result of the decision in *R & B Customs Brokers Co Ltd v United Dominion Trust Ltd* [1988] 1 WLR 321, CA. That decision has been strongly criticised by Howells, “The Businessman and Consumer Protection” (1988) 9 *Company Lawyer* 138.

243 A quite different approach to what constitutes a consumer may be found in the Australian Trade Practices Act 1952, s 4B. Although that Act has provided a basis for much of the Commerce and Fair Trading Acts enacted in New Zealand in 1986, there is no equivalent to s 4B in New Zealand legislation. The relevant parts of s 4B for present purposes are as follows:

(1) For the purposes of this Act, unless the contrary intention appears

- (a) a person shall be taken to have acquired particular goods as a consumer if, and only if
- (i) the price of the goods did not exceed the prescribed amount; or
 - (ii) where that price exceeded the prescribed amount—the goods were of a kind ordinarily acquired for personal, domestic or household use or consumption, or the goods consisted of a commercial road vehicle,

and the person did not acquire the goods, or hold himself out as acquiring the goods, for the purpose of re-supply or for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or of repairing or treating other goods or fixtures on land; and

- (b) a person shall be taken to have acquired particular services as a consumer if, and only if

- (i) the price of the services did not exceed the prescribed amount; or
- (ii) where that price exceeded the prescribed amount—the services were of a kind ordinarily acquired for personal, domestic or household use or consumption.

(2) For the purposes of subsection (1)

- (a) the prescribed amount is \$40,000 or, if a greater amount is prescribed for the purposes of this paragraph, that greater amount.

244 Thus it may be seen that the 1988 UK Act approach focusses on both the context of the contract and the nature of the goods, whereas the Australian Act invokes a monetary limit as well as the nature of the goods and the purpose for which they are to be used.

245 As indicated by some of the provisions outlined in the preceding paragraphs there are a number of approaches which might be taken to the consumer protection issue in arbitration. The approach finally settled on by the Law Commission in s 9 represents a balance, but does not include a monetary limit, a “cooling off” period or a judicial discretion. The formula recommended is designed to maintain a reasonable degree of commercial certainty, to ensure a reasonable degree of informed consent to arbitration, and to provide a broad approach (as compared to s 8 of the Insurance Law Reform Act 1977) to protect genuine and uninformed consumers.

246 Section 9 tends to follow the approach of the 1988 UK Act in limiting the enforcement of arbitration clauses between traders and consumers in general. The use of the phrase “in trade” follows that in, for example, the Fair Trading Act 1986, and is intended to be left for judicial exposition. The English Act allows exclusions for certain types of contract, including insurance contracts. But we could see no reason in principle for such exclusions. On the other hand we think it would be undesirable to follow the English Court of Appeal’s broad interpretation of the term “consumer” in the *R & B Customs Brokers Ltd* case as including persons who, although dealing as traders, enter into a transaction which is not in their ordinary course of business. Section 9(2) of the draft Act is intended to avoid that result.

247 Section 9(3) excludes arbitration agreements that are not governed by the law of New Zealand. It will be rare for a “consumer”

to be party to an arbitration agreement governed by the law of New Zealand but under which an arbitration is international within the meaning of article 1(3). Accordingly s 9 is likely to involve minimal erosions of the Model Law in its application to international arbitrations.

248 The reference in s 9(1) to a contract that “contains an arbitration agreement” both recognises the separate and severable status of an arbitration clause, and limits the scope of the section to pre-dispute arbitration agreements. A consumer would be bound by any separate agreement to arbitrate after a dispute has arisen: in those circumstances there is no basis for any presumption of lack of true agreement.

249 Some professional bodies and arbitrators expressed concern that consumers will be able to avoid arbitration clauses when they have agreed to them. To meet this, s 9(1) provides for the enforcement of an arbitration clause entered into by a consumer provided the consumer signs a separate agreement certifying that the consumer has read and understood the arbitration agreement and agrees to be bound by it. In the building industry, where arbitration clauses are often employed, a “consumer” would include a business or professional person having a \$250 000 residence built. If the builder wishes the arbitration clause to be binding, s 9(1) would need to be complied with.

250 Sections 9(4) and 9(5) apply s 9(1) in the context of related provisions of Schedule 1. These are: article 4 (allowing the arbitration to proceed if objection to non-compliance with s 9(1) is not taken as required by that article), the reference in article 8(1) to an arbitration agreement which is “inoperable”, and the references in articles 16(1), 34(2)(a)(i) and 36(1)(a)(i) to an arbitration agreement which is “not valid”.

251 Recently, there have been suggestions that, where arbitration clauses are included in the fine print of employment contracts, employees may need protection similar to that we recommend for consumers. In some cases employment contracts have, for many years, contained an arbitration clause, but, in practice, the operation of the arbitration clause was excluded by the personal grievances provisions of the Labour Relations Act 1987 and its predecessors. Since that Act was replaced by the Employment Contracts Act 1991,

there is nothing to prevent arbitration clauses in employment contracts from operating in accordance with their terms. In the graphic words of one commentator, “they are like a grenade waiting to go off” (Morning Report, Radio New Zealand, 27 August 1991). The Law Commission therefore recommends that the practice of including arbitration clauses in employment contracts and the operation of such clauses in practice should be kept under review in order to see whether a provision analogous to s 9 of the draft Arbitration Act should be included in the Employment Contracts Act 1991.

10 Powers of arbitral tribunal in deciding disputes

(1) Without prejudice to the application of article 28 of Schedule 1, an arbitral tribunal, in deciding the dispute that is the subject of the arbitral proceedings,

- (a) may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court;**
- (b) may award interest on the whole or any part of any sum which**
 - (i) is awarded to any party, for the whole or any part of the period up to the date of the award, or**
 - (ii) is in issue in the arbitral proceedings but is paid before the date of the award, for the whole or any part of the period up to the date of payment.**

(2) Nothing in this section affects the application of section 8 or of article 34(2)(b) or article 36(1)(b) of Schedule 1.

252 The spelling out of the powers of an arbitrator in s 10 reflects the reservations of the Law Commission about relying entirely on the proposition that, where New Zealand law is applicable to the substance of a dispute, it is an implied term of the arbitration agreement that the

arbitrator is to have authority to give the claimant such relief as would be available to him in a court of law having jurisdiction with respect to the subject matter.

That approach was accepted by the majority of the High Court of Australia, in *Government Insurance Office of New South Wales v Atkinson-Leighton Joint Venture* (1981) 146 CLR 206, 246, the

majority relying on a passage in *Chandris v Isbrandtsen-Moller Co Inc* [1951] 1 KB 240, CA, and certain United States decisions.

253 However, in addition to the powerful dissenting judgment of Barwick CJ in the *Atkinson-Leighton* case, the Commission is aware that a narrower view of *Chandris* has been taken in the United Kingdom, in particular in the House of Lords decision in *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Corporation Ltd* [1981] AC 909. In the discussion of this topic at pages 295-297 of their text, Mustill and Boyd suggest that the proposition asserted by the majority in *Atkinson-Leighton* is “misconceived”, and argue that the English arbitration statutes would not have needed to append a list of statutory implied powers (as in the New Zealand legislation, in the Second Schedule to the Arbitration Act 1908) if there has always been a wider set of common law implied powers derived from a supposed analogy between judge and arbitrator.

254 On the other hand, a recent decision of the NSW Court of Appeal, *IBM Australia Ltd v National Distribution Services Pty Ltd* (1991) 100 ALR 361, affirmed the decision of Rogers CJ Com D that an arbitrator had authority to award relief and make orders under the Trade Practices Act 1974, s 52 (the equivalent provision in New Zealand is s 9 of the Fair Trading Act 1986). That provision was based on the implied term asserted by the majority in the *Atkinson-Leighton* case.

255 To avoid any possible doubt about the powers of the arbitral tribunal where the parties have, in general terms, agreed to submit disputes between them to arbitration, the Law Commission proposes the inclusion of a specific provision in the draft Act. Rather than list specific implied powers of an arbitral tribunal—an approach which is problematic in ensuring that the list is complete, both at the time of its enactment and as later statutes bearing on the powers of the High Court are enacted—the Commission has preferred a more general statement on the lines of the proposition quoted in para 252 above.

256 The provision is appropriately included in the Act itself because, if it is needed to spell out what appears to be implicit in article 28(1) of Schedule 1, then that need arises as much in relation to international as to non-international arbitrations. Consequently, it is not appropriate to include it in Schedule 2 on an opt in or opt out basis. Nor is it appropriate to tack the provision on to article 28. Section 10 will apply to an arbitration in New Zealand, if, under

article 28, New Zealand law is applicable to the substance of the dispute. The introductory reference to that article in subsection (1) makes it clear that the right of the parties to choose the rules of law which are to apply to any one or more aspects of the dispute is preserved. Even where New Zealand law is, in general, to apply, the parties will still remain free to exclude the power of the arbitral tribunal to award a particular type of relief or remedy.

257 Moreover, the relevance of s 10 may not be limited to an arbitration in New Zealand. It may be a source of the powers of an arbitral tribunal where the place of arbitration is outside New Zealand but New Zealand law is applicable to the substance of the dispute. This could occur, for example, if a New Zealand firm were a party to an international commercial arbitration in Australia, and, under article 28 of the Model Law (given the force of law in Australia by s 16 of the IAA (Aust)), the law of New Zealand was required to be applied.

258 Section 10 falls short of completely assimilating the powers of an arbitral tribunal to those of the High Court. Obviously, the power to grant a remedy or relief does not include the High Court's coercive powers. Moreover, the question whether an arbitral tribunal may become seized of a particular dispute and may award a particular remedy are still subject to the overriding considerations of arbitrability and public policy. This is the reason for the saving provision in subs (3).

259 Given this safeguard, we consider that the proposed s 10 can safely be relied upon to adapt, where appropriate, references in enactments to the powers of the courts generally, or of the High Court in particular, so as to permit of their application by an arbitral tribunal. Under the present law, specific provision for the exercise of the court's powers by an arbitrator is made in or by the Frustrated Contracts Act 1944, the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1982. But no such provision was included in the Minors' Contracts Act 1969, the Illegal Contracts Act 1970, or the Credit Contracts Act 1981. The question of an adverse inference therefore arises. There are also the problems of keeping references to arbitration in specific Acts up to date and ensuring that they are included as appropriate in new legislation. We accordingly propose the repeal of the references to arbitrators made in or by the four contracts statutes listed above. See s

13(2) and Schedule 4. The effect of s 10 is that, subject to the agreement of the parties under article 28 of Schedule 1, an arbitral tribunal will be able to apply any provision of any of the contracts statutes or any other relevant enactment conferring powers on the court, except so far as its application by the arbitral tribunal may be excluded by considerations of arbitrability or public policy.

260 The linking of the powers of an arbitral tribunal to those of the High Court is consistent with the general proposition that an arbitration must be determined according to law. This does involve some limits, for example, the present restrictions on awards of interest, a subject presently under review by the Law Commission. As a stop-gap measure we have recommended the inclusion of a declaratory provision on the power of an arbitral tribunal to award interest up to the date of the award on sums payable under the award, or up to the date of payment on sums which were in issue but were paid prior to an award. Subsection (2) reflects s 19(A)(1)(a) of the Arbitration Act 1950 (UK), inserted by the Administration of Justice Act 1982, and extends beyond debt and damages to sums which are determined by an arbitration (eg a revised rental).

261 The position with regard to payment of interest after the date of the award is dealt with in a new paragraph (5) in article 31 of Schedule 1. See para 390.

11 Liability of arbitrators

An arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator, but is liable for fraud in respect of anything done or omitted to be done in that capacity.

262 The question of the liability of arbitrators was not dealt with in the Model Law because it was too difficult to obtain a standard approach acceptable to a wide range of countries. A 1981 UNCITRAL Secretariat note observed that:

National laws if they deal with this issue at all tend to apply the same (lenient) standards as adopted for judges. In view of the fact that the liability problem is not widely regulated and remains highly controversial, it may seem doubtful whether the model law could provide a satisfactory solution. [Reproduced in Holtzmann and Neuhaus, 1148.]

263 Section 11 follows s 28 of the IAA (Aust) which in turn followed s 51 of the UCAA (Aust). The Alberta ILRR did not recommend a similar provision being confident that, under Canadian law, an arbitrator cannot be sued by a party for negligence. Being aware of the less certain position in England (usefully discussed in Mustill & Boyd, *Commercial Arbitration* (2nd ed, 1989), 224–230), and the uncertain contemporary boundaries of negligence in New Zealand and English law, we believe it appropriate to follow the Australian provision.

264 The Alberta ILRR also recommended against giving arbitrators any express statutory protection against claims for defamation on the basis that, under Canadian law, an arbitrator enjoys qualified privilege (ie, not liable unless a plaintiff proves malice) if not absolute privilege (suggested by Lord Salmon in *Arenson v Casson Beckman* [1975] 3 All ER 901, 924). There is support for that view in Mustill & Boyd, 357, and it is on that basis that we refrain from recommending enactment of an express statutory immunity.

12 Certificates concerning parties to the Conventions

A certificate purporting to be signed by the Secretary of External Relations and Trade, or a Deputy Secretary of External Relations and Trade, that, at the time specified in the certificate, any country had signed and ratified or had denounced, or had taken any other treaty action under, the Protocol on Arbitration Clauses (1923) or the Convention on the Execution of Foreign Arbitral Awards (1927) in respect of the territory specified in the certificate is presumptive evidence of the facts stated.

265 This section is a simpler version of the provision at present made in s 4 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 and s 12 of the Arbitration (Foreign Agreements and Awards) Act 1982 for putting before the court evidence bearing on the status of a country as a contracting party to relevant arbitration treaties. The question whether a country is bound by the Protocol on Arbitration Clauses (1923) or the Convention on the Execution of Foreign Arbitral Awards (1927) is relevant for the purpose of applying s 6(2)(a)(ii) of the Act, assimilating arbitrations which are covered by those treaties to “international arbitrations” under the Model Law.

266 The section provides for the giving of a certificate by the Secretary of External Relations and Trade only as to the facts of signature and ratification, denunciation or any other treaty action in respect of the Protocol or the Convention by a particular country in respect of particular territory. In most cases the status of a country as a contracting party to the Protocol or the Convention at the material date will emerge straightforwardly from these facts; but in a few cases questions of state succession, recognition or the effect of war on treaties may arise. In those cases status as a contracting party will involve submissions on the applicable international law or further evidence—possibly in the form of further certificates from the executive on questions which may properly be the subject of such a certificate—or may be determined by reference to matters of which an arbitral tribunal or the courts can simply take notice.

13 Repeals and amendments

(1) The Arbitration Act 1908 and the Arbitration (Foreign Agreements and Awards) Act 1982 are repealed.

(2) The Acts specified in Schedule 4 are amended in the manner indicated in that Schedule.

267 The present statutory law of arbitration in New Zealand is to be found principally in the

- Arbitration Act 1908 and its amendments (especially the Act of 1938)
- Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933
- Arbitration (International Investment Disputes) Act 1979
- Arbitration (Foreign Agreements and Awards) Act 1982.

The proposed new Arbitration Act will deal in general both with domestic and international arbitration. Its scope and content means that the 1908, 1933 and 1982 Acts can be repealed.

268 The 1979 Act—designed to implement an international convention regulating one special category of arbitration—does however stand alone. It has been discussed in Chapter VI and distinct proposals are made for its amendment in the manner set out in Schedule 4.

269 Like the 1979 Act, the 1933 and 1982 Acts are also designed to give effect to treaties by which New Zealand is bound. The Commission considers that the proposed new statute will, without more, give full effect to the obligations arising from those treaties. Indeed, in some respects it goes further. The reasoning supporting that conclusion has been set out in Chapter VI.

270 Technically, the 1933 Act is part of the 1908 Act and will be repealed by the repeal of that Act. The 1982 Act is separately repealed.

271 Section 13 also provides for minor amendments to the other enactments listed in Schedule 4. Those amendments are the subject of later commentary on that Schedule (paras 442–455).

14 Transitional provisions

(1) Subject to subsection (2)

- (a) this Act applies to every arbitration agreement, whether made before or after the commencement of this Act, and to every arbitration under such an agreement, and**
- (b) a reference in an arbitration agreement to the Arbitration Act 1908, or to a provision of that Act, shall be construed as a reference to this Act, or to any corresponding provision of this Act.**

(2) Where the arbitral proceedings were commenced before the commencement of this Act, the law governing the arbitration agreement and the arbitration shall be the law which would have applied if this Act had not been passed.

(3) For the purposes of this section, arbitral proceedings are to be taken as having commenced on the date of the receipt by the respondent of a request for the dispute to be referred to arbitration, or, where the parties have agreed that any other date is to be taken as the date of commencement of arbitral proceedings, then on that date.

(4) This Act applies to every arbitral award, whether made before or after the commencement of this Act.

272 Section 14 provides for the draft Act to apply to all arbitration agreements and arbitrations as from the date of commencement of the Act (see s 2, above) unless the arbitral proceeding has already

commenced. Subsection (3) defines the time of commencement of arbitral proceedings in terms reflecting the provision made in article 21 of Schedule 1 (unless otherwise agreed, the arbitral proceeding commences on the date of receipt of a request for a dispute to be referred to arbitration).

273 The language of s 14(1) and (2) is taken from s 3(2) and (3) of the UCAA (Aust). The IAA (Aust) took a different approach: s 30 of that Act excluded the application of the Model Law to pre-commencement arbitration agreements unless the parties entered into a written agreement to the contrary, leaving the UCAA (Aust) to apply. Our recommendations will not leave a pre-existing arbitral framework to fall back on and this distinction justifies a departure from the approach of the IAA (Aust) on this point. The comparable legislation in Canada, Hong Kong and Scotland excludes only arbitrations already “commenced”.

274 During the course of our consultative activities we received comments querying the implications of retrospective operation of a new arbitration statute. Those comments were prompted by the possibility of a domestic arbitration regime which, like the unmodified Model Law, excluded rights of appeal or provided for such rights only on an opt in basis. As we recommend a right of appeal (on an opt out basis) for domestic arbitration, we believe that the concerns underlying those comments will be greatly reduced if not eliminated. We have considered the question of retrospectivity carefully; it is discussed in general terms in Chapter V of our recent Report, *A New Interpretation Act* (NZLC R17 1990). We are satisfied that it is proper to provide for the early application of the draft Act and the avoidance of a lengthy transitional period. In particular, we are mindful that the draft Act does not impact on accrued rights but is particularly concerned with procedures.

275 Accordingly, we have taken the further step of clarifying, in s 14(4), the application of the draft Act to every arbitral award, whether made before or after the commencement of the Act. This provision makes it clear that the new Act will apply to the recognition and enforcement of an award, even when the arbitral proceedings which led to the award had been commenced before the entry into force of the draft Act and so were governed by the pre-existing law under s 15(2).

THE ARTICLES OF SCHEDULE 1:

(The UNCITRAL Model Law with modifications)

276 As the valuable UNCITRAL materials on the Model Law are reproduced in Appendix D to this Report, the commentary on the articles of Schedule 1 focusses on the modifications to the text of the Model Law which we recommend, on some criticisms others have made of the language of those articles but where we recommend no change, and on the interrelationships between the articles themselves and between them and other provisions of the draft Act as a whole.

277 The alterations that we recommend be made to the articles of the UNCITRAL Model Law as adopted fall into several categories:

- insertion of appropriate references to “New Zealand” as the relevant State and to the “High Court” where a particular court is to be designated;
- changes designed to make the language gender neutral;
- the addition of English language alternatives to French and Latin words and phrases included in the Model Law;
- the removal to the Act of the definitions and the operative provisions as to scope; and
- substantive modifications which reflect our considered opinion that these will enable the draft Act to work more effectively.

278 The last of those categories is the most important. We believe that these modifications are appropriate for international and domestic arbitrations, and that they are entirely consistent with the spirit and the structure of the Model Law. It is helpful to note them at the outset:

- Article 1: deletion of “commercial” requirement;
- Article 7: substitution of provision that arbitration agreement may be made orally as well as “in writing”;
- Article 8: express reference to absence of dispute as a ground for refusing to stay court proceedings;
- Article 9: powers of the High Court or a District Court to respond to a request for interim measure of protection and status of a ruling by the arbitral tribunal on a relevant matter;

- Article 10: addition of presumption of single arbitrator where parties to a domestic arbitration have not agreed on the matter;
- Article 11: addition of power for court assistance in appointment of arbitrators where the place of an international arbitration has not been fixed;
- Article 15: elaboration of consequences of appointment of substitute arbitrator;
- Article 17: addition of award status to orders for interim protection;
- Article 19: addition of privileges and immunities for witnesses and persons appearing before arbitral tribunal;
- Article 25: addition of power to strike out stale claims;
- Article 27: addition of provisions empowering the High Court or a District Court to execute requests for assistance in taking evidence;
- Article 32: addition of provisions dealing with impact of death of a party;
- Article 34: addition of power of High Court to order money payable under award to be brought into court, and an elaboration of “public policy”;
- Article 35: addition of reference to enforcement of an award by entry as a judgment or by action;
- Article 36: an elaboration of “public policy”.

279 In the text of the articles of Schedule 1 as set out in this chapter the original Model Law wording of each article has been retained so that the changes can be readily identified: *additions to the Model Law have been underlined; and deletions have been placed in bold square brackets and italicised*. Chapter I sets out the text which we recommend should be enacted.

CHAPTER I—GENERAL PROVISIONS

1 Scope of application

(1) This [Law] Schedule applies [to international commercial arbitration, subject to any agreement in force between this State and any other State or States] as provided in sections 6 and 7.

(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] any commercial or other 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] that party's 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.]

280 The central thrust of our recommendations involves the application of the Model Law (as supplemented and amended) to “domestic” as well as to “international” arbitration. Provision for this has been made in s 6 of the Act. The operative provisions relating to the scope of Schedule 1 have therefore been removed to that section.

281 The other substantive departure from the field of application of the Model Law is the deletion of the reference to “commercial” arbitration and the accompanying footnote which elaborates the term “commercial”. If, as we recommend, Schedule 1 applies to all

international and domestic arbitrations, the description “commercial” would be a source of confusion without compensating advantages. Nevertheless, it seems likely that virtually all arbitrations which fall within the description “international”, as elaborated in article 1(3), will have a commercial flavour. A similar view is reflected in the Hong Kong legislation. It may also be noted that the list of the examples of “relationships of a commercial nature” contained in the footnote was considered inadequate in California when the Model Law (with modifications) was enacted in 1988. Paragraph 1297.16 of Title 9.3 of the California Code of Civil Procedure added to the matters listed in the Model Law footnote the following: the transfer of data or technology; intellectual or industrial property, including trade marks, patents, copyrights and software programs; and professional services.

282 In any event, the range of disputes which may be arbitrated is not limited to those arising from contracts, and a corresponding change is made to article 1(3)(b)(ii) defining **international arbitration** and to article 28(4).

283 The footnote to article 1 of the Model Law, referring to the lack of interpretative value of article headings, has been incorporated in Schedule 1 as article 2(f). Although it is contrary to the thrust of the Law Commission’s recommendation in its *Report on a New Interpretation Act* (NZLC R17) that, in ascertaining the meaning of an enactment, all the indications provided in the enactment as printed or published under the authority of the New Zealand Government may be considered (s 9(3)), the Model Law was adopted on the different basis that the article headings should not be included among the relevant indications.

284 The importance of article 1(3) is increased under our draft Act as it provides the main basis for the distinction between “international” and “domestic” arbitration and the respective regimes designed for each.

285 The saving provision in article 1(5) has been moved, in part to s 8(1) (disputes not arbitrable under any other law), and in part to s 7(1) (disputes which may be submitted to arbitration only according to provisions other than those of Schedule 1). See the commentary on those sections.

2 Definitions and rules of interpretation

For the purposes of this [Law] Schedule

- [(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;]*
- (a) arbitration, arbitration agreement, arbitral tribunal and award have the meanings assigned to those terms by section 4;**
- (b) *court* means a body or organ of the judicial system of a State;
- (c) where a provision of this [Law] Schedule, 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;
- (d) where a provision of this [Law] Schedule 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) where a provision of this [Law] Schedule, 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;
- (f) article headings are for reference purposes only and are not to be used for purposes of interpretation.**

286 The definitions of **arbitration** and **arbitral tribunal**, formerly in paragraphs (a) and (b) of article 2, have been moved to s 4 of the Act. See the commentary on that section.

287 The definition of “court” is essentially relevant only to the original article 9 (which has become paragraph (1) of that article) and article 36(1)(a)(v). The definition was designed to cover the position in countries where judicial authorities are not called “courts”, and to exclude bodies which are not part of the formal judicial system (such as the London Court of Arbitration); it was not intended to encompass administrative officers or agents of the court. In New Zealand there is no doubt about the meaning of “court”, and specific courts

are designated to exercise particular functions under the relevant articles of Schedule 1.

288 The new para (f) reflects a footnote to article 1 of the Model Law. See para 283.

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]* the addressee's 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.

289 Article 3(1)(a) provides three alternative methods for the delivery and receipt of written communications: delivery to the addressee personally; delivery to the place of business, habitual residence or mailing address of the addressee; or, failing those, despatch by registered post or similar transmission to the last known place of business, habitual residence or mailing address of the addressee. Given the wide scope of this paragraph, we see no reason to add a provision empowering a court to dispense with service or give directions, for example, for substituted service by a newspaper advertisement, although we note that such provisions have been included in, for example, the UCAA (Aust), s 60(d), and in s 3(3) of the draft domestic arbitration statute recommended by the Alberta ILRR.

290 The significance of article 3(1)(b), in fixing the date of receipt, extends to the question of commencement of arbitration (see article 21).

4 Waiver of right to object

A party who knows that any provision of this [Law] Schedule 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] that party's 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] the right to object.

291 Holtzmann and Neuhaus record that the origins of article 4 included expectations that its presence would inform lay arbitrators of the legal principle of waiver and further the uniformity of national laws on this topic. The Mustill Committee report makes two points about article 4: first, it does not reflect the distinction in English arbitration law between irregularities going to the jurisdiction of arbitrators (curable only by a fresh agreement) and others (which may be waived); and it is not clear from the Model Law itself which articles are mandatory. We have noted these points, and that the Alberta ILRR recommended the listing of the mandatory provisions in the equivalent to article 4, but do not ourselves recommend any substantive amendment or elaboration of article 4. We believe that the mandatory provisions of Schedule 1 will be clear in virtually all cases from the language used, and from the structure of the Model Law. In particular, the matters on which an award may be challenged under article 34 must be taken to be fundamental to the procedure which the Model Law establishes.

292 This clause has been expressly applied to non-compliance with the requirements for a consumer arbitration agreement. See s 9(4) and commentary on that subsection.

5 Extent of court intervention

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

293 Article 5 is critical to the structure of the Model Law and of the draft Act. It limits the scope for judicial intervention to those situations expressly contemplated under later articles in relation to "matters governed by" the Model Law. In addition to topics not "governed" by the Model Law (discussed below), article 5 is expressly qualified by those provisions of Schedule 2 which are inconsistent

with its prohibition of court intervention except where so provided in Schedule 1. The provisions of Schedule 2 in question are clause 3(2) (right to apply to the court for assistance in the conduct of the arbitral proceedings; clause 4 (determination of preliminary point of law by court); clause 5 (the right of appeal on a question of law). These provisions apply to domestic arbitrations on an opt out basis and to international arbitrations where there has been an opting in.

294 In the Mustill Committee report, article 5 was described as establishing a less than comprehensive “code of judicial intervention”:

The shape of the code appears to be as follows:

(1) It applies only in a circumscribed field: namely “in matters governed by this law”.

(2) Within the allotted field, judicial intervention can be invoked only in certain circumstances: namely (so far as concerns setting aside and remission) the circumstances set out in article 34(2) and as regards certain other remedies created by articles 11(3) and (4), 13(3), 14(1), 16(3) and 27, the circumstances specifically contemplated by those articles.

(3) Within the allotted field, judicial intervention may take place only in certain ways: namely in the case of “recourse to a court against an arbitral award”, by means of setting aside or remission, and in respect of the special circumstances contemplated by the above-mentioned articles, through the procedures referred to in those articles. [(1990) 6 Arbitration International at 51.]

295 Holtzmann and Neuhaus record (218–9) that the UNCITRAL Working Group and Secretariat provided non-exhaustive lists of matters not governed by the Model Law, including the following:

- (a) the capacity of parties to conclude the arbitration agreement;
- (b) the impact of State immunity;
- (c) the contractual or other relations between the parties and the arbitral tribunal;
- (d) fixing of fees and costs and securities;
- (e) the consolidation of arbitral proceedings;

- (f) the competence of the arbitral tribunal to adapt contracts;
- (g) the enforcement by courts of interim measures of protection ordered by the arbitral tribunal; and
- (h) time limits on enforcement of arbitral awards.

The authors add other matters to that list, including the liability of arbitrators for misconduct or error, and arbitrability.

296 On the basis that “matters” means certain aspects of the arbitration agreement and process, it would appear that, for example, article 5 would not preclude court proceedings in which one party to an arbitration challenged the legality of the agreement or the contractual capacity of one or more of the parties (such proceedings would pre-empt the need for an attack on the award under article 34(2)(a)), or proceedings where an arbitral tribunal sought to enforce a contractual entitlement to fees in relation to the arbitration.

297 The Alberta ILRR recommended replacement of the phrase “In matters governed by this Law” with “In a proceeding or other matter governed by the Act”. As their commentary shows, this change is based on a different interpretation of the term “matter”:

We think that it should be made clear that it is intervention in a proceeding which should be precluded, and not merely intervention in some aspects of a proceeding or intervention by some means. [72.]

This approach does not seem to accord with the preponderance of opinion on what the Model Law was intended to mean by its reference to “matters governed”, and we do not recommend adoption of the Alberta ILRR draft formulation.

298 The British Columbia legislation adopting the Model Law specifically excludes applications for judicial review. Section 5(b) of the International Arbitration Act 1986 (BC) provides

no arbitral proceedings of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal shall be questioned, reviewed or restrained by a proceeding under the judicial review procedure Act or otherwise except to the extent provided in this Act.

We have concluded that an express provision of that nature is not necessary on the basis that in almost all conceivable circumstances an

arbitrator is not exercising a statutory power of decision and thus is not subject to judicial review. In *R v Take-over Panel, ex p Datafin plc* [1987] 1 QB 815, Lloyd LJ observed, at 847:

If the source of power is a statute, or subordinate legislation under a statute, then clearly the body in question will be subject to judicial review. If, at the other end of the scale, the source of power is contractual, as in the case of private arbitration, then clearly the arbitrator is not subject to judicial review: see *Reg v National Joint Council for the Craft of Dental Technicians (Disputes Committee), Ex parte Neate* [1953] 1 QB 704.

The same point was made in *Kenneth Williams & Co Ltd v Martelli* [1980] 2 NZLR 596, 605-606. We do note, however, the widened scope of the definition of “statutory power” and “statutory power of discretion” in the Judicature Amendment Act 1972, s 3, to include the constitution and rules of bodies corporate.

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 ...] Any court having jurisdiction may perform any function conferred on a court by these articles, except where the article provides that the function shall be performed by a specified court or courts.

299 In recommending that certain judicial functions under Schedule 1 be within the sole jurisdiction of the High Court, the Commission has been conscious of two matters. First, the recent and substantial increases in the civil jurisdiction of the District Courts, and the trends discussed and recommended in our 1989 Report, *The Structure of the Courts* (NZLC R 7), and in part enacted in the court reforms of 1991, mean that it is not necessarily appropriate for the judicial role in arbitration to remain within the exclusive jurisdiction of the High Court. But, second, the High Court has and is likely to retain a supervisory jurisdiction over other decision-making bodies as in, for example, judicial review proceedings. Hence our recommendation that the essentially supervisory functions under articles 16(3) (Preliminary question of jurisdiction), 34(2) (Setting aside award) and 35(1) (enforcement of an award by entry as a judgment or by action) should be vested in the High Court alone. In the other

articles where jurisdiction is conferred only on the High Court, articles 11(3), 11(4) and the new 11(6), 13(3) and 14, the decisions of the court are expressly stated not to be subject to any appeal. In circumstances where there is no right of appeal, we favour the relevant power being exercised in the High Court.

300 As a specific reference to the High Court has been inserted in each of the provisions listed in para 299, it is not strictly necessary to enact article 6 of the Model Law. But, to retain the original structure and numbering, the article has been included in a revised, declaratory form. The substitution of a reference to “the High Court” for a reference in the original text to “the court or other authority specified in article 6”, has been shown in the text of the relevant articles of the Model Law reproduced in this chapter.

301 In other parts of Schedule 1, including articles 8, 9, 27, and 36, references to “a court” or “a competent court” would embrace District Courts as well as the High Court. Where powers are conferred, however, we have thought it desirable to refer expressly to “the High Court or a District Court” because the scope of the powers, or the procedure for their exercise may be different, depending on the court to which application is made. Under article 35 the recognition of awards will apply in District Courts as well as the High Court, but, as mentioned above, enforcement will be a matter for the High Court.

CHAPTER II—ARBITRATION AGREEMENT

7 *[Definition and]* Form of arbitration agreement

(1) An 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.]* may be made orally or in writing. Subject to section 9, 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.]* A reference in a

contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the reference is such as to make that clause part of the contract.

302 The definition of “arbitration agreement” in the first sentence of article 7(1) of the Model law has been moved to the **Definitions** section of the Act (s 4) and a cross-reference to that definition has been included in article 2(a). The remainder of article 7 deals with the form of an arbitration agreement. The title has been amended accordingly.

303 The major change which we recommend to article 7 is the deletion of the first sentence of paragraph (2), the requirement for the arbitration agreement to be in writing and the inclusion of an express provision in paragraph (1) that the arbitration agreement may be made orally or in writing. That recommendation is based on our view that the draft Act should be as comprehensive as is practicable, and our corresponding belief that it should minimise the scope for application of old common law rules about arbitration. The Mustill Committee report pointed out that the requirement for a signature on the document containing the contract “could leave most bills of lading, many brokers’ contract notes and other important categories of contract outside the scope of the Model Law”: (1990) 6 *Arbitration International* at 52.

304 More generally, our consultation on and consideration of this topic lead us to adopt the majority views succinctly expressed in the Alberta ILRR report:

Opinion is divided on whether writing should be required. A strong minority view is that the law should require writing because of the importance of an agreement to arbitrate and the need for a firm legal foundation for an arbitration. The majority view, however, is that an arbitration agreement is merely a contract like other contracts and that if the parties want to make such a contract orally they should not be precluded from doing so ... It will also avoid the risk perceived by Mustill and Boyd (Mustill page 8), that, where a written submission is, by oral agreement, waiver or estoppel, enlarged to include additional disputes, the Act does not apply to the additional disputes.

305 We expect that oral arbitration agreements will be rare and that it will be in the interests of arbitral tribunals as well as parties for there to be a written and thus less disputable record of the terms of the arbitration agreement. The absence of the requirement for writing is likely to have most impact in relation to small specialist arbitrations where an expert is called in after a problem has arisen and is able to inspect the situation and deliver a more or less immediate decision, although this would have to be in writing under article 31(1); the distinction between a requirement for writing in the agreement and in the award relates to the formalities of enforcement through the courts.

306 Holtzmann and Neuhaus, 260, note that article 7(2) was largely modelled on the text of the New York Convention dealing with the recognition and enforcement of arbitral awards. Nevertheless, we consider that the advantages of deleting the requirement for writing outweigh the disadvantages and expect that parties likely to be relying on the New York Convention for enforcement of any award will be at pains to ensure that any arbitration agreement is in writing so as to satisfy the requirements of that Convention.

307 The second sentence of article 7(1) is indicative of the continuation of the existing law that an arbitration clause in a contract is itself a separate agreement. This provision has been made subject to s 9 of the Act which imposes a special requirement where a person enters into such a contract as a consumer. See commentary on that section (paras 235–251).

8 Arbitration agreement and substantive claim before court

(1) A court before which [*an action is*] proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting [*his*] that party's first statement on the substance of the dispute, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed, or that there is not in fact any dispute between the parties with regard to the matters agreed to be referred.

(2) Where [*an action*] proceedings referred to in paragraph (1) [*of this article has*] have been brought, arbitral proceedings may nevertheless

be commenced or continued, and an award may be made, while the issue is pending before the court.

308 The proposed addition at the end of article 8(1) may be explained by a passage in the Mustill Committee report:

Section 1 of the Arbitration Act 1975 has a ground for refusing a stay which is not expressed in the New York Convention, namely “that there is not in fact any dispute between the parties with regard to the matter agreed to be referred”. This is of great value in disposing of applications for a stay by a defendant who has no arguable defence. ((1990) 6 *Arbitration International* at 53)

The phrase makes explicit in this provision the element of “dispute” which is already expressly included in article 7(1) when read with s 4. The same reasoning underlies the recommendation in the Alberta ILRR report that a court be empowered to refuse to stay an action if “the case is a proper one for a default or summary judgment”.

309 In the course of our consultative activity, we received a number of suggestions that the efficiency of the summary judgment procedure as it has developed under the High Court Rules should not be lost by reason of any implication that a dispute where there is no defence must be arbitrated under an arbitration agreement. We agree. Although it may be argued that if there is no dispute, then there is no “matter which is the subject of an arbitration agreement” within the meaning of article 8(1), it seems useful to spell out that the absence of any dispute is a ground for refusing a stay.

310 The reference to “null and void” in article 8(1) would extend to matters which are not arbitrable and where relief or remedy can only be provided by a court: see Holtzmann and Neuhaus, 303. The criteria contained in article 8(1) in its original form involved an almost literal adoption of the language of the New York Convention and would extend to cases where the arbitration agreement is void, discharged, frustrated or suspended, or simply practically ineffective: see Van den Berg, *The New York Arbitration Convention of 1958* (1981).

311 The UNCITRAL text requires the court to “refer the parties to arbitration”. The proposal to include also a direction that the court “stay” those proceeding reflects the standard formula found in New Zealand legislation and elsewhere in common law countries. The

proceeding when stayed may remain before the court rather than being dismissed (ready to be brought on, if for instance the arbitrators decide that they do not have jurisdiction or if the parties agree to terminate the arbitral process). See, for example, Aron Broches, *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* (1990) 42–45.

312 In the Scottish and British Columbia legislation applying the Model Law, the time limit contained in article 8(1) has been replaced by a reference to court pleadings. The Scottish formulation is to “any time before the pleadings and the action are finalised”. We believe that the language of the Model Law sufficiently conveys the distinction between a procedural or jurisdictional challenge and a substantive response to a claim made in a court, and that it is sufficiently clear to be applied in the New Zealand context.

313 If a stay is not granted and court proceedings continue in relation to the matter which is the subject of the arbitration agreement, it could be expected that the arbitral tribunal will terminate the arbitration under article 32(2)(c).

9 Arbitration agreement and interim measures by court

(1) 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.

(2) For the purposes of paragraph (1), the High Court or a District Court shall have the same power as it has for the purposes of proceedings before that court to make

- (a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or**
- (b) an order securing the amount in dispute; or**
- (c) an order appointing a receiver; or**
- (d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or**
- (e) an interim injunction or other interim order.**

(3) Where a party applies to a court for an interim injunction or other interim order and an arbitral tribunal has already ruled on any matter relevant to the application, the court shall treat the ruling or any

finding of fact made in the course of the ruling as conclusive for the purposes of the application.

314 A liberal interpretation of the scope of what is now the first paragraph of article 9 is supported by the contrast with the narrower scope of article 17, a matter discussed in the Analytical Commentary (see Appendix D).

315 Although the matter has been queried by some commentators, the legislative history referred to by Holtzmann and Neuhaus, at page 333, provides a persuasive case that article 9(1) does not preclude the effective operation of an agreement which expressly excludes recourse to the court for interim protection.

316 The scope of para (1) is not limited to requests to a New Zealand court. (See the definition of “court” in article 2(1).) But the operation of paragraph (1) in New Zealand is dependent on the conferment of powers on an appropriate court or courts to grant the interim measures of protection requested.

317 We have therefore added para (2) providing that the High Court or a District Court shall have the same power as it has for the purposes of a proceeding before that court to make the orders listed. Subparas (a), (b), (c) and the reference to an interim injunction in para (d) are powers at present conferred on the High Court by s 10 of and the First Schedule to the Arbitration Amendment Act 1938.

318 The remainder of para (2) and para (3) are based on the Scottish legislation adopting the Model Law which followed the recommendation of the Dervaird Committee report “that it would be appropriate that more detail should be spelt out as to what could be meant or is meant by [article 9]”: (1990) 6 Arbitration International at 71. Similar provisions, amplifying the term “interim measure of protection”, may be found in ss 1297.93 and 1297.94 of the 1988 California legislation.

CHAPTER III—COMPOSITION OF ARBITRAL TRIBUNAL

10 Number of arbitrators

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

(a) in the case of international arbitration the number of arbitrators shall be three;

(b) in every other case the number of arbitrators shall be one.

319 We recommend one substantive change to the terms of article 10 which would affect domestic arbitrations only: the default number of arbitrators provided, if the parties have not agreed, would be one, rather than three. This modification follows the direction of submissions received on the point, and the reasoning expressed in the Alberta ILRR report:

Model Law article 10(2) calls for 3 arbitrators if the parties do not agree on a number. International commercial arbitrations are likely to involve large sums of money and facts of considerable complexity, and each litigant is likely to want to have at least one arbitrator of his own nationality. These considerations do not apply to domestic arbitrations. We think that it is better to provide for a tribunal of one, which is likely to be cheaper, less formal and more expeditious, unless the parties decide that they want a larger tribunal. [78]

Although the legislation applying the Model Law to international arbitration in California and Scotland provides for a single arbitrator only (rather than three) if the parties do not agree, we recommend that the presumption of three arbitrators remain for international arbitrations.

320 Article 10 is indicative of a significant change to existing New Zealand arbitration law in that, as pointed out in the Mustill Committee report, the Model Law does not recognise a system of two arbitrators and an umpire.

11 Appointment of arbitrators

(1) No person shall be precluded by reason of [his] that person's 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]* High Court;
- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, *[he]* that arbitrator shall be appointed, upon request of a party, by the *[court or other authority specified in article 6]* High Court.

(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]* High Court 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]* or (6) to the *[court or other authority specified in article 6]* High Court 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, in the case of an international arbitration, take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(6) In an international arbitration where

- (a) the place of the arbitration has not been agreed, or

(b) the parties have agreed to an arbitration with two, or four or more, arbitrators,

and no procedure for the appointment of arbitrators has been agreed upon, the High Court may, upon request of a party, appoint the requisite number of arbitrators, having due regard to the matters referred to in paragraph (5).

321 It is important to note that only article 11(2) is likely to be of relevance in domestic arbitrations. Clause 1 of Schedule 2 provides for a procedure which is deemed to have been agreed to by the parties under article 11 (either para (2) or para (4), as applicable) in the absence of any express agreement to the contrary. The procedure under clause 1, unlike that under article 11, allows for a non-defaulting party to appoint the arbitral tribunal without the assistance of the court (although the defaulting party may subsequently challenge such a default appointment). See commentary on that clause.

322 In para (5) the reference to the advisability of appointing an arbitrator of a nationality other than those of the parties has been applied only to an international arbitration. It would be incongruous in the case of domestic arbitration.

323 The new article 11(6) would avoid two gaps in the appointment procedure for international arbitrations which have been recognised by a number of commentators on the Model Law. The first deals with the position where the place of the arbitration has not been agreed and thus article 1(2) would ordinarily deprive a court of jurisdiction under article 11. The second flows from the fact that the default procedures outlined in article 11(3) contemplate an arbitration with three arbitrators or one arbitrator but no other number of arbitrators. The reference to the “requisite” number of arbitrators is intended to cover either a specifically agreed number under article 10(1) or the default number under article 10(2).

12 Grounds for challenge

(1) [*When*] A person who is approached in connection with [*his*] that person's possible appointment as an arbitrator [*he*] shall disclose any circumstances likely to give rise to justifiable doubts as to [*his*] that person's 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] that arbitrator.

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to [his] that arbitrator's impartiality or independence, or if [he] that arbitrator does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by [him] that party, or in whose appointment [he] that party has participated, only for reasons of which [he] that party becomes aware after the appointment has been made.

324 We have noted the recommendation in the Alberta ILRR report that the reference in article 12 to “justifiable doubts as to ... impartiality or independence” be replaced with the phrase “a reasonable apprehension that [the arbitrator] is subject to bias”, a form of words often used in English and New Zealand administrative law cases. However, we believe the language of article 12 to be clear and that there is no substantial case for changing that language.

325 The legislation applying the Model Law to international arbitration in California goes into considerable detail about the “circumstances” which might be expected to be disclosed or be the basis for a challenge under article 12. Section 1297.121 of the California legislation provides guidance, although we do not propose that it be repeated in the draft Act; it refers to disclosure of

any information which might cause [the arbitrator's] impartiality to be questioned including, but not limited to, any of the following instances:

- (a) The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
- (b) The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or he or she has been a material witness concerning it.
- (c) The person served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding.

- (d) The person, individually or as a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.
- (e) The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:
 - (i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.
 - (ii) The person is acting or has acted as a lawyer in the proceeding.
 - (iii) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.
 - (iv) The person is likely to be a material witness in the proceeding.
- (f) The person has a close personal or professional relationship with a person who meets any of the following conditions:
 - (i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.
 - (ii) The person is acting or has acted as a lawyer or representative in the proceeding.
 - (iii) The person is or expects to be nominated as an arbitrator or conciliator in the proceedings.
 - (iv) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.
 - (v) The person is likely to be a material witness in the proceeding.

326 It has been suggested that the reference to "qualifications agreed to by the parties" in article 12(2) could extend to those impliedly agreed, including competence and diligence. If that argument is correct, then article 12(2) could have a much wider scope

than is suggested by an initial reading, and would reinforce the comment in the Mustill Committee Report, in relation to articles 12 and 13, that

a formal procedure for challenging the arbitrator would be an open invitation to delaying tactics by the respondent, of a kind which English arbitration has so far succeeded in avoiding. [(1990) 6 Arbitration International, 3, 28]

327 We believe that the general thrust of the Model Law, and of the draft Act, is inconsistent with an expansive interpretation of the scope for challenges under article 12, and that New Zealand courts would take a properly cautious approach to arguments such as that noted in the previous paragraph.

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]* High Court 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.

328 Although we received at least one submission which suggested that the 15 day time limit for commencing a challenge under article 13(2) was too short, we note that this period has been adopted in all other jurisdictions where the Model Law has been followed, believe that it is consistent with the general thrust of the Model Law and the draft Act, and do not recommend that it be changed.

14 Failure or impossibility to act

(1) If an arbitrator becomes *de jure or de facto* (in law or in fact) unable to perform [*his*] the functions of that office or for other reasons fails to act without undue delay, [*his*] that arbitrator's mandate terminates [*if he withdraws from his office*] on withdrawal from office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of those grounds, any party may request the [*court or other authority specified in article 6*] High Court 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).

329 In accordance with a drafting preference for the English language rather than any other, we have added English equivalents to the terms “de jure” and “de facto”. A similar approach is taken in relation to articles 16(1) and 28(3).

330 The Alberta ILRR report includes considerably more detailed provisions on the matters covered by article 14, including unqualified rights of resignation and removal by agreement of the parties, and wider grounds for removal by a court. Nevertheless, we are also aware that article 14 has been generally adopted without significant modification, believe that it will be used and interpreted in a workable manner in practice, and thus make no recommendation for substantive changes to its terms.

15 Appointment of substitute arbitrator

(1) 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*] that arbitrator's mandate by agreement of the parties or in any other case of termination of [*his*] that mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(2) Unless otherwise agreed by the parties,

- (a) where the sole or the presiding arbitrator is replaced, any hearings previously held shall be repeated, and**
- (b) where an arbitrator, other than a sole or a presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.**

(3) Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this article is not invalid solely because there has been a change in the composition of the arbitral tribunal.

331 We recommend that article 15 of the Model Law be supplemented by the addition of two further paragraphs which appear in the British Columbia and California legislation adopting the Model Law. The new article 15(2)(b) will go a substantial way towards providing a solution to the problem, referred to in the Mustill Committee report and elsewhere, of repeated resignations designed to obstruct the arbitral proceedings. Both articles 15(2) and (3) provide explicit and commonsense guidance on practical issues which arise where there is a replacement of an arbitrator after hearings have commenced. The concept of a “presiding arbitrator” appears in article 29.

332 Another issue which is expressly dealt with in the Alberta ILRR report is whether substitution of an arbitrator is possible where the original arbitration agreement named a specific arbitrator: s 15(5) of the draft contained in that report provides that the substitution provisions do not apply in those circumstances. But Holtzmann and Neuhaus, 465–6, indicate that that is also the position under article 15(1).

CHAPTER IV—JURISDICTION OF ARBITRAL TRIBUNAL

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* (necessarily) 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]~~ that party 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 on such a plea 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]~~ High Court 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.

333 Article 16(1) gives effect to the principle that an arbitral tribunal can determine its jurisdiction, and thus involves a major change from existing English and New Zealand law. As with certain other of the articles of Schedule 1, we recommend the addition of an English language equivalent of the phrase *ipso jure*.

334 The Mustill Committee report noted that article 16 puts the separate status of an arbitration agreement within a contract beyond doubt and thus represents a change to English (and New Zealand) law:

While English courts treat the arbitration clause as a wholly severable agreement for certain purposes, the concept of the separability of the arbitration clause is not fully accepted by the English courts. The orthodox view is that disputes as to whether the contract containing an arbitration clause was void *ab initio* fall outside the scope of the arbitration clause. [(1990) 6 Arbitration International, 55]

335 Article 16(2) contemplates that an arbitral tribunal faced with jurisdictional objections may do any of the following things:

- (a) give a preliminary ruling that it has jurisdiction;

- (b) give a preliminary ruling that it does not have jurisdiction;
- (c) give a preliminary ruling that it is exceeding the scope of its authority;
- (d) give a preliminary ruling that it is not exceeding the scope of its authority; or
- (e) defer making any ruling until making an award on the merits.

A number of commentators on the Model Law have noted that article 16(3) enables an aggrieved party to take only the first of those to court. We agree with the view expressed in the Dervaird Committee report that such access to the court should extend to any preliminary ruling on a jurisdictional question, and have recommended the amendment of article 16(3) in the same way as was done in the Scottish legislation (and in the ULCC draft, section 17(8)). However, we do not agree with the further view expressed by the Dervaird Committee (but not reflected in the Scottish legislation) that a decision by an arbitral tribunal to defer a jurisdictional ruling should be the subject of access to the court. An arbitral tribunal can use the power to defer a ruling where the jurisdictional objections appear frivolous or dilatory or are difficult to separate from the merits of the case: see Holtzmann and Neuhaus, 486.

336 The jurisdiction of an arbitral tribunal may also be the subject of court proceedings under article 8 in connection with an application for a stay of court proceedings, and in the provisions relating to setting aside (article 34) and enforcement (article 36).

17 Power of arbitral tribunal to order interim measures

(1) 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.

(2) Unless otherwise agreed by the parties, articles 35 and 36 apply to orders made by an arbitral tribunal under article 17 as if a reference in those articles to an award were a reference to such an order.

337 A number of commentaries on the Model Law have noted that in its unmodified form it does not make clear what power of enforcement is available in respect of orders made by an arbitral tribunal under article 17. Accordingly, following precedents set by legislation in Scotland and in Australia, we recommend the addition of a new article 17(2), the language of which is taken from s 23 of the IAA (Aust).

338 As noted in the UNCITRAL report (see Appendix D), the scope of any interim measure of protection available under article 17 is limited to the subject matter of the dispute, and is narrower than that under article 9.

CHAPTER V—CONDUCT OF ARBITRAL PROCEEDINGS

18 Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting [his] that party's case.

339 Article 18 is the cornerstone of the procedural provisions of the Model Law and is designed to apply irrespective of any agreement to the contrary between parties to an arbitration. The focus on the ability of the parties to present their case is reflected in articles 34 and 36 where inability to present the case is a ground for setting aside or non-enforcement of an award. On the other hand, article 18 refers to a “opportunity” which connotes an absence of constraint and, as discussed by Holtzmann and Neuhaus, at page 551–2, must be read reasonably and in the context of the procedural framework created by the other provisions of Chapter V of the Model Law.

340 The Alberta ILRR report (1988) recommended an express reference to an opportunity to respond to the case presented by other parties, and this is also reflected in s 19(2) of the ULCC draft. We believe that the opportunity to respond to another party’s case is implicit in the idea of “presenting” a case and, accordingly, do not recommend any substantive change to the language of article 18.

341 It is important to appreciate that neither the Model Law as a whole, nor article 18 in particular, insists upon a highly formal arbitral procedure. If the issue is a narrow or specialist one, as in the

quality of commodity shipments where the “look and sniff” expert arbitration is appropriate, article 18 does not stand in the way.

19 Determination of rules of procedure

(1) Subject to the provisions of this [Law] Schedule, 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] Schedule, 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) Every witness giving evidence, and every counsel or expert or other person appearing before an arbitral tribunal, shall have the same privileges and immunities as witnesses and counsel in proceedings before a court.

342 As may be seen from the Analytical Commentary (Appendix D), article 18 was initially a third paragraph in what is now article 19 of the Model Law. That legislative history makes it clear that the phrase “subject to the provisions of this Law” makes article 19(1) and (2) subject to the overriding principles set out in article 18.

343 The succinctness of the terms of article 19(2) may trouble lawyers and others used to more detailed procedural codes. For that reason, and for the avoidance of doubt, we propose that more detailed provisions appear in Schedule 2, see clause 3.

344 We have also proposed the addition to article 19 of one further rule of law within which the arbitral tribunal must operate. The new para (3) safeguards the privileges and immunities both of witnesses (including the parties) and those who appear before the arbitral tribunal in a representative capacity. The wording of the provision follows that of s 6 of the Commissions of Inquiry Act 1908 (as inserted by s 4 of the Commissions of Inquiry Amendment Act 1980). In part, it reflects s 9 of the Arbitration Act 1908 under which parties to an arbitration agreement may sue out an order of subpoena, subject to the safeguard that “no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action”.

345 The addition of the proposed paragraph (3) appears to be in keeping with the spirit of the Model Law. Article 27 recognises the right of an arbitral tribunal, or a party with the consent of the tribunal, to seek the assistance of the court in taking evidence. We considered including the new paragraph (3) in article 27, but that would have meant that it did not apply to a witness who appears voluntarily before the arbitral tribunal, but then claims privilege.

346 There is already a hint in article 25 that such a claim would be recognised, at least if made by a party. The introductory words indicate that the default of a party in failing to appear or to produce documentary evidence will be excused if “sufficient cause” is shown. The UNCITRAL commentaries indicate that these words were thought of primarily as excusing justified delay; but they would also let in a finding by the tribunal that the failure is excused by reason of privilege. Paragraph (3) of article 19 makes it explicit that the tribunal is required to recognise such a claim in that or any other context.

347 In its application to counsel or any other person who appears before the arbitral tribunal on behalf of a party, the new article 19(3) links up with our proposed new para (4) in article 24.

348 Holtzmann and Neuhaus, 568, discussed the absence of any express reference, which might have been expected to be in article 19, to the burden of proof, and the reasons for that omission:

[UNCITRAL] noted that it was “a generally recognised principle” that the reliance by a party on a fact required the party to prove that fact, but it felt that such a provision might interfere with the choice of substantive law under Article 28 and the broad freedom and conduct of the arbitration granted by Article 19.

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.

349 Under the the Model Law, the application of most of its provisions to international arbitrations depends on the place of arbitration (ie, the country in which the arbitration is conducted). Section 6(1) of the Act retains this link, and uses it it as the basis for applying the provisions of the Model Law to domestic arbitration. Our proposed article 11(6) fills a possible gap, where the parties have still to agree on, or the tribunal has still to determine, the place of arbitration. The place of arbitration is also deemed to be the place where the award is made: see article 31(3).

350 In the context of domestic arbitrations, article 20 merely provides sensible provisions about the location of hearings and other steps in the arbitration, illustrating one of the potential advantages of arbitration over litigation.

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.

351 The date of commencement of arbitral proceedings is relevant for the purposes of national limitation statutes and certain other provisions in the Model Law. Our proposals for amendments to the Limitation Act 1950 are set out in Schedule 4 and discussed in the commentary on that Schedule. Within the Model Law, the concept of commencement is expressly relevant to article 8(2) and is implicit in article 30(1) which refers to settlement “during” (ie, after commencement of) arbitral proceedings.

352 The Alberta Arbitration Act 1991 and s 23(2) of the ULCC draft add to the equivalent of article 21 a further paragraph which reads:

The arbitral tribunal may exercise its powers when every member has accepted appointment.

We have considered whether such a provision should be added for the purposes of the draft Act we recommend, but believe that the

concept made explicit in that paragraph is clearly implicit in the terms and structure of the Model Law.

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, 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.

353 Although article 22 has most obvious relevance for international arbitrations where the parties are from countries with different languages, this provision also illustrates the advantages of arbitration as a method of dispute resolution in domestic arbitrations where the parties do not use English as a first language.

354 Although the necessity to translate written documents and oral hearings may involve time and costs beyond the norm, this must be seen in the context of the equality of treatment prescribed by article 18.

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] the claim, the points at issue and the relief or remedy sought, and the respondent shall state [his] the 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] the 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.

355 Although a first reading of article 23(1) may suggest that it has as its model a formalistic adversarial proceeding, it is important to note the scope for the parties to agree to much more informal arrangements. This informality extends to dispensing with a requirement for written statements of claim and defence. Holtzmann and Neuhaus, 648, note that the legislative history of article 23(1) included a change to the last sentence whereby the phrase “annexed to”, in respect of documents accompanying statements of claim or defence, was changed to “submit with”.

356 Article 23(2) does not permit amendments to claims which extend the dispute beyond that agreed to be referred to arbitration.

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.

(4) At any hearing or any meeting of the arbitral tribunal of which notice is required to be given under paragraph (2), or in any proceedings conducted on the basis of documents or other materials, the parties may appear or act in person or may be represented by any other person of their choice.

357 The essential features of article 24(1) are that the parties can agree that there shall or shall not be oral hearings, and that in the absence of any such agreement it is a question for the arbitral tribunal subject to the right of any party to request an oral hearing “at an

appropriate stage of the proceedings". The reference to "appropriate stage" enables an arbitral tribunal to decline a belated and disruptive request for an oral hearing.

358 The legislation adopting the Model Law in British Columbia and in California includes a provision to the effect that, subject to the agreement of the parties, arbitral proceedings are to be held in camera. On the basis that this is the traditional practice in arbitration proceedings in New Zealand, is often an explicit term of an arbitration agreement, and in some situations may be an implied term of an arbitration agreement, we do not recommend any substantive alteration or addition to article 24.

359 The Hong Kong legislation deals with a separate but related matter, the confidentiality of court proceedings involving arbitrations. Sections 2D and 2E, added in 1989 and reflecting the Hong Kong Law Reform Commission report, are as follows:

- 2D Proceedings under this Ordinance in the Court or Court of Appeal shall on the application of any party to the proceedings be heard otherwise than in open court.
- 2E (1) This section applies to proceedings under this Ordinance in the Court or Court of Appeal heard otherwise than in open court.
 - (2) A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published.
 - (3) A court shall not give a direction under subsection (2) permitting information to be published unless
 - (a) all parties to the proceedings agree that such information may be published; or
 - (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.
 - (4) Notwithstanding subs (3), where a court gives a judgment in respect of proceedings to which this section

applies and considers that judgment to be of major legal interest, it shall direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall

- (a) give directions as to the action that shall be taken to conceal that matter in those reports; and
- (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no report shall be published until after the end of such period, not exceeding 10 years, as it considers appropriate.

360 We are sympathetic to the underlying argument that parties may in part choose to arbitrate rather than litigate because of the confidentiality it affords. We are also mindful of the traditional reasons for open courts and public decisions; and we are of the view that this issue is one which extends to much commercial litigation. We have concluded that the issue should be resolved in that wider context and, accordingly, have not recommended provisions similar to ss 2D and 2E of the Hong Kong Ordinance. We recommend that examination of the wider question take place at an early date.

361 We propose the addition of a new para (4) confirming the right of the parties to act in person for the purposes of an arbitral proceeding or to be represented by a person of their choice. The Model Law does not deal with the question of advocacy and representation in arbitrations. The reasons for this were summarised by Holtzmann and Neuhaus:

The topic of representation and assistance in arbitral proceedings was discussed only briefly at the outset of the drafting of the Model Law. The Secretariat noted that a number of national laws contain provisions on the subject, dealing, for example, with whether and by whom a party may be represented or assisted or with whether advance notice of the persons representing or assisting a party must be given. It doubted, however, that there was any "real need" to address the matter. Divergent opinions were expressed on the subject in the Working Group but the prevailing view was that the Model Law did not need to address the topic. There was

general agreement that parties had the right to be represented or assisted by persons of their choice, but this view appeared to be widely recognized and thus not seriously in need of efforts towards unification. [1121]

362 In Australia the topic of legal representation in arbitrations has been contentious with the UCAA (Aust) initially permitting legal representation only with the leave of the arbitrator, although this will be significantly relaxed by amendments introduced into state legislatures in 1990. In international arbitrations, the parties will often prefer to be represented by a lawyer from their home jurisdiction. An express right to such representation, avoiding any difficulties with local statutory regulation of law practitioners, was incorporated in British Columbia and Hong Kong legislation, and followed in s 29 of the IAA (Aust). We do not consider that the Law Practitioners Act 1982 creates similar difficulties, and have not recommended a similar provision.

25 Default of a party

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

- (a) the claimant fails to communicate [his] the statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;**
- (b) the respondent fails to communicate [his] the 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;**
- (d) the claimant fails to prosecute the claim, the arbitral tribunal may make an award dismissing the claim or give directions, with or without conditions, for the speedy determination of the claim.**

363 In article 25 and also article 32 there is reference to the "termination" of arbitral proceedings and also the making of an award.

While the making of an award would mean that the arbitration agreement is spent, that is not the consequence of terminating the particular arbitral proceedings—ie, the underlying claims remain and, subject to questions of limitation defences, new arbitral proceedings could be commenced.

364 A topic which has received a great deal of attention in recent writing on arbitration, particularly in the English context, has been that of present difficulties in terminating stale arbitral proceedings which the plaintiff or claimant has failed to pursue with any degree of diligence. Article 25 does not deal with this situation unless the claimant's failures include non-communication of the statement of claim. It is for that reason that the Alberta ILRR and the ULCC drafts include additional and explicit provisions dealing with that situation. There is a helpful discussion of the reasons for this in the Alberta ILRR report at pages 93–4:

In Food Corporation of India v Antclizo Shipping Corporation [1988] 1 WLR 603, Lord Goff, speaking with the concurrence of most of the members of the Appeals Committee of the House of Lords, noted that, under English law, an arbitrator has no power to strike out a claim for want of prosecution. He went on to associate himself with concerns expressed by the Court of Appeal and felt generally in the City of London about the law as it stands with regard to arbitrations which have been allowed to go to sleep for many years, and suggested that the sooner corrective legislation is passed, the better. Presumably the same legal situation obtains in Alberta, as the present Arbitration Act confers no power to dismiss for want of prosecution.

The enactment of Model Law article 25(a) would go some way towards meeting the problem, but not all the way: it provides for termination of proceedings for the claimant's failure to deliver a statement of his case, but it would not permit dismissal for failure to proceed thereafter. Article 25(c) would also be helpful, as it permits an arbitral tribunal to proceed on the evidence before it if a party fails to appear, but that requires a hearing at which the other party would have to appear and give evidence, which seems to be an unnecessary step if a claimant does nothing to advance a claim, and it is a step which is not required in a court action.

We think that a thoroughgoing power to dismiss for want of prosecution should be available. In court proceedings, it is not a power which is frequently used, but it is sometimes useful in itself and it is more often useful to have it in the background. We have accordingly adapted Rule 244 of the Alberta Rules of Court as s 25(2) of the draft Act.

The Law Commission agrees, and recommends the addition to article 25 of a new para (d) based on s 27(4) of the Uniform Law Conference of Canada draft. We consider that it is appropriate for the arbitral tribunal to have the power to strike out for want of prosecution rather than the court although it is the latter which is given that power under s 46 of the UCAA (Aust).

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] the expert's 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] a 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.

365 Article 26 is essentially self-explanatory but it should be noted that it represents a significant departure from English and New Zealand law, although reflecting the law and practice in civil law jurisdictions, in permitting an arbitral tribunal to appoint its own expert, rather than relying on the parties to bring out expert evidence as part of the presentation of their respective cases. The expert may be a lawyer in cases where a lay arbitral tribunal seeks legal advice on some aspect of the proceedings.

366 The Mustill Committee report considered the benefits of article 26 "debatable":

The power to appoint an expert, while leaving the parties free to question that expert and to present their own expert evidence, may be of some benefit where, as is more often the case abroad than in England, the tribunal consists entirely of lawyers. But there are risks of confusion, delay and extra expense involved in such a measure. [(1990) 6 Arbitration International at 27]

We do not consider these concerns sufficient to depart from the Model Law, and note that the appointment of an expert to assist the decision-maker is possible in some forms of litigation, for example, under the Patents Act 1953 and related provisions of the High Court Rules.

27 Court assistance in taking evidence

(1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from [*a competent court of this State*] the court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

(2) For the purposes of paragraph (1),

- (a) the High Court may make an order of subpoena or a District Court may issue a witness summons to compel the attendance of a witness before an arbitral tribunal to give evidence or produce documents;**
- (b) the High Court or a District Court may order any witness to submit to examination on oath or affirmation before the arbitral tribunal, or before an officer of the court or any other person for the use of the arbitral tribunal;**
- (c) the High Court or a District Court shall have, for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for**
 - (i) the discovery of documents and interrogatories;**
 - (ii) the issue of a commission or request for the taking of evidence out of the jurisdiction;**
 - (iii) the detention, preservation or inspection of any property or thing which is in issue in the arbitral proceedings and authorizing for any of those purposes any**

person to enter upon any land or building in the possession of a party, or authorizing any sample to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.

367 The limiting of the scope of article 27 to “taking evidence” reflects the concerns which were most relevant in drafting rules to apply to international arbitrations throughout the world. Holtzmann and Neuhaus identify those concerns as integration with existing court procedures, the possibility of abuse, and the lack of availability of court assistance in some countries: 734. The limited scope of article 27 is also reflected in the requirement for the arbitral tribunal to request or approve a request for court assistance.

368 In the Scottish legislation adopting the Model Law for international arbitration, the references to “taking evidence” have been extended to “recovering documents” in both sentences of the article. This appears to go further than the recommendations of the Dervaird Committee report which considered

that a reference to assistance in taking evidence would include the power of the court to order recovery of documents in appropriate cases. [Para 3.27]

We agree with that view.

369 The second sentence, however, in authorising a court to execute a request for assistance in taking evidence “within its competence and according to its rules on taking evidence”, presupposes that there will, or may be, local law authorising the courts to give the assistance requested. As we intend the draft Act to be a comprehensive statement of New Zealand law relating to arbitration (other than arbitrations governed by special statutory provisions), it is important to set out, for international as well as domestic arbitrations, the powers of the New Zealand courts to respond to a request under what will become article 27(1). We have done this in a new para (2).

370 The introductory words of para (2) make it clear that the High Court or a District Court will be entitled to exercise a power conferred on it only in response to, and within the ambit of, a request under para (1). The reference in para (1) to the execution of a request by a court “according to its rules on taking evidence” lets in not only

a claim of privilege under the proposed new article 19(3), but also any other relevant requirement.

371 Paragraph (2)(a) authorises the High Court to make an order of subpoena and the District Court to issue a witness summons for the purpose of compelling the attendance of a witness before an arbitral tribunal to give evidence or to produce documents. This provision corresponds, in part, to s19(1) of the Arbitration Act 1908.

372 Section 19(2) of that Act made provision for the High Court to order a prisoner to be brought up for examination before an arbitrator and provided that such an order should operate as a writ of habeas corpus ad testificandum. The power to issue that writ in New Zealand came to an end when the Imperial Laws Application Act 1988 was enacted, and did not keep in force the Habeas Corpus Act 1804 (UK). But s 26 of the Penal Institutions Act 1954 allows any Court, Judge or Registrar to order the Superintendent of a penal institution to arrange for the attendance of an inmate for judicial purposes. The term "judicial purposes" is defined in s 26(5) as including attendance, whether as a party or as a witness,

- (b) before any tribunal constituted by or under any enactment; or
- (c) at any meeting or examination convened or conducted under the authority of any enactment.

It would seem that, while Schedule 1 recognises arbitral tribunals and, in article 24(1), sets out their duties in relation to the holding of oral hearings, this is not sufficient to bring arbitral tribunals, or hearings before such tribunals, within paras (b) or (c). We therefore recommend the addition to s 26(5) of a new para (d) referring expressly to an arbitral tribunal. See s 13(2) and Schedule 4.

373 Paragraph (2) (b) authorises the High Court or a District Court to order a witness to submit to examination on oath or affirmation either by the tribunal or by an officer of the court or other person for the use of the tribunal. It reflects part of clause (4) in the First Schedule to the Arbitration Amendment Act 1938, and also clauses (6) and (7) of the Second Schedule to the Arbitration Act 1908. The reason for the paragraph, to the extent that it goes beyond the powers conferred by para (2)(a), are as follows.

374 Under the Oaths and Declarations Act 1957, no person may administer an oath or affirmation unless authorised by law. Under s 14 of that Act

all Courts and all persons acting judicially are empowered to administer an oath to all such witnesses as are lawfully called or voluntarily come before them respectively or to take the affirmation of any such witness instead of an oath.

Section 2 defines "person acting judicially" as "any person having in New Zealand by law or by consent of parties authority to hear, receive, and examine evidence". It follows that an arbitral tribunal may administer an oath or affirmation to a witness, for the purposes of international or domestic arbitration, and whether the authority of the tribunal to hear evidence is conferred by the agreement of the parties or "by law" under article 19(2).

375 It is not so clear, however, that the authority to administer an oath or affirmation necessarily imposes a duty on any person to submit to examination on oath or affirmation. The Second Schedule of the Arbitration Act 1908 imposed such a duty on both the parties and the witnesses, but that Schedule implies certain terms in an arbitration agreement, and it is hard to see how it could bind witnesses who are not parties. We have therefore decided to spell out the power of the courts not only to order the taking of evidence on oath or affirmation for the use of an arbitral tribunal, but also to require a witness to submit to examination on oath or affirmation before the arbitral tribunal itself.

376 Paragraph (2)(c) authorises each court to exercise, for the purpose of the arbitral proceeding, such ancillary powers as it may have to do the things listed. Corresponding powers are at present conferred on the High Court for the purposes of arbitral proceedings by s 10 and the First Schedule to the Arbitration Amendment Act 1938. In view of the complete discretion in procedural matters conferred on the parties and the tribunal by article 19, there is no need to repeat the provision in s 10 that the courts's powers are without prejudice to any power to make the orders specified that may be vested in an arbitrator.

377 In the British Columbia and California legislation, two additional paragraphs have been added to article 27 dealing with the

consolidation of two or more arbitral proceedings. Section 27(2) and (3) of the 1986 British Columbia legislation reads as follows:

(2) Where the parties to 2 or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the Supreme Court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

- (a) order the arbitrations to be consolidated on terms the court considers just and necessary;
- (b) where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with s 11(8);
- (c) where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

378 As subs (3) recognises, the parties to separate arbitrations may agree to consolidation and, in effect, enter into a new arbitration agreement, although the identity of the arbitral tribunal may be a matter on which agreement is not easily achieved. The purpose of s 27(2) is to give the court power to impose terms at the time of consolidation, appoint an arbitral tribunal if there is no agreement, and make other ancillary orders. In other words, s 27(2) is designed to enable the courts to complete an incomplete agreement.

379 A background to and critique of s 27(2) and (3) was included in a paper presented by Professor Robert Paterson of the University of British Columbia to the Legal Research Foundation/Law Commission seminar held at the University of Auckland on 20 September 1989. It has been reprinted as *Arbitration Law: "Perimeters and Parameters"* (1989), 27, 46:

Section 27(2) and (3) are not contained in the Model Law but were based on s 6B of the Arbitration Ordinance of Hong Kong. In its recent [1987] Report on the Adoption of the

UNCITRAL Model Law of Arbitration, the Law Reform Commission of Hong Kong recommended against a compulsory consolidation procedure on the ground that, inter alia, it is more difficult in an international context to devise a workable procedure for consolidation, than in a domestic context where the parties are usually all subject to the jurisdiction of the local courts. The Hong Kong Report is critical of the British Columbia Act for including a provision which operates only by consent and therefore seems to not justify court intervention. While the judicial intervention provided for in s 27(2) may expedite the process of consolidation by specifying the terms on which it is to occur, it is arguable that this has been achieved at the high cost of risking the level of judicial intervention in consolidation which has occurred in the United States.

380 We have noted that the issue of consolidation in multi-party disputes was considered by the UNCITRAL Working Group at an early stage of the development of the Model Law but the Group took the view that there was no real need to include a provision on consolidation. As we are proposing more detailed provisions on consolidation in Schedule 2 which would apply to domestic arbitrations on an opt out basis, and to international arbitrations on an opt in basis, and this will reflect the position in Australia, we do not recommend the amendment of article 27 to follow the British Columbia legislation.

CHAPTER VI—MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

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* (according to considerations of general justice and fairness) only if the parties have expressly authorised it to do so.

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

381 The existing law relating to arbitration requires an arbitrator to decide a dispute in accordance with New Zealand law. Article 28 liberalises that proposition in two respects: first the parties are entitled to choose which “rules of law” they wish to apply to the substance of the dispute, although there are default provisions and this freedom will be of limited relevance in most domestic arbitrations; and, second, the parties may expressly authorise an arbitral tribunal to decide otherwise than in strict accordance with the law under article 28(3). The “rules of law” referred to in article 28(1) are not limited to those of a single jurisdiction but would extend to, for example, rules set out in an international convention, such as the Vienna Convention on the International Sale of Goods, and even to general rules recognised in international commerce, as approved in *Deutsche Schactba-und Tiefbohrergesellschaft mbH v Shell International Petroleum* [1990] 1 AC 295, 312–316, CA, reversed in part but not on this point; see also “General Principles of Law in International Commercial Arbitration” (1988) 101 Harvard Law Review 1816).

382 The provisions of the Model Law have little to say about the range of remedies available to an arbitral tribunal. That generality assumes that most remedies are available to an arbitral tribunal: an award is “binding” under article 35(1) and enforcement can only be refused, if the arbitration process has proceeded properly, on the grounds of non-arbitrability or contravention of public policy under article 36(1)(b). The Alberta ILRR draft and s 31(1) of the ULCC draft statute would expressly refer to the power of an arbitral tribunal to grant specific performance, injunctions and other equitable remedies. We believe that equitable rules and remedies are an integral part of the law of New Zealand and thus available to an arbitral tribunal if the law applicable to the substance of the dispute is that of New Zealand. We take the same view of the remedial powers given under the various contracts statutes. The scope of an arbitral tribunal’s powers will, however, be subject to the overlapping limits

of arbitrability and public policy. See paras 224–234, and see also Professor Grant Hammond in *Arbitration Law: “Perimeters and Parameters”* (1989), at 101. However, for the avoidance of doubt, we have included, as s 10 of the Act, a general statement that, within the limits just mentioned, an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings in that court. See the commentary on that section (paras 252–261).

383 In article 28(3) we recommend the addition of an English language equivalent to the Latin and French phrases used in the Model Law.

384 As we recommend that Schedule 1 form the basis of all arbitrations, and not be limited to any narrower conception of “commercial” disputes, there may not be a contract or trade usage which is relevant to the dispute, for example, if it relates to potential infringement of intellectual property rights, or to a claim which would involve the law of torts. On that basis, we have amended article 28(4) to refer to “any” rather than “the” contract and trade usages. The same amendment appears in s 33 of the ULCC draft.

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 authorised by the parties or all members of the arbitral tribunal.

385 The Alberta ILRR report and also s 34 of the ULCC draft go beyond article 29 in providing that, if there is no majority, the arbitrator chairing the tribunal is given a power of decision. The reason for this is to prevent the arbitration being aborted by the absence of a majority. We prefer to retain article 29 in its unmodified form, notwithstanding the potential for an arbitration to run its full course without producing a result, mindful that it is possible for the parties to agree (even at a late stage of the proceedings) to something other than a majority decision.

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.

386 Article 30 gives an arbitral tribunal a discretion to record a settlement between the parties in the form of an award, and thus to decline to endorse any settlement which might conflict with the law or public policy. As is made clear by article 31(2) no reasons are required to be given for such an award.

387 In the British Columbia legislation adopting the Model Law, the equivalent of article 30 was prefaced by a new subs (1) dealing with settlement and reading:

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement.

This provision was followed in the 1988 California legislation, and somewhat similar provisions appear in the Hong Kong legislation, the Alberta ILRR report and the ULCC draft. We believe that, as it merely states what the parties may agree to, this provision operates as no more than a reminder of the existence of mediation, conciliation and similar techniques, and involves a potential for considerable complexity and difficulty where an arbitrator must undergo a transformation of role from that of mediator or conciliator. We are also aware that a similar provision in the UCAA (Aust) has been the source of some controversy within the Australian arbitral community. On the other hand we recognise that conciliation is held to be an important aspect of dispute resolution in many parts of Asia, as noted in the HKLRC report (1987), and recommend that this aspect of the legislation be kept under review.

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 the article*] shall be delivered to each party.

(5) Unless the arbitration agreement otherwise provides, or the award otherwise directs, a sum directed to be paid by an award shall carry interest as from the date of the award and at the same rate as a judgment debt.

388 Article 31 has as one of its major features a requirement for reasons to be given for an award. Our consultative activities revealed strong support for such a change in New Zealand. A failure by an arbitral tribunal to give reasons would mean non-compliance with the agreed arbitral procedure, and scope for an application to set the award aside, which would include giving the tribunal an opportunity to remedy its default: see article 34(4).

389 The British Columbia legislation adopting the Model Law has provisions dealing with the arbitral tribunal's power to award interest and costs. We believe that, if not the subject of agreement between the parties, interest and costs will be issues in the dispute and thus properly dealt with in an award (or an additional award: see article 33(3)). In view, however, of the provision in s 10 to the effect that the tribunal has, for the purposes of the arbitral proceeding, all the powers of the High Court, we have recommended the inclusion there of express provision for the award of interest in the period up to the date of the award. See s 10(1)(b) and para 260.

390 We have also decided to recommend the inclusion of a new para (5) concerning interest payable after the date of the award. In doing so we have provided that, in the absence of agreement, and unless the award otherwise directs, a sum payable under the award shall carry interest as from the date of the award and at the same rate as a judgment debt. It seems appropriate to apply this provision on a mandatory basis to both international and domestic arbitration, because, under article 35(1), an award may be enforced by entry of judgment in the High Court in terms of the award. Apart from being residual rather than mandatory, this provision continues the present position under s 13 of the Arbitration Amendment Act 1938. The Law Commission is aware of the problems that have arisen in relation to the current statutory provisions governing the rate of interest on judgment debts, and will be proposing remedial measures in the context of a separate project on aspects of damages. In the meantime, the proposed new para (5) will act as a reminder to a party who would prefer the residual rule not to apply to make that known during the course of the arbitral proceedings so there is an opportunity for other parties to respond and the tribunal to give its direction in its award.

391 In Schedule 2, we propose a residual rule on costs (clause 6), again applying in the absence of agreement between the parties or provision in an award or additional award. This will apply to international arbitrations on an opt-in basis, and to domestic arbitration unless the parties opt-out.

392 The Quebec legislation adopting the Model Law imposes a further obligation that arbitrators keep the award secret. We do not recommend any change to article 31. We regard questions of secrecy and certain other matters (for example, the issue of dissenting arbitral opinions) as matters of procedure governed by article 19. Similarly, we would expect the practice whereby an award is not made available until the fees and costs of the arbitral tribunal have been met to be dealt with as a procedural matter in terms of article 19, and not in conflict with article 31(4).

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] the claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on [his] the respondent's 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).

(4) Unless otherwise agreed by the parties, the death of a party does not terminate the arbitral proceedings or the authority of the arbitral tribunal.

(5) Paragraph (4) does not affect any rule of law or enactment under which the death of a person extinguishes a cause of action.

393 The termination of arbitral proceedings under article 32 does not necessarily involve the bringing to an end of the disputes between the parties: although that will be the effect of a final award, it is not necessarily the case under article 32(2) orders, as is implicit in article 32(2)(a). However, if there is an agreement under article 32(2)(b), that would provide a further defence for the respondent to any further claim in relation to the same subject matter. In other words, the termination provisions largely relate to the mandate of the arbitral tribunal itself, expressly dealt with in article 32(3), rather than the force of the arbitration agreement.

394 We have noted that the Alberta ILRR and the ULCC drafts propose that the effect of death of a party be expressly dealt with by additional provisions in the equivalent of article 32. There will be few international arbitrations involving individuals (rather than corporations or government agencies) and thus this issue is of most relevance to domestic arbitrations. Nevertheless, we agree that this is a matter which should be dealt with expressly, and in the way suggested in the Alberta ILRR report. This is the source of the new

paras (4) and (5) which we recommend be added to article 32 (in terms somewhat similar to s 3 of the 1938 New Zealand Act).

395 On a similar topic, we have considered the effect of insolvency of a party (whether individual or corporate) to an arbitration and have concluded that no express provision is required in an arbitration statute. That means that no equivalent to s 4 of the 1938 New Zealand Act is carried forward. We believe that an arbitration agreement should be treated no differently from other contracts into which the insolvent party has entered and which, for example, are able to be terminated or continued by the Official Assignee under s 76 of the Insolvency Act 1967.

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 paragraphs (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.

396 Article 33 contains important provisions designed to avoid inconvenience from minor errors or lack of clarity in an award as presented by the arbitral tribunal. We recommend that article 33 not be modified, although we are aware of three matters on which modifications have been recommended or enacted in other jurisdictions:

- (a) the Alberta ILRR report and s 44(1)(b) of the ULCC draft would extend the nature of the errors covered by article 33(1)(a) to errors by way of oversight which might cause an injustice if uncorrected (this would include, for example, the overlooking of relevant statutory provisions, and would equate with the balance of the “slip” rule which applies to unsealed judgments in the High Court);
- (b) the Alberta ILRR report and s 40 of the ULCC draft would remove the requirement for the agreement of the other parties before any party can request an interpretation of a specific point by the arbitral tribunal under article 33(1)(b); and
- (c) the deletion of the 60 day time limit at the end of article 33(3), as was done in the Scottish legislation.

We have considered each of those propositions but have concluded that they do not assist in making the Model Law more effective in New Zealand conditions, and that the situations which they are designed to remedy can be sufficiently dealt with under the provisions of the Model Law (such as the setting aside powers under article 34) or, as is likely, by the agreement of the parties when such a situation arises.

CHAPTER VII—RECOURSE AGAINST AWARD

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] High Court 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 on that question, under the law of [this State] New Zealand; 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] that party's 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] Schedule from which the parties cannot derogate, or, failing such agreement, was not in accordance with this [Law] Schedule; or

(b) the [court] High Court finds that

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of [this State] New Zealand; or
- (ii) the award is in conflict with the public policy of [this State] New Zealand.

(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. This paragraph does not apply to an application

for setting aside on the ground that the award was induced or affected by fraud or corruption.

(4) The [court] High 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.

(5) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

(6) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii), it is declared that an award is in conflict with the public policy of New Zealand if

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

397 The limitation of judicial control of arbitral proceedings and awards is a central feature of the Model Law. It is given effect by article 34 which excludes rights of appeal or other forms of judicial review in favour of an application for setting aside on the limited grounds specified in article 34(2). This feature of the Model Law was the subject of many of the submissions received and, although few suggested that it was inappropriate for international commercial arbitration, many had reservations about its application to domestic arbitrations. As also discussed in Chapter IV, above, we have concluded that the arguments in favour of an appeal for domestic arbitration should be recognised in Schedule 2. We do not recommend any substantial change to article 34 for international arbitrations as s 6(2) presents parties who wish to include a right of appeal to do so by opting into the relevant provision in Schedule 2.

398 The interrelationship of article 34 with article 36, which deals with recognition or enforcement of arbitral awards, should be noted. The grounds upon which an award may be challenged under article 34(2) or resisted under article 36(2) are parallel. Further, the filing of

an application under article 34(1) provides the basis for a court to stay recognition or enforcement: see article 36(2).

399 The specific grounds referred to in article 34(2)(a) cover various aspects of an arbitration: the validity of the agreement; equality of treatment under article 18; the scope of the arbitration (although subpara (iii) provides for severance of the impugned part of an award); and non-compliance with the arbitral agreement or the other articles of Schedule 1 itself (including article 18). Article 34(2)(b) deals with arbitrability and public policy under the law of New Zealand. The meaning of “public policy” has been elaborated in a new para (6) referring, among other things, to agreements procured by fraud or corruption.

400 In Scotland, the logic of impugning an award for fraud (which may be concealed for some time) was recognised by excluding that ground from the time limit provided in article 34(3). This issue is nicely balanced between attempting to achieve finality in an arbitral award and retaining powers to remedy the consequences of an award which has been tainted by fraud or corruption. On balance the Law Commission accepts the Scottish approach which is reflected in the addition to article 34(3).

401 Article 34(4) provides substantial flexibility to a court invited to set aside an award insofar as it permits that court to adjourn the setting aside application in order to enable the arbitral tribunal to correct the matter complained of. This would operate in the same way as a remission back to an arbitral tribunal does under the existing law, with nothing to stop a court from indicating, in the reasons given for adjourning the setting aside proceedings, what the nature of the complaints are. Contrary to the view expressed in the Mustill Committee report, we do not see that the court must have made a firm finding that there are grounds for setting aside before it exercises its power to suspend the setting aside proceedings under this paragraph. It would be contrary to commonsense for a court to be required to reach a definite conclusion on the grounds alleged before those proceedings could be suspended.

402 The proposed new para (5) permitting the High Court to order that, pending determination of an application to set aside an award, the High Court may order money payable under the award to be

brought into Court or otherwise secured picks up s10(3) of the Arbitration Amendment Act 1938. It seems a potentially useful power that is not inconsistent with the role accorded to a court by article 34.

403 Paragraph (6) elaborates the meaning of “public policy” for the purposes of setting aside an award under article 34, and follows closely the wording of s 19 of the IAA (Aust). Although the IAA (Aust) includes this provision as a section of the Act, rather than in the Model Law, a somewhat similar provision was added to article 34(2)(a) of the Model Law as applied in Scotland. We believe that the provision is appropriately placed in that article (and also in article 36 where there is also a reference to “public policy”).

404 We have hesitated before including the reference to “the rules of natural justice” in article 34(6)(b) for two reasons. First, the principal rules of natural justice, an impartial decision-maker, and a proper opportunity to be heard, are clearly embodied in articles 12, 18 and 24. Second, the thrust of the Model Law, and of the draft Act, involves a reduction in judicial involvement in arbitral proceedings, and an expansive approach to judicial review by New Zealand courts would contradict that thrust. Nevertheless, we have concluded that the Australian provision should be followed: the significance of natural justice in arbitral proceedings can be emphasised; and many recent decisions of New Zealand courts show that our judges are sensitive to their relatively limited role in arbitrations.

CHAPTER VIII—RECOGNITION AND ENFORCEMENT OF AWARDS

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*] High Court, shall be enforced by entry as a judgment in terms of the award, or by action, 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, if recorded in writing, 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 English language, the party shall supply a duly certified translation into [such language] the English language.

405 Article 35 is critical in giving effect to a central feature of arbitration: that an arbitral award is generally as effective as a judgment of a court, notwithstanding that the decision-making process does not involve a court. Article 35(1) deals with the separate concepts of recognition and enforcement. Recognition applies automatically in any court, and is the same concept as “reliance” in s 5(2) of the Arbitration (Foreign Agreements and Awards) Act 1982 which refers to reliance “by way of defence, set off, or otherwise” in any court proceedings. Enforcement involves a positive remedial action and, in order to obtain the enforcement powers of the High Court, backed up by powers of contempt and sequestration and the like, we recommend the addition of a provision which expressly refers to enforcement by entry as a judgment, or by action. The first part of this addition follows the language of s 12 of the Arbitration Amendment Act 1938 but omits the existing discretion given to the court to enter such a judgment (see s 13 of the 1908 Act); although the discretion is removed, the enforcement remains expressly subject to articles 35(2) and 36. The reference to enforcement by action is an alternative provided for in s5(1) of the Arbitration (Foreign Agreements and Awards) Act 1982, and would cover the case where, by reason of intervening events or otherwise, the terms of the award are not capable of being entered as a judgment.

406 The effect of articles 35 and 36 is to provide a consistent regime for recognition and enforcement of awards irrespective of where they are made. We propose this general approach for the reasons given in chapter VI. It will be recalled that one factor is the set of safeguards included in article 36.

407 In article 35(2) the reference to supply of the original or a copy of the arbitration agreement presupposes that the agreement is in writing, as required in the unmodified version of article 7(2). As we have deleted the requirement for writing from article 7, we have made a corresponding qualification to the terms of article 35(2).

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*] on that question, 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*] that party's 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*] New Zealand; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of [*this State*] New Zealand.

(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.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii), it is declared that an award is contrary to the public policy of New Zealand if

(a) the making of the award was induced or affected by fraud or corruption; or

(b) a breach of the rules of natural justice occurred in connection with the making of the award.

408 As noted in the commentary on article 34, the grounds for refusal of recognition or enforcement of an arbitral award under article 36(1) parallel those in article 34 as to setting aside, although recognising that the arbitration may have taken place in another country. In addition, article 36(1)(a)(v) deals with the situation where the award has not yet become binding (eg, if it is to take effect at a future date) or has been set aside or suspended by a court in the country where the award was made. Notwithstanding the focus on the law and courts of the country where the award was made in article 36(1)(a), the questions of arbitrability and public policy (including natural justice: see article 36(3)) are to be judged by reference to the law of New Zealand.

409 Although the language of article 36(1)(a)(v) is clearly designed to cover the enforcement of an award made in another country, it extends to awards made in New Zealand and, on that basis, the powers under article 36(2) will apply where a party to an arbitration challenges an award under article 34 or (as is made explicit in clause 5(8) of Schedule 2) invokes the additional power of appeal on a point of law provided in Schedule 2.

410 The Mustill Committee report queried the benefits of article 36 over the “invaluable” power of summary enforcement of an award where there is no real ground of defence. We are confident that the New Zealand courts are well aware of commercial realities and able to perceive the employment of purely delaying tactics and exercise the discretion under article 36(2) accordingly.

411 The new paragraph (3), elaborating the meaning of “public policy” is in the same terms as the new article 34(6). See the commentary on that provision (paras 403-404).

THE CLAUSES OF SCHEDULE 2:

(Additional optional rules governing arbitration)

412 Although we have found that the UNCITRAL Model Law provides a sound and flexible framework for arbitration, we recognise that it was designed with large international commercial arbitrations in mind and that its application to domestic arbitration would be enhanced by certain additional provisions which either add to or modify the terms of the Model Law as these appear (with supplementary provisions appropriate for both domestic and international arbitration) in Schedule 1.

413 The additional provisions in Schedule 2 relate to the important topics of default appointment of arbitrators, consolidation of arbitral proceedings, and appeals (and preliminary decisions) on points of law. As discussed in Chapter IV, we have accepted the force of submissions that these provisions should be available in domestic arbitration, although they are not necessarily appropriate for international arbitrations. Nevertheless, as provided in s 6(2) of the draft Act, parties to an international arbitration may agree to opt in to Schedule 2 provisions and parties to a domestic arbitration may agree to opt out. In relation to these additional topics, we have deliberately chosen to model the Schedule 2 provisions on the latest version of the UCAA (Aust), bearing in mind the advantages of achieving an appropriate degree of similarity between the domestic arbitration regimes in both countries.

414 The other provisions in Schedule 2 on the procedural powers of arbitral tribunals and the allocation of the costs and expenses of the arbitration spell out terms to be implied in the arbitration agreement unless the parties agree otherwise, and permit the intervention of the courts to support or monitor the decisions of the tribunal on these matters in ways going beyond those authorised in Schedule 1. We have not followed any single model in drafting these provisions but have had particular regard to the UCAA (Aust) as well as noting the provisions found in domestic arbitration statutes developed in England, Bermuda, Hong Kong and various Canadian jurisdictions.

415 The sequence of the clauses of Schedule 2 generally follows that to be expected in arbitral proceedings: appointment; consolidation; conduct of proceedings; determination of preliminary point of law; appeals; and costs.

1 Default appointment of arbitrators

(1) For the purposes of article 11 of Schedule 1, the parties shall be taken as having agreed on the procedure for appointing the arbitrator or arbitrators set out in subclauses (2) to (5), unless the parties agree otherwise.

(2) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator.

(3) In an arbitration with a sole arbitrator, the parties shall agree on the person to be appointed as arbitrator.

(4) Where, under paragraph (2) or paragraph (3), or any other 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, by written communication delivered to every such party, arbitrator or third party, specify the details of that person's default and propose that, if that default is not remedied within the period specified in the communication (being not less than 7 days after the date on which the communication is received by all of the persons to whom it is delivered), a person named in the communication shall be appointed to such vacant office of arbitrator as is specified in the communication, or the arbitral tribunal shall consist only of the person or persons who have already been appointed to the office of arbitrator.

(5) If the default specified in the communication is not remedied within the period specified in the communication,

- (a) the proposal made in the communication shall take effect as part of the arbitration agreement on the day after the expiration of that period; and**

(b) the arbitration agreement shall be read with all necessary modifications accordingly.

416 Clause 1 effectively amends article 11 of Schedule 1. It deals with the important question of appointment of arbitrators where one party wishes to have questions of appointment settled so that the arbitration can proceed but one or more other parties are uncooperative. The clause departs from the thrust of article 11(3) and (4) which look to an application to a court for appointment where there is a difficulty. By deeming the procedure set out in subclauses 1(2) to (5) to have been agreed under article 11, the clause bypasses article 11(3) and (4). The overall objective is to give the non-defaulting party a greater ability to get the arbitration commenced by appointment of the arbitral tribunal without a separate court application. The procedure largely follows that in s 8 of the UCAA (Aust) but has been extended to cover failure to agree on a procedure for the appointment of an arbitrator or arbitrators, as well as failure to comply with any procedure which has been agreed. The language follows that of article 11 as closely as possible, to avoid any inconsistency. When read with article 10 (Number of Arbitrators), clause 1 will enable one party alone to get an arbitration under way, even if the arbitration agreement consists of no more than an undertaking to submit any disputes arising out of a contract “to arbitration”.

417 As indicated in subclause 1(1), an express agreement by the parties as to a procedure for appointment of the arbitrator or arbitrators will prevail over the procedure to be taken as having been agreed under the clause. If that procedure, or any variant on it agreed by the parties, is carried through, the only role of the court will be that under article 13 of Schedule 1 (deciding on a subsequent challenge). If, however, the default procedure itself fails to result in the appointment of all necessary arbitrators, the residual provisions of article 11(3) and (4) will still apply for the benefit of any party interested in seeking the help of the High Court to constitute the arbitral tribunal.

418 Articles 12 to 14 of Schedule 1 provide for the disposition by the arbitral tribunal of challenges to an arbitrator on the grounds that “circumstances exist that give rise to justifiable doubts about that arbitrator’s impartiality or independence” or that “that arbitrator does not possess qualifications agreed to by the parties”. In view of those provisions, we have not recommended a power for the court (as in s 8(4) of the UCAA (Aust)) to set aside a default appointment.

2 Consolidation of arbitral proceedings

(1) This subclause applies to arbitral proceedings all of which have the same arbitral tribunal:

- (a) the arbitral tribunal may, on the application of at least one party in each of the arbitral proceedings, order**
 - (i) those proceedings to be consolidated on such terms as the arbitral tribunal thinks just;**
 - (ii) those proceedings to be heard at the same time, or one immediately after the other; or**
 - (iii) any of those proceedings to be stayed until after the determination of any other of them;**
- (b) if an application has been made to the arbitral tribunal under paragraph (a), and the arbitral tribunal refuses or fails to make an order under that paragraph, the High Court may, on application by a party in any of the proceedings, make any such order as could have been made by the arbitral tribunal.**

(2) This subclause applies to arbitral proceedings not all of which have the same arbitral tribunal:

- (a) the arbitral tribunal for any one of the arbitral proceedings may, on the application of a party in the proceedings, provisionally order**
 - (i) the proceedings to be consolidated with other arbitral proceedings on such terms as the arbitral tribunal thinks just;**
 - (ii) the proceedings to be heard at the same time as other arbitral proceedings, or one immediately after the other; or**
 - (iii) any of those proceedings to be stayed until after the determination of any other of them;**
- (b) an order ceases to be provisional when consistent provisional orders have been made for all of the arbitral proceedings concerned;**
- (c) the arbitral tribunals may communicate with each other for the purpose of conferring on the desirability of making orders under this subclause and of deciding on the terms of any such order;**

- (d) if a provisional order is made for at least one of the arbitral proceedings concerned, but the arbitral tribunal for another of the proceedings refuses or fails to make such an order (having received an application from a party to make such an order), the High Court may, on application by a party in any of the proceedings, make an order or orders that could have been made under this subclause;
 - (e) if inconsistent provisional orders are made for the arbitral proceedings, the High Court may, on application by a party in any of the proceedings, alter the orders to make them consistent.
- (3) When arbitral proceedings are to be consolidated under subclause (2), the arbitral tribunal for the consolidated proceedings shall be that agreed on for the purpose by all the parties to the individual proceedings, but, failing such an agreement, the High Court may appoint an arbitral tribunal for the consolidated proceedings.
- (4) An order or a provisional order may not be made under this clause unless it appears
 - (a) that some common question of law or fact arises in all of the arbitral proceedings; or
 - (b) that the rights to relief claimed in all of the proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
 - (c) that for some other reason it is desirable to make the order or provisional order.
- (5) Any proceedings before an arbitral tribunal for the purposes of this clause shall be treated as part of the arbitral proceedings concerned.
- (6) Arbitral proceedings may be commenced or continued, although an application to consolidate them is pending under subclause (1) or (2) and although a provisional order has been made in relation to them under subclause (2).
- (7) Subclauses (1) and (2) apply in relation to arbitral proceedings whether or not all or any of the parties are common to some or all of the proceedings.
- (8) There shall be no appeal from any decision of the High Court under this clause.

(9) Nothing in this clause prevents the parties to two or more arbitral proceedings from agreeing to consolidate those proceedings and taking such steps as are necessary to effect that consolidation.

419 Clause 2 is based on the new s 26 of the UCAA (Aust) proposed in an amendment introduced in the NSW legislature in 1990. The new s 26 gives effect to the recommendations of a February 1988 report by a Working Group (established by the Commonwealth Attorney-General) on the operation of the UCAA (Aust). The abbreviated reference to that report in the paragraphs that follow is "the 1988 AWG report".

420 The 1988 AWG report noted that the original version of s 26 enabled a court to order the consolidation of arbitral proceedings in certain circumstances upon the application of all the parties to those proceedings, and that the UNCITRAL Model Law contains no provision dealing with consolidation (see commentary on article 27, above). The report identified the problem as follows:

The present provision enabled and encouraged any one party to frustrate what might otherwise be a worthwhile application (for tactical or other reasons not relating to the efficient resolution of the dispute), by simply withholding its agreement to the application. As a consequence the same issues might give rise to conflicting arbitral decisions, such as in building disputes where separate arbitrations may be conducted under the head contract and sub-contracts.

421 The solution proposed by the AWG, and reflected in the new s 26, involves applications for consolidation being made to the arbitral tribunal with the role of the court becoming one of last resort:

The Working Group considered that it would be desirable for applications for consolidation of proceedings to be determined in the first instance by arbitrators as an interlocutory matter. This procedure would encourage speedy determination of such applications without, in most cases, any delay in the arbitral proceedings. It was also in accordance with the underlying philosophy of the legislation to minimise the supervisory jurisdiction of the courts, particularly where this was open to procedural abuse.

422 Clause 2 recognises three situations in which consolidation of arbitral proceedings may take place: by application where the same

tribunal has been appointed for more than one arbitral proceeding (subclause (1)); by application where different arbitral tribunals are involved (subclause (2)); and without application where all parties agree (subclause (8)).

423 Small variations from the language of the new s 26 make it clear in subclause (1) (relating to arbitral proceedings before the same arbitral tribunal) that the application to the tribunal must be made by at least one party in each of the arbitral proceedings (and not by a person who is a party in each of those proceedings: see subclause (7)); and that an application to the tribunal (which then refuses or fails to make an order) is a condition precedent to an application to the High Court under subclause (1)(b) (compare the corresponding provision for more than one tribunal: subclause (2)(d)). In keeping with the structure of Schedule 1, under which appeals are excluded if the High Court is given power to overcome the failure of the parties to agree, it is provided that there shall be no appeal from a decision of the High Court under clause 2 (subclause (8)).

3 Powers relating to conduct of arbitral proceedings

(1) For the purposes of article 19 of Schedule 1, and unless the parties agree otherwise, the parties shall be taken as having agreed that the powers conferred upon the arbitral tribunal include the power to

- (a) adopt inquisitorial processes;**
- (b) draw on its own knowledge and expertise;**
- (c) order the provision of further particulars in a statement of claim or statement of defence;**
- (d) order the giving of security for costs;**
- (e) fix and amend time limits within which various steps in the arbitral proceedings must be completed;**
- (f) order the discovery and production of documents or materials within the possession or power of a party;**
- (g) order the answering of interrogatories;**
- (h) order that any evidence be given orally or by affidavit or otherwise;**
- (i) order that any evidence be given on oath or affirmation;**

(j) order any party to do all such other things during the arbitral proceedings as may reasonably be needed to enable an award to be made properly and efficiently; and

(k) make an interim, interlocutory or partial award.

(2) Notwithstanding anything in article 5 of Schedule 1, the arbitral tribunal or a party with the approval of the arbitral tribunal, may request from the court assistance in the exercise of any power conferred on the arbitral tribunal under subclause (1).

(3) If a request is made under subclause (2), the High Court or a District Court shall have, for the purposes of the arbitral proceedings, the same power to make an order for the doing of any thing which the arbitral tribunal is empowered to order under subclause (1) as it would have in civil proceedings before that court.

424 Clause 3(1) sets out the provisions which are to be implied terms of the agreement of the parties for the purposes of article 19 of Schedule 1—Determination of rules of procedure, unless the parties agree otherwise. Structurally, therefore, the powers thus conferred on the arbitral tribunal remain subject to the non-derogable provisions of Schedule 1. Moreover, in this form, clause 3(1) leaves intact the amplitude of the residual power conferred on the tribunal by article 19(2) to conduct the arbitration, subject to those provisions, in such manner as it considers appropriate. Although the paragraphs of the subclause do not follow any specific provision in any other legislative model, many of the matters listed reflect powers given to the court in the 1908 and 1938 New Zealand Acts, while the broader para (j) reflects s 37 of the UCAA (Aust).

425 In the event of non-compliance with any of the procedural orders of the arbitral tribunal contemplated under subclause (1), articles 25, 27 and 32 of Schedule 1 will be relevant. A claimant who fails to take the required steps will be at risk of having the claim simply dismissed, and a respondent who fails to take the required steps will be at risk of having the defence disregarded.

426 Nevertheless, it seems useful, following the form of what is now article 27(1) of Schedule 1, to authorise the tribunal or a party with the approval of the tribunal to request assistance from the court in the conduct of the arbitral proceeding. This requires an express derogation from article 5 of Schedule 1 which forbids court intervention in matters governed by that Schedule except in ways authorised by

that Schedule. Although it appears that the giving of security is not a matter governed by that Schedule (para 295), clause 3(2) and (3) are not limited to that issue.

427 Subclause (3) confers the necessary authority on the High Court or a District Court to respond to such a request by using, for the purposes of the arbitral proceeding, any relevant power which it has for the purposes of a legal proceeding. One such power is that to order the giving of security for costs, at present conferred on the High Court by s 10 and the First Schedule to the Arbitration Amendment Act 1938.

428 Clause 3 does not, of course, need to deal with powers already expressly conferred on an arbitral tribunal or the courts by Schedule 1. The tribunal may itself order interim measures under article 17. The powers of the court to respond to a request for interim measures of protection have now been set out as article 9(2). Similarly, their powers to respond to a request for assistance in the taking of evidence are set out in article 27(2). Nor is there reference to payment into court as this procedure is premised on non-disclosure to the decision-making tribunal. The general point, that a claimant may have unnecessarily pursued a hearing when a reasonable offer could have been taken, is reflected in clause 6 in relation to costs.

4 Determination of preliminary point of law by court

(1) Notwithstanding anything in article 5 of Schedule 1, on an application to the High Court by any party

- (a) with the consent of the arbitral tribunal, or**
- (b) with the consent of every other party,**

the High Court shall have jurisdiction to determine any question of law arising in the course of the arbitration.

(2) The High Court shall not entertain an application under subclause (1)(a) with respect to any question of law unless it is satisfied that the determination of the question of law concerned

- (a) might produce substantial savings in costs to the parties, and**
- (b) might, having regard to all the circumstances, substantially affect the rights of one or more of the parties.**

(3) With the leave of the High Court, any party may, within one month from the date of any determination of the High Court under this clause or within such further time as that court may allow, appeal from that determination to the Court of Appeal.

(4) If the High Court refuses to grant leave to appeal under subclause (3), the Court of Appeal may grant special leave to appeal.

429 Clause 7 follows s 39 of the UCAA (Aust), which in turn reflects s 2 of the 1979 English Act. Unlike that provision, however, it is, of course, subject to the opt in or opt out processes for international and domestic arbitration respectively. As indicated by its introductory words, clause 7 involves a derogation from articles 5 and 34 of Schedule 1. Subclauses (3) and (4) follow the commonly applied provisions of the Summary Proceedings Act 1957, s 144, see *The Structure of the Courts* (NZLC R7) paras 392 and 404.

5 Appeals on questions of law

(1) Notwithstanding anything in articles 5 or 34 of Schedule 1, any party may appeal to the High Court on any question of law arising out of an award

- (a) if the parties have so agreed before the making of that award; or**
- (b) with the consent of every other party given after the making of that award; or**
- (c) with the leave of the High Court.**

(2) The High Court shall not grant leave under subclause (1)(c) unless it considers that, having regard to all the circumstances, the determination of the question of law concerned could substantially affect the rights of one or more of the parties.

(3) The High Court may grant leave under subclause (1)(c) on such conditions as it sees fit.

(4) On the determination of an appeal under this clause, the High Court may, by order,

- (a) confirm, vary or set aside the award; or**
- (b) remit the award, together with the High Court's opinion on the question of law which was the subject of the appeal, to the arbitral tribunal for reconsideration or, where a new**

arbitral tribunal has been appointed, to that arbitral tribunal for consideration,

and where the award is remitted under paragraph (b) the arbitral tribunal shall, unless the order otherwise directs, make the award not later than three months after the date of the order.

(5) With the leave of the High Court, any party may appeal to the Court of Appeal from any refusal of the High Court to grant leave or from any determination of the High Court under this clause.

(6) If the High Court refuses to grant leave to appeal under subclause (5), the Court of Appeal may grant special leave to appeal.

(7) Where the award of an arbitral tribunal is varied on an appeal under this clause, the award as varied shall have effect (except for the purposes of this clause) as if it were the award of the arbitral tribunal; and the party relying on the award or applying for its enforcement under article 35(2) of Schedule 1 shall supply the duly authenticated original order of the High Court varying the award or a duly certified copy.

(8) Article 34(3) and (4) of Schedule 1 apply to an appeal under this clause as they do to an application for the setting aside of an award under that article.

(9) For the purposes of article 36 of Schedule 1,

- (a) an appeal under this clause shall be treated as an application for the setting aside of an award; and**
- (b) an award which has been remitted by the High Court under subclause 4(b) to the original or a new arbitral tribunal shall be treated as an award which has been suspended.**

430 Apart from the opt in and opt out flexibility provided by s 6(2) of the Act, and the express derogation from articles 5 and 34 of Schedule 1, clause 6 follows closely s 38 of the UCAA (Aust). The appeal provisions are based on those referred to in the annotations to clause 4.

431 The 1988 AWG report recorded that there had been a difference of approach between the courts in NSW and in Victoria in applying *The Nema* guidelines (from *Pioneer Shipping Ltd v BTP Tioxide Ltd* [1982] AC 724 HL) to applications for leave to appeal

under the original version of s 38 of the UCAA (Aust). The report observed that

one of the major objectives of the uniform legislation was to minimise judicial supervision and review. The approach adopted by the Australian courts contrasts with other provisions of the legislation which give effect to this objective. To hear substantive argument on the merits of the appeal before deciding whether or not to grant leave would lead to more awards being open for review than if *The Nema* guidelines applied and this would detract from the finality of arbitral awards. The Working Group considered that if arbitration were to be encouraged as a settlement procedure and not as a “dry-run” for litigation, the more restrictive criterion for the granting of leave was desirable than that applied by the Australian courts. As a matter of policy, the Working Group agreed with Lord Diplock’s statement in *The Nema* (at page 743) that “the parties should be left to accept, for better or for worse, the decision of the tribunal that they had chosen to decide the matter in the first instance”.

432 As a result of the AWG report, legislation was introduced into the NSW legislature in 1990, and is expected in other state legislatures at an early date, amending s 38 of the UCAA. The major feature of the amendment would be an addition to the conditions to be satisfied before a court could grant leave for an appeal on the question of law. Section 38 presently provides that leave cannot be granted unless the court considers that, in all the circumstances, the determination of the question of law could substantially affect the rights of parties to the agreement; this provision, based on s 1(4) of the 1979 English Act, is followed in clause 5(2). The additional requirement would be to satisfy the court that there was

- (a) a manifest error of law on the face of the record, or
- (b) strong evidence that the arbitrator or umpire made an error of law and that the determination of the question may add, or may be likely to add, substantially to the certainty of commercial law.

433 The additional requirement is clearly intended as a statutory restatement of the guidelines in *The Nema*, reiterated and elaborated in *The Antaios* [1985] AC 191, HL. However, the Law Commission has concluded that a number of factors weigh against adoption of the

additional requirement. First, as Lord Diplock made clear in *The Nema*, the observations set out in that case were guidelines rather than absolute rules; indeed, in certain categories of cases, the English courts have determined that the guidelines are not applicable. Second, there are reservations about resurrecting such concepts as “the face of the award”. And, thirdly, no difference of judicial opinion over the application of *The Nema* guidelines has yet arisen in New Zealand and, given the advantages to New Zealand of access to the English jurisprudence on a similar provision, we would expect that the English approach to appeals on questions of law, including *The Nema* guidelines as modified from time to time, will be adopted by the New Zealand courts. Accordingly, there is no policy difference between what is sought to be achieved by the amending legislation in Australia, and by clause 5 of our draft statute. Should the difficulties encountered in the New South Wales jurisprudence and recorded in the AWG report occur in New Zealand, this issue might require further legislative attention.

434 Clause 5 contemplates four possible situations relating to appeals:

- (a) there is no right of appeal in any event (other than the right to apply for an award to be set aside under article 34 of Schedule 1);
- (b) the parties agree before the making of the award that there is to be a right of appeal in any event;
- (c) all parties consent, after the award, to an appeal being brought by one party ; and
- (d) the High Court gives leave to appeal in accordance with subclauses (1)(c) and (2).

If they desire situation (a), the parties to a domestic arbitration must opt out of clause 5, and the parties to an international arbitration will refrain from opting into it. Situations (b), (c) and (d) are not mutually exclusive. Any one or more of them will be achieved if parties to a domestic arbitration refrain from opting out of clause 5, and parties to an international arbitration choose to opt into it, to the extent desired in each case.

435 In applying subclause (2), the High Court will have the assistance not only of the Australian jurisprudence on s 38 of the UCAA

(Aust), but also English decisions on s 1(4) of the 1979 English Act, including *The Nema* guidelines.

6 Costs and expenses of an arbitration

(1) Unless the parties agree otherwise,

- (a) the costs and expenses of an arbitration, being the legal and other expenses of the parties, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration, shall be as fixed and allocated by the arbitral tribunal in its award under article 31 of Schedule 1, or any additional award under article 33(3) of Schedule 1, or**
- (b) in the absence of an award or additional award fixing and allocating the costs and expenses of the arbitration, each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees and expenses of the arbitral tribunal and any other expenses relating to the arbitration.**

(2) Unless the parties agree otherwise, the parties shall be taken as having agreed that,

- (a) if a party makes an offer to another party to settle the dispute or part of the dispute and the offer is not accepted and the award of the arbitral tribunal is no more favourable to the other party than was the offer, the arbitral tribunal, in fixing and allocating the costs and expenses of the arbitration, may take the fact of the offer into account in awarding costs and expenses in respect of the period from the making of the offer to the making of the award; and**
- (b) the fact that an offer to settle has been made shall not be communicated to the arbitral tribunal until it has made a final determination of all aspects of the dispute other than the fixing and allocation of costs and expenses.**

(3) Where an award or additional award made by an arbitral tribunal fixes or allocates the costs and expenses of the arbitration, or both, the High Court, may, on the application of a party, if satisfied that the amount or the allocation of those costs and expenses is unreasonable in all the circumstances, make an order varying their amount or allocation, or both. The arbitral tribunal is entitled to appear and be heard on any application under this subclause.

(4) Where

(a) an arbitral tribunal refuses to deliver its award before the payment of its fees and expenses, and

(b) an application has been made under subclause (3),

the High Court may order the arbitral tribunal to release the award on such conditions as the Court sees fit.

(5) An application may not be made under subclause (3) after three months have elapsed from the date on which the party making the application received any award or additional award fixing and allocating the costs and expenses of the arbitration.

(6) There shall be no appeal from any decision of the High Court under this clause.

436 Clause 6 does not expressly follow any other legislative model in whole, although a number of the subclauses are based on elements of s 54 of the 1990 ULCC draft. Unlike a number of overseas provisions on costs and expenses, the central point in clause 6 is that costs, like most other aspects of arbitral proceedings, may be the matter of agreement by the parties before or after the arbitration. The discretion of the arbitral tribunal under subclause (1)(a) is not absolute in that it cannot override the agreement of the parties. Our acceptance of the principle of party autonomy in this context is in contrast with s 14 of the Arbitration Amendment Act 1938 and s 34(3) of the UCAA (Aust) which avoid pre-dispute agreements as to costs, presumably reflecting consumer protection concerns which we address at a different level: see the commentary on s 9, above.

437 Subclause (1) contains two residual rules: that in the absence of agreement, costs are to be at the discretion of the tribunal (subclause (a)) or, in the absence of an award as to costs, the parties are to bear their own costs and share other costs equally.

438 The making of a settlement offer is expressly referred to in subclause (2) as an implied term of the agreement between the parties unless they agree otherwise. The draft Act contains no provision for payment into court as is the case in other jurisdictions. There is no explicit sanction for a breach of subclause (2)(b), although the displeasure of the arbitral tribunal at such a breach may influence the exercise of its overall discretion. The fact that the conditions set out in subclause (2) are to be read into the agreement of the parties,

leaves intact the unfettered discretion of the tribunal to include directions as to costs in its award or additional award under articles 31 and 33(2) of Schedule 1.

439 Because the question of costs is not dealt with explicitly in the Model Law, it is seen to be outside the scope of article 5 of Schedule 1, forbidding the intervention of the courts “in matters governed by” that Schedule, except where so provided there (see para 295). Therefore, there is no inconsistency with article 5 in conferring a power of review of orders for costs and expenses on the High Court under subclause (3). The power of review extends to the arbitral tribunal’s own fees as well as the sharing out of the costs between parties to the arbitral proceedings. Nevertheless, an application for review will need to establish that the order is an irrational one, that no reasonable arbitral tribunal could have made. The High Court may be expected to exercise its review power sparingly as the matter is within the discretion of the arbitral tribunal, and the thrust of the draft Act is against unnecessary intervention by a court.

440 Indeed, the High Court has recently confirmed that an arbitrator’s order as to costs is not limited in any way by the rules of procedure or convention applicable to costs based on a party-and-party scale: see *H W Broe Ltd v Jones* (unreported, Greig J, High Court, Wellington, CP629/89; 24 September 1990).

SCHEDULE 3

TREATIES RELATING TO ARBITRATION

441 This Schedule sets out the texts of the three treaties to which effect is given by the draft Act: the Protocol on Arbitration Clauses (1923), the Convention on the Execution of Foreign Arbitral Awards (1927) and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958). These texts are set out in Chapter I and have not been reproduced again in this Chapter. For a commentary on the way in which effect is given to the treaties in the draft Act, see Chapter VI.

SCHEDULE 4

AMENDMENTS TO OTHER ENACTMENTS

Section 13(2)

Provision	Amendment
Frustrated Contracts Act 1944	Repeal section 2. Substitute the following new section: 2 Interpretation In this Act the expression "Court" means, in relation to any matter, the Court before which the matter falls to be determined.
Contractual Mistakes Act 1977	Repeal section 11.
Contractual Remedies Act 1979	Repeal section 14(2).
Contracts (Privity) Act 1982	Repeal section 12.

442 Section 10 of the draft Act sets out in general terms the proposition that, under New Zealand law, an arbitral tribunal may award any remedy or relief that could have been ordered by the High Court if the dispute had been the subject of civil proceedings. It is therefore unnecessary to spell out the powers of a tribunal to apply the provisions of any New Zealand Act conferring jurisdiction specifically on the High Court. See paras 252-261. We therefore propose the repeal and substitution of s 2 of the Frustrated Contracts Act 1944 (to remove the reference to determination by an arbitrator as well as by a Court). Although clauses 10A, 10B and 10C of the Second Schedule to the Arbitration Act 1908 will be repealed with the repeal of that Act, it seems sensible to repeal also the provisions of the Contractual Mistakes Act 1977, the Contractual Remedies Act 1979 and the Contracts (Privity) Act 1982 which insert the relevant provisions in the Second Schedule to the Arbitration Act 1908.

Judicature Act 1908	Repeal section 26M. Substitute the following new section: 26M Master may act as referee A Master may act as a referee under the High Court Rules in respect of any proceedings or any question arising in the course of any proceedings.
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443 See para 103; s 26M presently provides that a Master may act as a special referee or arbitrator under the Arbitration Act 1908. The substituted section gives the Master jurisdiction where the court refers the proceeding or any question arising in a proceeding for inquiry or report. This corresponds to the s 14 reference under the 1908 Act. The s 15 reference to an “arbitrator” is not carried forward: see para 104. See also paras 108-111 recommending that the Rules Committee consider changes to the High Court Rules to give effect to our proposals on references in the course of legal proceedings, and that parallel changes be considered for the District Court Rules.

Evidence Act 1908

In section 2, delete from the definition of **person acting judicially** the words “or by consent of the parties”.

Evidence Amendment Act 1945

In section 2, repeal definitions of **proceedings** and **court**.

Evidence Amendment Act (No 2) 1980

In section 2, repeal definitions of **court** and **proceedings**.

444 Any need, as a matter of law, for an arbitral tribunal in New Zealand to apply the common law or statutory rules of evidence is overridden by article 19 of Schedule 1 which makes it clear that the parties are free to agree on the procedure to be followed by the arbitral tribunal; that, failing such agreement, the arbitral tribunal may, subject to the provisions of the Schedule, conduct the arbitration in such manner as it considers appropriate; and that the power conferred upon the arbitral tribunal by that article includes “the power to determine the admissibility, relevance, materiality and weight of any evidence”. As a gloss on this freedom, the proposed new article 19(3) preserves the privileges of witnesses in arbitral proceedings and persons appearing before arbitral tribunals in a representative capacity.

445 We have therefore provided for the repeal of the references to arbitrators and arbitral proceedings in the Evidence Act 1908 and its amendments. If the parties or the arbitral tribunal decide to apply some or all of the common law or statutory rules of evidence which would govern the conduct of legal proceedings in New Zealand, they are, of course free to do so. In that case statutory provisions referring

to “courts” or to “legal proceedings” or similar phraseology would simply become applicable by analogy.

Limitation Act 1950

In section 2, repeal definitions of **arbitration, award and submission.**

Repeal section 29(2), (3) and (4).

In section 29(5), delete the words **“or orders, after the commencement of an arbitration, that the arbitration shall cease to have effect with respect to the dispute referred”;**

In section 29(6), substitute the words **“arbitration agreement”** for the word **“submission”;** and delete the words from and including **“and subsections (3) and (4) of this section”** to the end of the subsection.

446 The terms appearing in s 2 are defined by reference to the Arbitration Act 1908 and are redundant.

447 Section 29 concerns the application of the Limitation Act 1950 and other limitation enactments to arbitrations. These enactments apply to arbitrations as they apply to actions. The amendments to the section in essence mean that arbitration proceedings continue to be treated as court proceedings for limitation purposes and that the time taken up by arbitration proceedings which somehow fail is not to be taken into account in the calculation of the limitation period for subsequent proceedings.

448 Subsections (2)-(4) deal with the time a cause of action accrues; it is deemed to be commenced by the service of notice requiring the appointment of an arbitrator or the submission of a dispute to an already designated arbitrator. Article 21 replaces these subsections, providing that arbitral proceedings are commenced on the date on which a request for the dispute to be referred to arbitration is received by the respondent: see para 351. See also the Law Commission’s report on Limitation Defences (NZLC R6). The provision made for the application of the draft Limitation Defences Act to any

claim submitted to arbitration is compatible with the draft Arbitration Act recommended in this report.

Arbitration (International Disputes) Act 1979

Repeal sections 3 to 9. Substitute the following sections:

3 Act binds the Crown

This Act binds the Crown.

4 Application of Convention to New Zealand

(1) Articles 18 and 20–24 and chapters II to VII of the Convention have the force of law in New Zealand in accordance with the provisions of this Act.

(2) Nothing in the Arbitration Act 199- applies to a dispute within the jurisdiction of the Centre or to an award made under the Convention.

5 Recognition and enforcement of awards

(1) An award may be enforced by entry as a final judgment of the High Court in terms of the award.

(2) The High Court is designated for the purposes of article 54 of the Convention.

6 Certificates concerning parties to Convention

A certificate purporting to be signed by the Secretary of External Relations and Trade and stating that a State is, or was at the time specified, a Contracting State to the Convention and the territories (if any) for the international relations of which the Contracting State is responsible to which the Convention is not applicable is presumptive evidence of the facts stated.

449 The reasons for these amendments are set out in Chapter VI, paras 154–171. The draft does not include s 7 of the present Act which deals with assistance by the High Court in collecting evidence. The Australian and United States Acts contain no such provisions. The United Kingdom Act has a provision *enabling* the Lord Chancellor to apply its general arbitration law. The matter appears better left to the Arbitration Rules prepared and revised from time to time by ICSID. The draft does not include the present s 3(2) which exempts the Crown from enforcement. That matter along with foreign State immunity from exemption is covered by article 55 of the Convention.

Insurance Law Reform Act 1977 Repeal section 8.

450 See para 238; under s 9, an arbitration clause in an insurance contract is enforceable only if the insured chooses to let an arbitration proceed. It is anomalous and of limited scope. The Commission recommends that consumer protection should be addressed more broadly and directly in s 9 of the Act.

Penal Institutions Act 1954 In section 26(5), add after paragraph (c) the word “or” and the following new paragraph:
“(d) Before any arbitral tribunal.”

451 See para 372; under s 26 arrangements may be made for the “attendance for judicial purposes” of an inmate of a penal institution before a court and other bodies constituted by or under any enactment. An arbitral tribunal is probably not covered. We therefore propose the inclusion of an express reference to attendance before an arbitral tribunal.

Mercantile Law Act 1908 Amend section 26 by inserting, after the word **legal**, the words **or arbitral**.

452 This amendment preserves the effect, compatibly with the draft Act, of s 18(3), (4) and (5) of the Arbitration Amendment Act 1938 which imported into s 26 of the Mercantile Law Act 1908 a reference to the institution by a shipowner of arbitral proceedings as an alternative to legal proceedings.

Sea Carriage of Goods Act 1940 Repeal section 11A(3). Substitute the following:
 “(3) Nothing in this section shall affect any stipulation or agreement to submit any dispute to arbitration in New Zealand or in any other country.”

453 The Sea Carriage of Goods Act was amended in 1968 to make all bills of lading and other documents relating to the export of goods by sea from New Zealand to any place outside New Zealand subject to the law of New Zealand. Further, any agreement in such a document or a document relating to the import of goods by sea purporting to oust or restrict the jurisdiction of the New Zealand courts in respect of the document is of no effect (s 11A(1) and (2)). On their face those provisions may override arbitration agreements and be inconsistent with the requirement in the 1923 Protocol on Arbitration Clauses and the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards that the courts stay proceedings brought before them in respect of a matter which the parties have agreed to arbitrate. An Australian Court has indeed recently applied the almost identical Australian provision to declare an arbitration provision of no effect, *Re “Blooming Orchard”* (1990) 99 ALR 138.

454 In 1985, the New Zealand Parliament moved to reduce the impact of the 1968 amendment by providing that nothing in that amendment

shall be construed as limiting or affecting any stipulation or agreement to submit any dispute to arbitration in New Zealand or to arbitration in any other country which is a party to an international convention or protocol relating to arbitration to which New Zealand is also a party.

455 The amendment proposed above in effect removes the final, geographical part of that qualification to the 1968 bar. The 1923 Protocol is not limited in its scope to arbitrations *in* the countries which are parties to the Protocol (articles 1 and 4) and the relevant provision of the 1958 New York Convention has no express geographic limit at all (article II; section 4 of the implementing Act has similarly broad scope).

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APPENDIX A

R.S. Vol. 1

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REPRINTED ACT

[WITH AMENDMENTS INCORPORATED]

ARBITRATION

REPRINTED AS ON 1 JANUARY 1979

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THE ARBITRATION ACT 1908

1908, No. 8

**An Act to consolidate certain enactments of the General
Assembly relating to arbitration** [4 August 1908]

1. Short Title, etc.—(1) The Short Title of this Act is the Arbitration Act 1908.

(2) This Act is a consolidation of the enactments mentioned in the First Schedule hereto, and with respect to those enactments the following provisions shall apply:

- (a) All submissions, awards, orders, rules, reports, appointments, instruments, and generally all acts of authority which originated under any of the said enactments, and are subsisting or in force on the coming into operation of this Act, shall enure for the purposes of this Act as fully and effectually as if they

had originated under the corresponding provisions of this Act, and accordingly shall, where necessary, be deemed to have so originated.

- (b) All matters and proceedings commenced under any such enactment, and pending or in progress on the coming into operation of this Act, may be continued, completed, and enforced under this Act.

This Act was extended to Niue by s. 681 of the Niue Act 1966.

This Act was extended to Tokelau by reg. 2 (1) of the Tokelau (New Zealand Laws) Regulations 1975 (S.R. 1975/263).

For further provisions dealing with arbitration under this Act, see:

Animals Act 1967, s. 42

Apiaries Act 1969, s. 15 (2)

Auckland Metropolitan Drainage Act 1960, s. 95 (2)

Building Research Levy Act 1969, s. 6 (5)

Co-operative Freezing Companies Act 1960, s. 9 (b)

Hutt Valley Drainage Act 1967, s. 83 (2)

Mangawai Lands Empowering Act 1966, s. 6 (5)

Marine Farming Act 1971, s. 39 (5)

Milk Act 1967, s. 46 (5) and s. 47 (2)

Mining Act 1971, s. 86 (2)

North Shore Drainage Act 1963, s. 79 (2)

Poultry Act, 1968, s. 10

Tauranga City Council and Mount Maunganui Borough Council (Tauranga

Harbour Bridge) Empowering Act 1972, s. 24

Tokoroa Agricultural and Pastoral Association Empowering Act 1968, s. 6 (2)

2. Interpretation—In this Act, if not inconsistent with the context,—

“Arbitrator” includes referee and valuer:

“Court” means the Supreme Court, and includes a Judge thereof:

“Rules of Court” means rules of the Court of Appeal, or of the Supreme Court, made by the proper authority under this Act:

“Submission” means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not, or under which any question or matter is to be decided by one or more persons to be appointed by the contracting parties or by some person named in the agreement.

Cf. 1890, No. 10, s. 3; 1906, No. 33, s. 2; Arbitration Act 1950, s. 32 (U.K.)

“Submission”: see—

Animals Act 1967, s. 42

Apiaries Act 1969, s. 15 (2)

Co-operative Freezing Companies Act 1960, s. 9 (b)

Hutt Valley Drainage Act 1967, s. 83 (2)

Mangawai Lands Empowering Act 1966, s. 6 (5)

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Mining Act 1971, s. 86 (3)

North Shore Drainage Act 1963, s. 79 (2)

Poultry Act 1968, s. 10

Tokoroa Agricultural and Pastoral Association Empowering Act 1968, s. 6 (2)

References by Consent Out of Court

3. Submission to be irrevocable—A submission, unless a contrary intention is expressed therein, shall be irrevocable, except by leave of the Court, and shall have the same effect in all respects as if made an order of Court.

Cf. 1890, No. 10, s. 4; Arbitration Act 1950, s. 1 (U.K.)

As to the grounds for setting aside an award, see s. 12 (2) of this Act.

As to the effects of death or bankruptcy, see ss. 3 and 4 of the Arbitration Amendment Act 1938.

As to the power of the Court to give relief where an arbitrator is not impartial or where the dispute referred involves questions of fraud, see s. 16 of the Arbitration Amendment Act 1938.

4. Provisions implied in submissions—A submission, unless a contrary intention is expressed therein, shall be deemed to include the provisions specified in the Second Schedule hereto, so far as they are applicable to the reference under the submission.

Cf. 1890, No. 10, s. 5; Arbitration Act 1950, ss. 6, (8) (1), (2), 12 (1), (2), 14, 15, 16, 18 (1) (U.K.)

[5. Power of Court to stay proceedings where there is a submission]—(1) If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to those legal proceedings may, at any time before filing a statement of defence or a notice of intention to defend or taking any other step in the proceedings, apply to the Court in which the proceedings were commenced to stay the proceedings; and that Court may, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, make an order staying the proceedings.

(2) The refusal by any Magistrate's Court of an application for a stay of proceedings under this section in any action under the Magistrates' Courts Act 1947 shall not affect the right of the defendant in the action to have the action transferred to the Supreme Court under subsection (1) of section 43 of that Act or, as the case may require, to apply under subsection (2) of that section for an order that the action be so transferred, and in any such case the time prescribed under that Act for giving notice under the said

section 43 shall not begin to run until the stay of proceedings is refused.]

Cf. Arbitration Act 1950, s. 4 (1) (U.K.)

This section was substituted for the original s. 5 by s. 2 of the Arbitration Amendment Act 1952.

As to the stay of Court proceedings in respect of matters referred to arbitration under commercial agreements, see s. 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

6. Appointment of arbitrator or umpire—(1) In any of the following cases:

- (a) Where a submission provides that the reference shall be to a single arbitrator, and all the parties do not concur in the appointment of an arbitrator; or
- (b) Where an appointed arbitrator fails to act, or is or becomes incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties do not supply the vacancy; or
- (c) Where the parties or 2 arbitrators are at liberty to appoint an umpire [or a third arbitrator] [or where 2 arbitrators are required to appoint an umpire] and do not appoint one; or
- (d) Where an appointed umpire or third arbitrator fails to act, or is or becomes incapable of acting, or dies, and the submission does not show that it was intended that the vacancy should not be supplied, and the parties or arbitrators do not supply the vacancy,—

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator or umpire [or a third arbitrator].

(2) If the appointment is not made within 7 days after the service of the notice, the Court may, on application by the party who gave the notice, appoint an arbitrator or umpire [or a third arbitrator], who shall have the like powers to act in the reference and make an award as if he had been appointed by consent of all parties.

Cf. 1890, No. 10, s. 7; Arbitration Act 1950, s. 10 (U.K.)

The words "or a third arbitrator" were inserted in 3 places by s. 2 of the Arbitration Amendment Act 1915. These words were previously in the Arbitration Amendment Act 1890.

In subs. (1) (c) the words "or where 2 arbitrators are required to appoint an umpire" were inserted by s. 7 (2) of the Arbitration Amendment Act 1938.

For provisions as to the appointment of 3 arbitrators, see s. 6 of the Arbitration Amendment Act 1938.

As to umpires, see s. 7 of the Arbitration Amendment Act 1938.

As to a trustee company being appointed arbitrator or umpire, see ss. 7 and 11 of the Trustee Companies Act 1967.

7. Power for parties to supply vacancy—(1) Where a submission provides that the reference shall be to 2 arbitrators, one to be appointed by each party, then, unless the submission expresses a contrary intention,—

- (a) If either of the appointed arbitrators fails to act, or is or becomes incapable of acting, or dies, the party who appointed him may appoint a new arbitrator in his place; and
- (b) If one party fails to appoint an arbitrator, either originally or by way of substitution as aforesaid, for 7 days after the other party, having appointed his arbitrator, has served the party making default with notice to make the appointment, the party who has appointed an arbitrator may appoint that arbitrator to act as sole arbitrator in the reference, and his award shall be binding on both parties as if he had been appointed by consent.

(2) The Court may set aside any appointment made in pursuance of this section.

Cf. 1890, No. 10, s. 8; Arbitration Act 1950, s. 7 (U.K.)

As to the powers of the Court where an arbitrator is removed, see s. 5 of the Arbitration Amendment Act 1938.

8. Powers of arbitrator—The arbitrators or umpire acting under a submission may, unless the submission expresses a contrary intention,—

- (a) Administer oaths to the parties and witnesses appearing; and
- (b) *Repealed by s. 21 of the Arbitration Amendment Act 1938.*
- (c) Correct in an award any clerical mistake or error arising from any accidental slip or omission.

Cf. 1890, No. 10, s. 9; Arbitration Act 1950, ss. 12 (3), 17 (U.K.)

9. Witnesses may be subpoenaed—Any party to a submission may sue out a writ of *subpoena ad testificandum*, or a writ of *subpoena duces tecum*, but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action.

Cf. 1890, No. 10, s. 10; Arbitration Act 1950, s. 12 (4) (U.K.)

10. Power to enlarge time for making award—The time for making an award may from time to time be enlarged by

order of the Court, whether the time for making the award has expired or not.

Cf. 1890, No. 10, s. 11; Arbitration Act 1950, s. 13 (2) (U.K.)

11. Power to remit award—(1) In all cases of reference to arbitration the Court may from time to time remit the matters referred, or any of them, to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted the arbitrators or umpire shall, unless the order otherwise directs, make their award within 3 months after the date of the order.

Cf. 1890, No. 10, s. 12; Arbitration Act 1950, s. 22 (U.K.)

See s. 8 of the Arbitration Amendment Act 1938 as to the use of due dispatch, and power to make an award at any time.

12. Power to remove arbitrator or set aside award—

(1) Where an arbitrator or umpire has misconducted himself [or the proceedings] the Court may remove him.

(2) Where an arbitrator or umpire has misconducted himself [or the proceedings], or any arbitration or award has been improperly procured, the Court may set the award aside.

Cf. 1890, No. 10, s. 13; Arbitration Act 1950, s. 23 (1), (2) (U.K.)

The words "or the proceedings" were inserted in subss. (1) and (2) by s. 17 of the Arbitration Amendment Act 1938.

As to the removal of an arbitrator who does not use due dispatch, see s. 8 of the Arbitration Amendment Act 1938.

As to the powers of the Court where an arbitrator is removed, see s. 5 of the Arbitration Amendment Act 1938.

As to the powers of the Court where an arbitrator is not impartial or where a question of fraud is involved, see s. 16 of the Arbitration Amendment Act 1938.

13. Enforcing award—An award on a submission may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect.

Cf. 1890, No. 10, s. 14; Arbitration Act 1950, s. 26 (U.K.)

As to the entry of judgment in terms of an award, see s. 12 of the Arbitration Amendment Act 1938.

As to the enforcement of an award (not being a foreign award) in other countries, see the Reciprocal Enforcement of Judgments Act 1934.

As to enforcing a foreign award, see s. 5 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

References Under Order of Court

14. Reference for report—(1) Subject to rules of Court and to any right to have particular cases tried by a jury, the Court or a Judge may refer any question arising in any cause or matter (other than a criminal proceeding by the Crown) for inquiry or report to any official or special referee.

(2) The report of such official or special referee may be adopted wholly or partially by the Court or a Judge, and if so adopted may be enforced as a judgment or order to the same effect.

Cf. Supreme Court of Judicature (Consolidation) Act 1925, s. 88 (U.K.)

15. Power to refer in certain cases—In any cause or matter (other than a criminal proceeding by the Crown),—

- (a) If all the parties interested who are not under disability consent; or
- (b) If the question in dispute consists wholly or in part of matters of account; or
- (c) If the cause or matter requires any prolonged examination of documents, or any scientific or local investigation, which cannot in the opinion of the court or a Judge conveniently be made before a jury or conducted by the Court through its other ordinary officers,—

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before an arbitrator agreed on by the parties, or before an officer of the Court.

Cf. 1890, No. 10, s. 15; Supreme Court of Judicature (Consolidation) Act 1925, s. 89 (U.K.)

16. Powers and remuneration of arbitrators—(1) In all cases of reference to an arbitrator under an order of the Court in any cause or matter the arbitrator shall be deemed to be an officer of the Court, and shall have such authority, and shall conduct the reference in such manner, as is prescribed by rules of Court, and, subject thereto, as the Court directs.

(2) The report or award of any arbitrator on any such reference shall, unless set aside by the Court, be equivalent to the verdict of a jury.

(3) The remuneration to be paid to any arbitrator to whom

any matter is referred under order of the Court shall be determined by the Court.

Cf. 1890, No. 10, s. 16; Supreme Court of Judicature (Consolidation) Act 1925, s. 90 (U.K.)

17. Court to have powers as in references by consent—

The Court shall, as to references under order of the Court, have all the powers conferred by this Act on the Court as to references by consent out of Court.

Cf. 1890, No. 10, s. 17; Supreme Court of Judicature (Consolidation) Act 1925, s. 91 (U.K.)

18. Court of Appeal to have powers of Court—The Court of Appeal shall have all the powers conferred by this Act on the Court under the provisions relating to references under order of the Court.

Cf. 1890, No. 10, s. 18; Supreme Court of Judicature (Consolidation) Act 1925, s. 92 (U.K.)

General

19. Power to compel attendance of witness in any part of New Zealand, and to order prisoner to attend—(1) The Court may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall issue to compel the attendance before any arbitrator or umpire of a witness wherever he may be in New Zealand.

(2) The Court may also, by order in writing under the hand of a Judge, require a prisoner to be brought up for examination before any arbitrator or umpire, and such order shall operate and be obeyed in like manner in all things as a writ of *habeas corpus ad testificandum* issued out of the Court.

Cf. 1890, No. 10, s. 19; Arbitration Act 1950, s. 12 (4), (5) (U.K.)

20. Repealed by s. 21 of the Arbitration Amendment Act 1938.

21. Costs—Any order made under this Act may be made on such terms as to costs, or otherwise, as the authority making the order thinks just.

Cf. 1890, No. 10, s. 21; Arbitration Act 1950, s. 28 (U.K.)

See also s. 14 of the Arbitration Amendment Act 1938.

22. Arbitrator or umpire entitled to remuneration—An arbitrator or umpire shall be entitled to a reasonable remuneration for his services as such arbitrator or umpire, and if the parties to the submission do not agree as to the amount to be paid, or as to the mode and time of payment, a Judge may, on a summary application to him for that purpose, fix and determine all or any of such matters.

Cf. 1890, No. 10, s. 22

As to the taxation of an arbitrator's or umpire's fees, see s. 15 of the Arbitration Amendment Act 1938.

See also s. 8 (2) of the Arbitration Amendment Act 1938, as to arbitrators or umpires who are removed for failure to use all reasonable dispatch.

23. Power to make rules—Rules may from time to time be made in the manner prescribed by the Judicature Act 1908 for the purpose of giving effect to this Act in the Court of Appeal of the Supreme Court.

Cf. 1890, No. 10, s. 23

The manner of making rules is now prescribed by the Judicature Amendment Act 1930.

See also s. 7 (3) of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

24. Crown to be bound—This Act shall apply to any arbitration to which [Her Majesty], in right of the Crown, is a party; but nothing herein shall empower the Court to order any proceedings to which [Her Majesty] is a party, or any question or issue in any such proceedings, to be tried before any arbitrator or officer without the consent of the Attorney-General. . . .

Cf. 1890, No. 10, s. 25; Supreme Court of Judicature (Consolidation) Act 1925, s. 96 (U.K.); Arbitration Act 1950, s. 30 (U.K.)

The words "or shall affect the law as to costs payable by the Crown" were omitted from this section by s. 21 of the Arbitration Amendment Act 1938.

The reference to Her Majesty has been updated from a reference to His Majesty.

25. Application of Act to references under statutory powers—This Act applies to every arbitration under any Act passed before or after the coming into operation of this Act as if the arbitration were pursuant to a submission, except in so far as this Act is inconsistent with the Act regulating the arbitration, or with any rules or procedure authorised or recognised by that Act.

Cf. 1890, No. 10, s. 26; Arbitration Act 1950, s. 31 (U.K.)

See also s. 20 of the Arbitration Amendment Act 1938.

SCHEDULES

Section 1 (2)

FIRST SCHEDULE

ENACTMENTS CONSOLIDATED

1890, No. 10—The Arbitration Act 1890.

1906, No. 33—The Arbitration Act Amendment Act 1906.

Section 4

SECOND SCHEDULE

PROVISIONS TO BE IMPLIED IN SUBMISSIONS

1. If no other mode of reference is provided, the reference shall be to a single arbitrator.

[2. If the reference is to 2 arbitrators, the 2 arbitrators shall appoint an umpire immediately after they are themselves appointed.]

3. *Repealed by s. 21 of the Arbitration Amendment Act 1938.*

4. If the arbitrators . . . have delivered to any party to the submission, or to the umpire, a notice in writing stating that they cannot agree, the umpire may forthwith enter on the reference in lieu of the arbitrators.

5. *Repealed by s. 21 of the Arbitration Amendment Act 1938.*

6. The parties to the reference, and all persons claiming through them respectively, shall, subject to any legal objection, submit to be examined by the arbitrators or umpire on oath in relation to the matters in dispute, and shall, subject as aforesaid, produce before the arbitrators or umpire all books, deeds, papers, accounts, writings, or documents within their possession or power that may be required or called for, and do all such other things as during the proceedings on the reference the arbitrators or umpire may require.

7. The witnesses on the reference shall, if the arbitrators or umpire think fit, be examined on oath.

8. The award made by the arbitrators or umpire shall be final and binding on the parties and the persons claiming under them respectively.

9. The costs of the reference and award shall be in the discretion of the arbitrators or umpire, who may direct to and by whom and in what amount those costs or any part thereof shall be paid, and may tax or settle the amount of costs to be so paid or any part thereof, and may award costs to be paid as between solicitor and client.

[10. The arbitrators or umpire shall have the same power as the Court to order specific performance of any contract other than a contract relating to land or any interest in land.

[[10A. The arbitrators or umpire shall have the same power as the Court to exercise any of the powers conferred by section 6 or section 7 of the Contractual Mistakes Act 1977.]]

11. The arbitrators or umpire may, if they think fit, make an interim award.]

Clause 2 was substituted for the original clause 2 by s. 7 (1) of the Arbitration Amendment Act 1938.

In clause 4 the words "have allowed their time or extended time to expire without making an award, or" were omitted by s. 21 of the Arbitration Amendment Act 1938.

Clauses 10 and 11 were added by s. 9 of the Arbitration Amendment Act 1938.

Clause 10A was inserted by s. 11 of the Contractual Mistakes Act 1977.

THE ARBITRATION AMENDMENT ACT 1915 1915, No. 13

An Act to amend the Arbitration Act 1908

[5 August 1915]

1. Short Title—This Act may be cited as the Arbitration Amendment Act 1915, and shall form part of and be read together with the Arbitration Act 1908.

2. (1) *This subsection amended s. 6 of the principal Act.*

(2) This section shall be deemed to have been in operation as from the commencement of the Arbitration Act 1908.

THE ARBITRATION CLAUSES (PROTOCOL) AND THE ARBITRATION (FOREIGN AWARDS) ACT 1933

1933, No. 4

An Act to give effect in New Zealand (1) to a protocol on arbitration clauses signed on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the 24th day of September 1923; and (2) to a convention on the execution of foreign arbitral awards signed on behalf of His Majesty on the 26th day of September 1927

[28 October 1933]

WHEREAS the protocol on arbitration clauses (the terms of which are set forth in the First Schedule hereto) was signed at Geneva on behalf of His Majesty at a meeting of the Assembly of the League of Nations held on the 24th day of September 1923, and was ratified by His Majesty in respect of the Dominion of New Zealand on the 9th day of June 1926: And whereas the convention on the execution of foreign arbitral awards (the terms of which are set forth in the Second Schedule hereto) was signed at Geneva on behalf of His Majesty on the 26th day of September 1927, and was ratified by His Majesty in respect of the Dominion of New Zealand on the 9th day of April 1929: And whereas in order that the said protocol and convention respectively should have full effect in New Zealand it is expedient that provision be made as hereinafter appearing.

1. Short Title—(1) This Act may be cited as the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.

(2) This Act shall be read together with and deemed part of the Arbitration Act 1908 (hereinafter referred to as the principal Act).

PART I

PROTOCOL ON ARBITRATION CLAUSES

2. Interpretation—In this Part of this Act the expression “the said protocol” means the protocol the terms of which are set forth in the First Schedule hereto.

3. Stay of Court proceedings in respect of matters to be referred to arbitration under commercial agreements—

Notwithstanding anything in the principal Act, if any party to a submission made in pursuance of an agreement to which the said protocol applies, or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings.

Cf. Arbitration Act 1950, s. 4 (2) (U.K.)

PART II

ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

[4. Application of Part II]—(1) This Part of this Act applies to any award made after the 28th day of July 1924,—

- (a) In pursuance of an agreement for arbitration to which the protocol set out in the First Schedule to this Act applies; and
- (b) Between persons of whom one is subject to the jurisdiction of one of the Powers which the Governor-General, being satisfied that reciprocal

provisions have been made, by Order in Council declares to be parties to the said Convention, and of whom the other is subject to the jurisdiction of another of those Powers; and

- (c) In one of such territories as the Governor-General, being satisfied that reciprocal provisions have been made, by Order in Council declares to be territories to which the said Convention applies,—

and an award to which this Part of this Act applies is in this Part referred to as a foreign award.

(2) Every Order in Council made in the United Kingdom under section 1 of the Arbitration (Foreign Awards) Act 1930 of the Parliament of the United Kingdom which is in force in New Zealand at the date of the commencement of this section shall be deemed to have been duly made under the provisions of this Act, but the Governor-General may, by Order in Council, declare that any such first-mentioned Order in Council shall cease to have effect as part of the law of New Zealand.]

Cf. Arbitration Act 1950, s. 35 (U.K.)

This section was substituted for the original s. 4 by s. 2 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Amendment Act 1957.

5. Effect of foreign awards—(1) A foreign award shall, subject to the provisions of this Part of this Act, be enforceable in New Zealand either by action or under the provisions of section 13 of the principal Act.

(2) Any foreign award which would be enforceable under this Part of this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off, or otherwise in any legal proceedings in New Zealand, and any references in this Part of this Act to enforcing a foreign award shall be construed as including references to relying on an award.

Cf. Arbitration Act 1950, s. 36 (U.K.)

6. Conditions for enforcement of foreign awards—(1) In order that a foreign award may be enforceable under this Part of this Act it must have—

- (a) Been made in pursuance of an agreement for arbitration which was valid under the law by which it was governed;
- (b) Been made by the tribunal provided for in the

agreement or constituted in manner agreed upon by the parties;

- (c) Been made in conformity with the law governing the arbitration procedure;
- (d) Become final in the country in which it was made;
- (e) Been in respect of a matter which may lawfully be referred to arbitration under the law of New Zealand,—

and the enforcement thereof must not be contrary to the public policy or the law of New Zealand.

(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part of this Act if the court dealing with the case is satisfied that—

- (a) The award has been annulled in the country in which it was made; or
- (b) The party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case, or was under some legal incapacity and was not properly represented; or
- (c) The award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration:

Provided that, if the award does not deal with all the questions referred, the Court may, if it thinks fit, either postpone the enforcement of the award or order its enforcement subject to the giving of such security by the person seeking to enforce it as the Court may think fit.

(3) If a party seeking to resist the enforcement of a foreign award proves that there is any ground other than the non-existence of the conditions specified in paragraphs (a), (b), and (c) of subsection (1) of this section, or the existence of the conditions specified in paragraphs (b) and (c) of subsection (2) of this section, entitling him to contest the validity of the award, the Court may, if it thinks fit, either refuse to enforce the award or adjourn the hearing until after the expiration of such period as appears to the Court to be reasonably sufficient to enable that party to take the necessary steps to have the award annulled by the competent tribunal.

Cf. Arbitration Act 1950, s. 37 (U.K.)

7. Evidence—(1) The party seeking to enforce a foreign award must produce—

- (a) The original award or a copy thereof duly authenti-

cated in manner required by the law of the country in which it was made; and

- (b) Evidence proving that the award has become final; and
- (c) Such evidence as may be necessary to prove that the award is a foreign award and that the conditions mentioned in paragraphs (a), (b), and (c) of subsection (1) of the last foregoing section are satisfied.

(2) In any case where any document required to be produced under subsection (1) of this section is in a foreign language, it shall be the duty of the party seeking to enforce the award to produce a translation certified as correct by a diplomatic or consular agent of the country to which that party belongs, or certified as correct in such other manner as may be sufficient according to the law of New Zealand.

(3) Subject to the provisions of this section, rules of Court may be made in accordance with the Judicature Act 1908 with respect to the evidence which must be furnished by a party seeking to enforce an award under this Part of this Act.

Cf. Arbitration Act 1950, s. 38 (U.K.)

8. Meaning of "final award"—For the purposes of this Part of this Act an award shall not be deemed final if any proceedings for the purpose of contesting the validity of the award are pending in the country in which it was made.

Cf. Arbitration Act 1950, s. 39 (U.K.)

9. Saving—Nothing in this Part of this Act shall—

- (a) Prejudice any rights which any person would have had of enforcing in New Zealand any award or of availing himself in New Zealand of any award if this Part of this Act had not been enacted; or
- (b) Apply to any award made on an arbitration agreement governed by the law of New Zealand.

Cf. Arbitration Act 1950, s. 40 (U.K.)

THE ARBITRATION AMENDMENT ACT 1938

1938, No. 6

An Act to amend the Arbitration Act 1908

[1 September 1938]

1. Short Title and commencement—This Act may be cited as the Arbitration Amendment Act 1938, and shall be read together with and deemed part of the Arbitration Act 1908 (hereinafter referred to as the principal Act), and shall come into force on the 1st day of January 1939.

2. Interpretation—References in this Act and in the principal Act to an award shall be deemed to include references to an interim award.

Cf. Arbitration Act 1950, s. 14 (U.K.)

3. Submission not to be discharged by death of party thereto—(1) A submission shall not be discharged by the death of any party thereto, either as respects the deceased or any other party, but shall in such an event be enforceable by or against the personal representative of the deceased.

(2) The authority of an arbitrator shall not be revoked by the death of any party by whom he was appointed.

(3) Nothing in this section shall be taken to affect the operation of any enactment or rule of law by virtue of which any right of action is extinguished by the death of a person.

Cf. Arbitration Act 1950, s. 2 (U.K.)

Subs. (1) does not apply in statutory arbitrations; see s. 20 of this Act.

4. Provisions in case of bankruptcy—(1) Where it is provided by a term in a contract to which a bankrupt is a party that any differences arising thereout or in connection therewith shall be referred to arbitration, the said term shall, if the Official Assignee adopts the contract, be enforceable by or against him so far as relates to any such differences.

(2) Where a person who has been adjudged bankrupt had

before the commencement of the bankruptcy become a party to a submission and any matter to which the submission applies requires to be determined in connection with or for the purposes of the bankruptcy proceedings, then, if the case is one to which subsection (1) of this section does not apply, any other party to the submission or the Official Assignee may apply to the Court having jurisdiction in the bankruptcy proceedings for an order directing that the matter in question shall be referred to arbitration in accordance with the submission, and that Court may, if it is of opinion that, having regard to all the circumstances of the case, the matter ought to be determined by arbitration, make an order accordingly.

Cf. Arbitration Act 1950, s. 3 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

5. Power of Court where arbitrator is removed or appointment of arbitrator is revoked—(1) Where an arbitrator (not being a sole arbitrator) or 2 or more arbitrators (not being all the arbitrators) or an umpire who has not entered on the reference is or are removed by the Court, the Court may, on the application of any party to the submission, appoint a person or persons to act as arbitrator or arbitrators or umpire in place of the person or persons so removed.

(2) Where the appointment of an arbitrator or arbitrators or umpire is revoked by leave of the Court, or a sole arbitrator or all the arbitrators or an umpire who has entered on the reference is or are removed by the Court, the Court may, on the application of any party to the submission, either—

- (a) Appoint a person to act as sole arbitrator in place of the person or persons removed; or
- (b) Order that the submission shall cease to have effect with respect to the dispute referred.

(3) A person appointed under this section by the Court as an arbitrator or umpire shall have the like power to act in the reference and to make an award as if he had been appointed in accordance with the terms of the submission.

(4) Where it is provided (whether by means of a provision in the submission or otherwise) that an award under a submission shall be a condition precedent to the bringing of an action with respect to any matter to which the submission applies, the Court, if it orders (whether under this section or under any other enactment) that the submission shall cease to

have effect as regards any particular dispute, may further order that the provision making an award a condition precedent to the bringing of an action shall also cease to have effect as regards that dispute.

Cf. Arbitration Act 1950, s. 25 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

6. Provisions on the appointment of 3 arbitrators—

(1) Where a submission provides that the reference shall be to 3 arbitrators, one to be appointed by each party and the third to be appointed by the 2 appointed by the parties, the submission shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the 2 arbitrators appointed by the parties.

(2) Where a submission provides that the reference shall be to 3 arbitrators to be appointed otherwise than as mentioned in the last preceding subsection, the award of any 2 of the arbitrators shall be binding.

Cf. Arbitration Act 1950, s. 9 (U.K.)

7. Provisions relating to umpires—(1) *This subsection substituted a new clause for clause 2 of the Second Schedule to the principal Act.*

(2) *This subsection amended s. 6 (1) (c) of the principal Act.*

(3) At any time after the appointment of an umpire, however appointed, the Court may, on the application of any party to the reference and notwithstanding anything to the contrary in the submission, order that the umpire shall enter on the reference in lieu of the arbitrators and as if he were a sole arbitrator.

Cf. Arbitration Act 1950, s. 8 (3) (U.K.)

8. Arbitrators and umpires to use due dispatch—

(1) The Court may, on the application of any party to a reference, remove an arbitrator or umpire who fails to use all reasonable dispatch in entering on and proceeding with the reference and making an award.

(2) An arbitrator or umpire who is removed by the Court under this section shall not be entitled to receive any remuneration in respect of his services.

(3) Subject to the provisions of subsection (2) of section 11 of the principal Act and to anything to the contrary in the submission, an arbitrator or umpire shall have power to make an award at any time.

(4) For the purposes of this section the expression "proceeding with a reference" includes, in a case where 2 arbitrators are unable to agree, giving notice of that fact to the parties and to the umpire.

Cf. Arbitration Act 1950, s. 13 (1), (3) (U.K.)

9. This section added clauses 10 and 11 to the Second Schedule to the principal Act.

10. Additional powers of Court—(1) The Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of any of the matters set out in the First Schedule to this Act as it has for the purpose of and in relation to an action or matter in the Court:

Provided that nothing in the foregoing provision shall be taken to prejudice any power which may be vested in an arbitrator or umpire of making orders with respect to any of the matters aforesaid.

(2) Where relief by way of interpleader is granted and it appears to the Court that the claims in question are matters to which a submission to which the claimants are parties applies, the Court may direct the issue between the claimants to be determined in accordance with the submission.

(3) Where an application is made to set aside an award the Court may order that any money made payable by the award shall be brought into Court or otherwise secured pending the determination of the application.

Cf. Arbitration Act 1950, ss. 5, 12 (6), 23 (3) (U.K.)

Subs. (2) does not apply in statutory arbitrations; see s. 20 of this Act.

11. Statement of case by arbitrator or umpire—(1) An arbitrator or umpire may, and shall if so directed by the Court, state—

(a) Any question of law arising in the course of the reference; or

(b) An award or any part of an award—
in the form of a special case for the decision of the Court.

(2) A special case with respect to an interim award or with respect to a question of law arising in the course of a reference may be stated, or may be directed by the Court to be stated, notwithstanding that proceedings under the reference are still pending.

(3) A decision of the Court under this section shall be deemed to be a judgment of the Court within the meaning of

section 66 of the Judicature Act 1908 (which relates to the jurisdiction of the Court of Appeal to hear and determine appeals from any judgment of the Court), but no appeal shall lie from the decision of the Court on any case stated under paragraph (a) of subsection (1) of this section without the leave of the Court or of the Court of Appeal.

Cf. Arbitration Act 1950, s. 21 (U.K.)

As to the application of this section to applications under ss. 46–51 of the Patents Act 1953, see s. 53 (4) of that Act.

As to the application of this section to building societies' disputes, see s. 113 (2) of the Building Societies Act 1965.

12. Entry of judgment in terms of award—Where leave is given under section 13 of the principal Act to enforce an award in the same manner as a judgment or order, judgment may be entered in terms of the award.

Cf. Arbitration Act 1950, s. 26 (U.K.)

13. Interest on awards—A sum directed to be paid by an award shall, unless the award otherwise directs, carry interest as from the date of the award and at the same rate as a judgment debt.

Cf. Arbitration Act 1950, s. 20 (U.K.)

As to the rate of interest on judgment debts, see rule 305 of the Code of Civil Procedure.

14. Provision as to costs—(1) Any provision in a submission to the effect that the parties or any party thereto shall in any event pay the whole or any part of the costs of the reference or award shall be void; and the principal Act shall in the case of a submission containing any such provision have effect as if that provision were not contained therein:

Provided that nothing herein shall invalidate such a provision when it is part of an agreement to submit to arbitration a dispute which has arisen before the making of such agreement.

(2) If no provision is made by an award with respect to the costs of the reference, any party to the reference may within 14 days of the publication of the award, or such further time as the Court may direct, apply to the arbitrator for an order directing by and to whom such costs shall be paid, and thereupon the arbitrator shall, after hearing any party who may desire to be heard, amend his award by adding thereto

such directions as he may think proper with respect to the payment of the costs of the reference.

Cf. Arbitration Act 1950, s. 18 (3), (4) (U.K.)

Subs. (1) does not apply in statutory arbitrations; see s. 20 of this Act.

15. Taxation of arbitrator's or umpire's fees—(1) If in any case an arbitrator or umpire refuses to deliver his award except on payment of the fees demanded by him the Court may, on an application for the purpose, order that the arbitrator or umpire shall deliver the award to the applicant on payment into Court by the applicant of the fees demanded, and further that the fees demanded shall be taxed by the taxing officer and that out of the money paid into Court there shall be paid out to the arbitrator or umpire by way of fees such sum as may be found reasonable on taxation and that the balance of the money, if any, shall be paid out to the applicant.

(2) An application for the purposes of this section may be made by any party to the reference unless the fees demanded have been fixed by a written agreement between him and the arbitrator or umpire.

(3) A taxation of fees under this section may be reviewed in the same manner as a taxation of costs.

(4) The arbitrator or umpire shall be entitled to appear and be heard on any taxation or review of taxation under this section.

Cf. Arbitration Act 1950, s. 19 (U.K.)

See also s. 22 of the principal Act and s. 8 (2) of this Act.

16. Power of Court to give relief where arbitrator is not impartial or dispute referred involves question of fraud—(1) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred to an arbitrator named or designated in the agreement and after a dispute has arisen any party applies, on the ground that the arbitrator so named or designated is not or may not be impartial, for leave to revoke the submission or for an injunction to restrain any other party or the arbitrator from proceeding with the arbitration, it shall not be a ground for refusing the application that the said party at the time when he made the agreement knew, or ought to have known, that the arbitrator by reason of his relation towards any other party to the agreement or of his connection with the subject referred might not be capable of impartiality.

(2) Where an agreement between any parties provides that disputes which may arise in the future between them shall be referred and a dispute which so arises involves the question whether any such party has been guilty of fraud, the Court shall, so far as may be necessary to enable that question to be determined by the Court, have power to order that the agreement shall cease to have effect and power to give leave to revoke any submission made thereunder.

(3) In any case where by virtue of this section the Court has power to order that an agreement shall cease to have effect or to give leave to revoke a submission, the Court may refuse to stay any action brought in breach of the agreement.

Cf. Arbitration Act 1950, s. 24 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

17. This section amended s. 12 (1) and (2) of the principal Act.

18. Limitation of time for commencing arbitration proceedings—(1), (2) *Repealed by s. 35 (2) of the Limitation Act 1950.*

(3), (4), (5) *See the reprint of the Mercantile Law Act 1908.*

(6) Where the terms of an agreement to refer future disputes to arbitration provide that any claims to which the agreement applies shall be barred unless notice to appoint an arbitrator is given or an arbitrator is appointed or some other step to commence arbitration proceedings is taken within a time fixed by the agreement, and a dispute arises to which the agreement applies, the Court, if it is of opinion that in the circumstances of the case undue hardship would otherwise be caused, and notwithstanding that the time so fixed has expired, may, on such terms, if any, as the justice of the case may require, but without prejudice to the foregoing provisions of this section, extend the time for such period as it thinks proper.

(7), (8) *Repealed by s. 35 (2) of the Limitation Act 1950.*

Cf. Arbitration Act 1950, s. 27 (U.K.)

This section does not apply in statutory arbitrations; see s. 20 of this Act.

As to the application of the Limitation Act 1950 to arbitrations, see s. 29 of that Act.

19. Saving for pending arbitrations—The provisions of this Act shall not affect any arbitration which has been commenced within the meaning of section 18 of this Act

before the date on which this Act comes into operation, but shall apply to any arbitration so commenced after the said date under a submission made before the said date.

Cf. Arbitration Act 1950, s. 33 (U.K.)

20. Application to statutory arbitrations—This Act, except the provisions thereof set out in the Second Schedule to this Act shall apply in relation to every arbitration under any other Act passed before or after the commencement of this Act as if the arbitration were pursuant to a submission and as if that other Act were a submission, except in so far as this Act is inconsistent with that other Act or with any rules or procedure authorised or recognised thereby:

Provided that this Act shall not apply to any arbitration to which the principal Act does not apply, and no provision of this Act which expressly amends a provision of the principal Act shall apply to any arbitration to which that provision of the principal Act does not apply.

Cf. Arbitration Act 1950, s. 31 (U.K.)

See also s. 25 of the principal Act.

21. Amendments of principal Act—The principal Act is hereby amended in the manner indicated in the Third Schedule hereto.

SCHEDULES

FIRST SCHEDULE

Section 10

MATTERS IN RESPECT OF WHICH THE COURT MAY MAKE ORDERS

- (1) Security for costs.
 - (2) Discovery of documents and interrogatories.
 - (3) The giving of evidence by affidavit.
 - (4) Examination on oath of any witness before an officer of the Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction.
 - (5) The preservation, interim custody, or sale of any goods which are the subject-matter of the reference.
 - (6) Securing the amount in dispute in the reference.
 - (7) The detention, preservation, or inspection of any property or thing which is the subject of the reference or as to which any question may arise therein, and authorising for any of the purposes aforesaid any persons to enter upon or into any land or building in the possession of any party to the reference, or authorising any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence.
 - (8) Interim injunctions or the appointment of a receiver.
-

SECOND SCHEDULE

Section 20

PROVISIONS OF ACT WHICH DO NOT APPLY TO STATUTORY ARBITRATION

- Subsection (1) of section 3.
Section 4.
Section 5.
Subsection (2) of section 10.
Subsection (1) of section 14.
Section 16.
Section 18.
-

THIRD SCHEDULE

Section 21

AMENDMENTS OF PRINCIPAL ACT

The amendments specified in this Schedule have been incorporated in the reprint of the principal Act.

THE ARBITRATION AMENDMENT ACT 1952

1952, No. 27

An Act to amend the Arbitration Act 1908

[16 October 1952]

1. Short Title—This Act may be cited as the Arbitration Amendment Act 1952, and shall be read together with and deemed part of the Arbitration Act 1908 (hereinafter referred to as the principal Act).

2. *This section substituted a new section for s. 5 of the principal Act.*

**THE ARBITRATION CLAUSES (PROTOCOL) AND
THE ARBITRATION (FOREIGN AWARDS)
AMENDMENT ACT 1957**

1957, No. 44

**An Act to amend the Arbitration Clauses (Protocol) and
the Arbitration (Foreign Awards) Act 1933**

[24 October 1957]

1. Short Title—This Act may be cited as the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Amendment Act 1957, and shall be read together with and deemed part of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 (hereinafter referred to as the principal Act).

2. *This section substituted a new section for s. 4 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933.*

The Arbitration Act 1908 is administered in the Department of Justice.



ANALYSIS

Title	9. Reciprocal Enforcement of Judgments Act 1934 not to affect enforcement under this Act
1. Short Title and commencement	10. Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 not to apply to Convention awards enforceable under this Act
2. Interpretation	11. Application of Act
3. Act to bind the Crown	12. Orders in Council and certificates declaring countries to be parties to Convention
4. Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement	13. Convention awards to be unenforceable in New Zealand if no reciprocity
5. Enforcement of foreign arbitral awards	14. Repeal Schedule
6. Evidence	
7. Refusal of enforcement	
8. Enforcement of Convention awards under other enactments	

1982, No. 21

An Act to implement an international Convention on the recognition and enforcement of foreign arbitral awards

[7 October 1982]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

1. Short Title and commencement—(1) This Act may be cited as the Arbitration (Foreign Agreements and Awards) Act 1982.

(2) This Act shall come into force on the 1st day of January 1983.

2. Interpretation—In this Act, unless the context otherwise requires,—

“Arbitration agreement” means an agreement in writing of the kind to which Article II of the Convention relates:

“Convention” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted at New York by the United Nations Conference on International Commercial Arbitration on the 10th day of June 1958, a copy of the English text of which is set out in the Schedule to this Act:

“Convention award” means an arbitral award to which the Convention applies made pursuant to an arbitration agreement in a country (other than New Zealand) which is a party to the Convention.

3. Act to bind the Crown—(1) Subject to subsection (2) of this section, this Act shall bind the Crown.

(2) Nothing in this Act shall make a Convention award enforceable against the Crown in a manner in which a judgment would not be enforceable against the Crown.

Cf. 1979, No. 39, s. 3

4. Power of Court to stay Court proceedings in respect of matters subject to an arbitration agreement—(1) If any party to an arbitration agreement to which this section applies (or any person claiming through or under that person) commences any legal proceedings in any Court against any other party to that arbitration agreement (or any person claiming through or under that other party) in respect of any matter in dispute between the parties which the parties have agreed to refer to arbitration pursuant to that arbitration agreement, any party to those proceedings may at any time apply to the Court to stay those proceedings; and the Court shall, unless the arbitration agreement is null and void, inoperative, or incapable of being performed, make an order staying the proceedings.

(2) The Court may, in addition to any order made under subsection (1) of this section, make such other orders in relation to any property which is or may be the subject-matter of the dispute between the parties to the arbitration agreement as it thinks fit.

(3) Any order under subsection (1) or subsection (2) of this section may be made subject to such conditions as the Court thinks fit.

(4) This section applies to every arbitration agreement which provides, expressly or by implication, for arbitration in any country other than New Zealand.

(5) Section 5 of the Arbitration Act 1908 shall not apply to any arbitration agreement to which this section applies.

5. Enforcement of foreign arbitral awards—(1) Subject to this Act, a Convention award shall be enforceable in New Zealand either by action or in the same manner as an award under the Arbitration Act 1908.

(2) Any Convention award which would be enforceable under this Act shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off, or otherwise in any legal proceedings in New Zealand, and any references in this Act to enforcing a Convention award shall be construed as including references to relying on an award.

Cf. 1933, No. 4, s. 5

6. Evidence—(1) The party seeking to enforce a Convention award shall produce to the Court—

(a) The duly authenticated original award or a duly certified copy thereof; and

(b) The original arbitration agreement or a duly certified copy thereof.

(2) Where the Convention award or arbitration agreement is in a foreign language, the party seeking to enforce it shall also produce a translation of it in the English language certified as a correct translation by an official or sworn translator, or by a diplomatic or consular agent of the country in which it was made, or in such other manner as the Court may require.

(3) Any document produced under subsection (1) or subsection (2) of this section shall, in the absence of evidence to the contrary, be conclusive evidence of the document which it purports to be or the matters to which it relates, as the case may be.

7. Refusal of enforcement—(1) Subject to subsections (2) and (3) of this section, a Convention award shall not be enforceable pursuant to this Act if the person against whom it is sought to enforce it proves that:

(a) A party to the arbitration agreement under which the Convention award was made, was, under the law applicable to that party, under some incapacity at the time the arbitration agreement was made; or

(b) The arbitration agreement was not valid under the law to which the parties have subjected it or, if the arbitration agreement is not expressed to be subject to the law of any country, under the law of the country where the Convention award was made; or

- (c) The party against whom it is sought to enforce the Convention award was not given proper notice of the appointment of the arbitrator, or of the arbitration proceedings, or was otherwise unable to present his case in those proceedings; or
 - (d) Subject to subsection (4) of this section, the Convention award deals with a difference not contemplated by, or not falling within the terms of the submission to arbitration, or contains a decision on a matter beyond the scope of the submission; or
 - (e) The composition or appointment of the arbitral authority, or the arbitration procedure was not in accordance with the agreement of the parties, or, in the absence of such agreement, the law of the country where the arbitration took place; or
 - (f) The Convention award has not yet become binding on the parties, or has been set aside or suspended by a competent authority in the country in which, or under the law of which, the award was made.
- (2) The Court may refuse to enforce a Convention award—
- (a) If it relates to a matter that may not lawfully be referred to arbitration under the law of New Zealand; or
 - (b) If the enforcement of the award would be contrary to public policy.
- (3) Where pursuant to this Act it is sought to enforce a Convention award and the Court is satisfied that an application to set aside or suspend that award has been made to a competent authority of the country in which, or under the law of which, it was made, the Court may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce that Convention award, order the other party to give security.
- (4) Where a Convention award to which paragraph (d) of subsection (1) of this section applies contains a decision on a matter not contemplated by, or falling within the terms of the submission to arbitration or beyond the scope of the submission which can be severed from a decision on a matter properly contemplated by and within the terms and scope of the submission, the Convention award may be enforced in respect of that latter decision.

8. Enforcement of Convention awards under other enactments—Nothing in this Act shall affect the right of any person to the enforcement of a Convention award otherwise than pursuant to this Act.

9. Reciprocal Enforcement of Judgments Act 1934 not to affect enforcement under this Act—Nothing in section 8 or section 10 of the Reciprocal Enforcement of Judgments Act 1934 shall affect the enforcement of a Convention award pursuant to this Act.

10. Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 not to apply to Convention awards enforceable under this Act—Nothing in the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 shall apply to the enforcement of a Convention award.

11. Application of Act—This Act shall apply in respect of any arbitration agreement or Convention award whether made before or after the commencement of this Act.

12. Orders in Council and certificates declaring countries to be parties to Convention—(1) The Governor-General may from time to time, by Order in Council, declare any country specified in the order to be a party to the Convention and any order while it remains in force shall be conclusive evidence that the country specified in the order is a party to the Convention.

(2) The Secretary of Foreign Affairs or a Deputy Secretary of Foreign Affairs may from time to time certify in writing that any country, not being a country specified in any Order in Council made under subsection (1) of this section, is or was at the time specified in the certificate a party to the Convention and may at any time revoke such a certificate and any certificate shall in the absence of evidence to the contrary be conclusive evidence that the country specified in the certificate is, or was at the time specified, a party to the Convention.

13. Convention awards to be unenforceable in New Zealand if no reciprocity—(1) If the Governor-General is satisfied that the treatment in respect of recognition and enforcement accorded by the courts of any country which is a party to the Convention to an award made in arbitration proceedings in New Zealand is substantially less favourable than that accorded by the courts in New Zealand to a Convention award made in that country, the Governor-General may, by Order in Council, direct that no Convention award made in that country shall be enforceable pursuant to this Act.

(2) Where an order has been made under subsection (1) of this section, no proceedings shall be commenced or continued in any Court in New Zealand to enforce, pursuant to this Act, a Convention award made in a country to which the order applies.

14. Repeal—Section 3 of the Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 is hereby repealed.

APPENDIX B

Consultative Activities and Acknowledgements

The Law Commission undertook a review of the law relating to arbitration in June 1987. After substantial research and preliminary consultation a discussion paper was published in October 1988. It outlined various methods of reforming the law and many helpful and considered responses to the discussion paper were received.

In September 1989, in conjunction with the Legal Research Foundation Inc, the Commission organised a seminar at Auckland University. The panel of speakers comprised the Hon Mr Justice Barker, P Brazil, T Dean, J Hagen, T V H Kennedy-Grant, N Moreau, Professor R K Paterson, the Hon E Prichard and D A R Williams QC. The papers presented at that seminar were published under the title *Arbitration Law: "Perimeters and Parameters"*.

The Commission also held several in house seminars and Commission staff attended the Arbitrators' Institute of New Zealand Conference in September 1989. The discussion at the conference and the various seminars indicated enthusiasm and support for reform of arbitration law.

At several stages the Commission sought advice on drafts and particular matters. This produced very useful and detailed comment from those who responded to these requests and the Commission acknowledges this valuable assistance.

The Commission also received excellent advice and comment from two international experts on arbitration, Dr G Herrmann of the United Nations Commission on International Trade Law and Professor R K Paterson of the University of British Columbia. We are greatly indebted to both of them.

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APPENDIX C

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APPENDIX D

UNCITRAL REPORT ON THE MODEL LAW

Extract from Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3-21 June 1985) (A/40/17)

Chapter II. International commercial arbitration: draft model law on international commercial arbitration¹

A. Introduction

11. The Commission, at its fourteenth session, decided to entrust the Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration.⁴ The Working Group carried out its task at its third, fourth, fifth, sixth and seventh sessions.⁵ The Working Group completed its work by adopting the draft text of a model law on international commercial arbitration at the close of the seventh session,⁶ after a drafting group had established corresponding language versions in the six languages of the Commission.

12. The Commission, at its seventeenth session, requested the Secretary-General to transmit the draft text to all Governments and interested international organizations for their comments and requested the secretariat to prepare an analytical compilation of the comments received. The Commission also requested the secretariat to submit to the eighteenth session of the Commission a commentary on the draft text.⁷

13. At its current session, the Commission had before it a report of the Secretary-General containing an analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration

(A/CN.9/263 and Add. 1 and 2) and a report of the Secretary-General containing an analytical commentary on the draft text (A/CN.9/264).

B. General observations on the draft text of a model law on international commercial arbitration

14. The Commission reaffirmed its appreciation to the Working Group on International Contract Practices for having elaborated the draft text of a model law on international commercial arbitration, which was in general favourably received and regarded as an excellent basis for the deliberations of the Commission.

15. It was stated that the paramount consideration in reviewing and revising the draft text should be the efficient functioning of international commercial arbitration.

¹The Commission considered this subject at its 305th to 333rd meetings, on 3 to 21 June 1985. Summary records of those meetings are contained in A/CN.9/SR.305-333.

⁴Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, para. 70.

⁵Reports on the work of those sessions are contained in A/CN.9/216, A/CN.9/232, A/CN.9/233, A/CN.9/245 and A/CN.9/246.

⁶The draft text of a model law on international commercial arbitration is contained in the annex to A/CN.9/246.

⁷Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth session, Supplement No. 17 (A/39/17)*, para. 101.

tration. To that end, due account must be taken of the needs of those who in day-to-day practice would use the text and whom it was ultimately intended to serve.

16. As regards the future form of the text to be adopted, the Commission decided to maintain the working assumption of the Working Group, according to which the text would be adopted and recommended in the form of a model law and not in that of a convention, subject to possible review of that decision at the end of its deliberations on the substance of the draft text.

C. Discussion on individual articles of the draft text

CHAPTER I. GENERAL PROVISIONS

Article 1.

*Scope of application**

17. The text of article 1 as considered by the Commission was as follows:

"(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 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."

Substantive scope of application: international commercial arbitration

18. While some concern was expressed about restricting the substantive scope of application to international commercial matters, the Commission was agreed that the draft text should be geared to and cover only international commercial arbitration.

The term "commercial"

19. Divergent views were expressed as to the appropriateness of the footnote accompanying paragraph (1) as regards its form as well as its content, although it was generally agreed that the term "commercial" should be given a wide interpretation. Under one view, the footnote should be deleted since in many legal systems, in particular those which did not use the technique of a footnote, it would be without legal value. Instead, an attempt should be made to define the term "commercial" in the body of the law itself. Such a definition might, for example, be based on a shortened version of the text contained in the footnote or by a reference in article 1 (1) to disputes arising from trade or commerce. An alternative suggestion was to present the guideline for interpretation, contained in the footnote, in a commentary or in the report on the proceedings.

20. The prevailing view was that the footnote should be retained, though possibly with certain modifications. It was realized that no generally acceptable definition had been found to date and that any definition would entail certain risks. It was felt that the footnote, despite its uncertain legal effect, could provide useful guidance in interpretation, at least to the drafters of any national enactment of the model law.

21. A number of modifications were proposed to the text of the footnote, whether the text would be retained in a footnote or incorporated into the body of the law itself. One proposal was to clarify that, in line with article 7 (1), non-contractual relationships were included, since the term "transaction" might lead to the opposite result. Other proposals were to add to the list of examples such commercial activities as services and processing as well as agreements on international economic co-operation.

22. In view of the fact that certain national laws of civil law tradition drew the line between commercial and civil transactions according to whether or not the parties involved were commercial persons (merchants), there was support for the proposal to state in the opening sentence that the qualification of a relationship as commercial did not depend on the nature or character of the parties. That proposal was objected to on the ground that such wording might be construed as touching upon the sensitive issue of State immunity. The Commission was agreed that there was no intention to deal with that issue in the Model Law and that, if the proposal were to be accepted, it would have to be made clear that rules on State immunity were not affected. Another concern was that the illustrative list of commercial relationships could be construed as

meaning in positive terms that any dispute arising therefrom would be capable of settlement by arbitration. As to a formula relating to that concern, see below, para. 29.

23. The Commission established an *ad hoc* working party composed of the representatives of China, Hungary and the United States and requested it to prepare, in the light of the above discussion and proposals, a revised version of paragraph (1) and the accompanying footnote for consideration by the Commission.

24. The *ad hoc* working party suggested replacing, in article 1 (1), the words "international commercial** arbitration" by the words "international arbitration in commercial** matters, including services and other economic relations". It also suggested revising the opening part of the footnote as follows: "***The term 'commercial' should be given a wide interpretation so as to include, but not be limited to, the following: any trade transaction for the supply or exchange of goods or services; distribution agreement; . . .".

25. It was noted that the proposed text did not use the term "international commercial arbitration", which had come to be a well-known term in the field. After discussion, the Commission decided that, in spite of the acknowledged difficulties, it would be better to retain the original text of article 1 (1) and to revise the footnote as follows: "***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 nature include, but are not limited to, the following transactions: any trade transaction for the supply of goods or services; distribution agreement; . . .".

26. The Commission was of the view that with the revision of the footnote it was sufficiently clear that the qualification of a relationship as commercial did not depend on the nature of the parties. Therefore, it was felt that it was not necessary to express it explicitly in the text either of article 1 (1) or of the footnote. The Commission was also of the view that the provision as drafted did not touch on any rule on sovereign immunity.

Paragraph (2): "international"

27. The Commission adopted subparagraph (a) and was agreed that the provision would cover the bulk of cases encountered in international commercial arbitration.

28. Divergent views were expressed as to the appropriateness of retaining subparagraph (b) (i). Under one view, the provision should be deleted for essentially two reasons. One reason was that there was no justification to qualify a purely domestic relationship as international simply because a foreign place of arbitration was chosen. Party autonomy was unacceptable here since it would enable parties to evade mandatory provisions of law, including those providing for exclusive court jurisdiction, except where recognition or enforce-

ment of the "foreign" award was later sought in that State. The other reason was that the provision covered not only the case where the place of arbitration was determined in the arbitration agreement but also the case where it was determined only later, pursuant to the agreement, for example by an arbitral institution or the arbitral tribunal. It was felt that the latter case created uncertainty as to what was the applicable law and as to the availability of court services before the place of arbitration was determined. Under another view, only the latter reason was convincing and, therefore, subparagraph (b) (i) should be maintained without the words "or pursuant to".

29. The prevailing view was to retain the entire provision of subparagraph (b) (i). It was noted that the provision only addressed the question of internationality, i.e. whether the (Model) Law for international cases or the same State's law for domestic cases applied. It was thought that the principle of party autonomy should extend to that question. The Commission, in adopting that view, was agreed, however, that the concern relating to non-arbitrability, which had also been raised in a more general sense and in particular in the discussion on paragraph (1) and the accompanying footnote (above, para. 22), should be met by a clarifying statement in a separate paragraph of article 1 along the following lines: "This Law does not affect any other law of this State which provides that a certain dispute or subject-matter is not capable of settlement by arbitration."

30. As regards subparagraphs (b) (ii) and (c), the Commission was agreed that their respective scope was not easily determined in a clear manner. In particular, subparagraph (c) was regarded as unworkable due to its vague ambit. While there was some support for maintaining the provision, though possibly in some modified form, the Commission, after deliberation, decided to delete subparagraph (c).

31. However, in order to balance the reduction in scope due to that deletion, it was proposed to add an opting-in provision, either only to subparagraph (b) (ii) or as a replacement for subparagraph (c). It was thought that such a provision provided a more precise test than the one set forth in subparagraph (c). In response to that proposal, a concern was expressed that such a subjective criterion would enable parties freely to label as international a purely domestic case. Others, however, considered that any such concern was outweighed by the advantages of a system that provided certainty to the parties that their transaction would be recognized as international, a characterization that should properly fall within the scope of party autonomy. In response to that consideration the view was expressed that it was inconceivable that any State which deemed it necessary to retain a special law for domestic cases would want to allow parties to evade that system.

32. The Commission requested an *ad hoc* working party, composed of the representatives of Australia, Finland, India, the Union of Soviet Socialist Republics and the United States, to prepare a draft of an opting-in

provision and of a provision to implement the proposal on non-arbitrability. The working party was also requested to prepare, for consideration by the Commission, a draft provision which would express the character of the Model Law as a *lex specialis* with regard to all matters governed by the Law.

33. As to the opting-in provision, the *ad hoc* working party suggested replacing the wording in subparagraph (c) by the following new provision: "(c) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country." While the concern previously expressed above in paragraph 31 was restated, it was pointed out that courts were unlikely to give effect to such an agreement in a purely domestic case. After discussion, the Commission adopted the suggested provision.

34. As to the provision on non-arbitrability, the *ad hoc* working party suggested adding the following new paragraph to article 1: "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." The Commission adopted the suggested paragraph.

35. As to the provision expressing the *lex specialis* character of the Model Law, the *ad hoc* working party suggested adding the following new paragraph to article 1: "This Law prevails over other provisions of law of this State as to matters governed by this Law." The Commission decided not to include the suggested formulation in article 1 because of a concern that the proposed provision linked a somewhat imprecise delimitation of "matters governed by this Law" with a categorical rule. However, it was understood that, since the Model Law was designed to establish a special legal régime, in case of conflict, its provisions, rather than those applicable to arbitrations in general, would apply to international commercial arbitrations.

Paragraph (3)

36. The Commission adopted the provision, subject to the deletion of the word "relevant" and to clarifying that the second sentence did not relate to the first sentence but to paragraph (2).

* * *

Article 2.

Definitions and rules of interpretation

37. The text of article 2 as considered by the Commission was as follows:

"For the purposes of this Law:

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

Subparagraphs (a), (b) and (d)

38. The Commission adopted subparagraphs (a), (b) and (d) of the article.

Subparagraph (c)

39. During the discussion on subparagraph (c), a suggestion was made to express by an appropriate reservation that the freedom of the parties to authorize a third person to make a certain determination did not extend to the determination of the rules of law applicable to the substance of the dispute, as referred to in article 28 (1). The Commission postponed consideration of the suggestion until the discussion of article 28.

40. In accordance with the view of the Commission expressed during the subsequent discussion on article 28 that the Model Law should not deal with the possibility that parties might authorize a third person to determine rules of law applicable to the substance of the dispute (see below, para. 242), the Commission decided to modify subparagraph (c) along the following lines: "(c) 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".

Subparagraph (e)

41. In respect of subparagraph (e), several suggestions were made for adding certain procedural rules, in particular as regards the case where the addressee's place of business, habitual residence or mailing address was not to be found. One suggestion, which the Commission adopted, was to clarify that in such case the mailing by registered letter sufficed. The Commission did not accept a suggestion to lay down certain criteria for determining what constituted a reasonable inquiry. Another submission, with which the Commission agreed, was that the expression "last-known" referred to the knowledge of the sender.

42. In order to reduce the risk that the provision might operate to the detriment of a party who was unaware of any proceedings against him, it was suggested that some sort of advertising should be required, a certain period of time should be established for the fictitious receipt to become effective or that some possibility for the respondent to resort to a court should be envisaged. Another suggestion was not to retain the provision and to rely solely on the requirements and safeguards of the applicable procedural law. Yet another suggestion was that the provision, since it went clearly beyond a mere definition or rule of interpretation, should be placed in a separate article of the Model Law.

43. The Commission, after deliberation, was agreed that the provision should not set forth excessively detailed procedural requirements which could prove to be an obstacle to incorporating the Model Law in national legal systems. The Commission entrusted an *ad hoc* working party, composed of the representatives of Czechoslovakia, Iraq and Mexico, to prepare a modified version of the provision in the light of the above discussion.

44. The *ad hoc* working party suggested placing the provision in a new article 3 in the following modified form:

"(1) 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; if none of these can be found after making 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.

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

45. The Commission adopted the suggested provision as new article 3. It was noted that the reason for placing the provision in a separate article was that it contained a rule of procedure and neither a definition nor a rule of interpretation. It was also noted that the reason for placing the last sentence in a separate paragraph was to make clear that the sentence referred to the entire provision. As to the understanding of the Commission that new article 3 on receipt of communications did not apply to court proceedings or measures but only to the arbitral proceedings proper, see below, para. 106.

Suggestions for additional definitions

46. The Commission adopted the proposal to express in article 2, possibly before the definition of "arbitral tribunal" in subparagraph (a), that the term "arbitration" meant any arbitration whether or not administered by a permanent arbitral institution.

47. The Commission did not accept a proposal to move the definition of "arbitration agreement", set forth in article 7 (1), to article 2.

48. It was suggested that the term "award" should be defined in the Model Law. Such a definition, which would be useful for all provisions where the term was used, could also clarify the various possible types of awards, such as final, partial, interim or interlocutory awards.

49. The Commission was agreed that, while a definition was desirable, a more modest approach should be taken in view of the considerable difficulty of finding an acceptable definition and in view of the fact that other legal texts on arbitration, e.g. the 1958 New York Convention and many national laws, did not define the term. It was agreed to determine in the context of article 34 and any other provision where such determination was needed (e.g. articles 31 and 33) which types of decisions were covered by those articles.

50. As to a decision to add a new subparagraph (f) in respect of counter-claims, see below, para. 327.

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Article 4.

Waiver of right to object

51. The text of article 4 as considered by the Commission was as follows:

"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 therefor, within such period of time, shall be deemed to have waived his right to object."

52. Divergent views were expressed as to whether article 4 should be retained. Under one view, the provision was too vague and possibly in conflict with relevant provisions of national law and, as regards its effect, too rigid in that it might operate unfairly against a party. For those reasons, the question of waiver or estoppel should either be left entirely to the applicable national law or, if it was deemed absolutely necessary to have a waiver rule in regard to certain provisions, the question should be addressed only in the individual articles of the Model Law concerning those provisions.

53. The prevailing view, which the Commission adopted, was that a general waiver rule along the lines of article 4 should be maintained, since such a rule would help the arbitral process function efficiently and in good faith and would help achieve greater uniformity in the matter.

54. As regards the contents of article 4, various suggestions were made. It was suggested that, as to the imputed knowledge of a party, the wording "or ought to have known" should either be deleted or be made more precise and less rigid by requiring ordinary care or reasonable diligence. Noting that those words were not contained in the corresponding provision in the

UNCITRAL Arbitration Rules (article 30), the Commission decided to delete them since they might create more problems than they solved.

55. A suggestion was made to delete the reference to the non-mandatory provisions of law and the arbitration agreement. The Commission did not adopt the proposal since the remaining provision would be too vague and, since it would also cover non-compliance with mandatory provisions of law, it would be too rigid.

56. The view was expressed that the words "without delay" were too vague and too rigid. It was, therefore, proposed to establish instead a period of time or to soften the requirement by using wording such as "within reasonable time". It was noted, in that context, that the time element was important in view of the fact that a period of time as referred to in article 4 was not contained in any provision of the Model Law and was rarely contained in arbitration agreements. The Commission, after deliberation, decided to use the wording "without undue delay" instead of fixing a period of time, since no period of time could be appropriate in all cases.

57. As regards the effect of a waiver under article 4, the Commission was agreed that it was not limited to the arbitral proceedings but extended to subsequent court proceedings in the context of articles 34 and 36. It was noted, however, that where an arbitral tribunal had ruled that a party was deemed to have waived his right to object, the court could come to a different conclusion in its review of the arbitral procedure under article 34 or, provided the proceedings were conducted under the Model Law, article 36.

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Article 5.

Scope of court intervention

58. The text of article 5 as considered by the Commission was as follows:

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

59. Divergent views were expressed as to the appropriateness of the provision. The discussion focused on two objections. The first objection was that the provision, which addressed an issue of fundamental practical importance, did not give a clear answer to the question whether in a given situation court intervention was available or excluded. The second objection was that the provision, read together with the few provisions of the Model Law which provided for court intervention, presented an unacceptably restrictive scope of judicial control and assistance.

60. In advancing the first objection, it was pointed out that in many cases it was not possible to know whether a matter was governed by the Law. If a particular matter was not expressly mentioned in the Law, it was possible that the drafters had considered the matter and decided that the Law should not cover it, that the

drafters had considered the matter and decided not to give the court authority to intervene or that the drafters had failed to consider the matter at all. Especially since the parties, arbitral tribunals and courts who would be called upon to apply the Law in the future would not have easy access to the drafting history, they would often not know into which category a particular matter fell.

61. In response to that objection, it was pointed out that the problem was common to any *lex specialis* and, in fact, all texts for the unification of law. Since no such text was complete in every respect, what was not governed by it must be governed by the other rules of domestic law. Therefore, it was necessary, though admittedly often difficult, to determine the scope of coverage of the particular text. Yet, in the great majority of cases in which the question of court intervention became relevant, the answer could be found by using the normal rules of statutory interpretation, taking into account the principles underlying the text of the Model Law.

62. In advancing the second objection, it was emphasized that article 5 expressed an excessively restrictive view as to the desirability and appropriateness of court intervention during an arbitration. It was to the advantage of businessmen who engaged in international commercial arbitration to have access to the courts while the arbitration was still in process in order to stop an abuse of the arbitral procedure. Furthermore, a limitation of the authority of the courts to intervene in arbitral proceedings might constitute an unwarranted interference in the prerogatives of the judicial power, and might even be contrary to the constitution in some States. Finally, even if the authority of the court to intervene in supervision of an arbitration might have to be limited, the court should have a broader power to act in aid of the arbitration. It was suggested, as a possible means of softening the extremely rigid character of article 5, to give the parties to an arbitration the authority to agree on a more extensive degree of court supervision and assistance in their arbitration than was furnished by the Model Law.

63. In response to that second objection, it was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse. The purpose of article 5 was to achieve certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the (Model) Law on international commercial arbitration all instances of court intervention. Thus, if a need was felt for adding another such situation, it should be expressed in the Model Law. It was also recognized that, although the Commission might hope that States would adopt the Law as it was drafted, since it was a model law and not a convention, any State which might have constitutional problems could extend the scope of judicial intervention when it adopted the Law without violating any international obligation.

64. As regards the suggestion to enable parties to agree on a wider scope of court intervention, the question was raised as to whether the parties could be expected to draft an agreement on the point that would adequately deal with the problems. Moreover, the concern was expressed that institutional arbitration rules might include a provision extending the right of court intervention and that some parties who had agreed to the use of those rules might be subject to court intervention they had not expected.

65. The Commission, after deliberation, adopted the article in its current form.

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Article 6.

Court for certain functions of arbitration assistance and supervision

66. The text of article 6 as considered by the Commission was as follows:

"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)."

67. The Commission was agreed that article 6, by calling upon each State to designate a court for performing the functions of arbitration assistance and supervision referred to in the article, was useful and beneficial to international commercial arbitration. As a result of a subsequent decision to provide for instant court control over an arbitral tribunal's ruling that it had jurisdiction (see below, para. 161), a reference to article 16 (3) was included in article 6.

68. It was understood that a State was not compelled to designate merely one single court but was free to entrust a number of its courts or a certain category of its courts with performing those functions. That point could be made clear by adding to the words "the Court" the words "or the Courts".

69. It was also agreed that a State should not be compelled to designate a court in the terms of article (2) (b) for all the functions referred to in article 6 but should be free to entrust the functions envisaged in articles 11, 13 and 14 to an organ or authority outside its judicial system such as a chamber of commerce or an arbitral institution.

70. A suggestion was made to recognize party autonomy as regards the choice of the forum in those cases where more than one court was competent to perform the functions of arbitration assistance and supervision. Another suggestion was to resolve any possible positive conflict of court competence by according priority to the court first seized with the matter. The Commission did not accept those suggestions since, in so far as the choice of forum within a given State was concerned, the issue fell in the national domain of regulating the organization of and access to its courts and, in so far as the issue and possible conflict of the competence of

courts in different States was concerned, it could not effectively be settled by a model law.

71. The Commission was agreed, however, that it was desirable to determine the instances in which the court or courts of a particular State which had adopted the Model Law would be competent to perform the functions referred to in article 6. It was noted that the question was directly related to the general matter of the territorial scope of application of the Model Law. The Commission, therefore, embarked on a discussion of that general matter.

Discussion on territorial scope of application

72. Divergent views were expressed as to whether the Model Law should expressly state its territorial scope of application and, if so, which connecting factor should be the determining criterion. Under one view, it was inappropriate to determine that issue in the Model Law since the territorial scope of application of the Law as adopted in a given State was either self-evident from the fact of its enactment or was to be determined by the particular State in accordance with its general policies in that regard, including its stance on conflict of laws and on court competence. The prevailing view, however, was that it was desirable to determine that issue in the Model Law in order to achieve a greater degree of harmony, thereby helping to reduce the conflict of laws as well as of court competence.

73. As regards the connecting factor which should determine the applicability of the (Model) Law in a given State, there was wide support for the so-called strict territorial criterion, according to which the Law would apply where the place of arbitration was in that State. In support of that view, it was pointed out that that criterion was used by the great majority of national laws and that, where national laws allowed parties to choose the procedural law of a State other than that where the arbitration took place, experience showed that parties in practice rarely made use of that faculty. The Model Law, by its liberal contents, further reduced the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration; it was pointed out that the Model Law itself allowed the parties wide freedom in shaping the rules of the arbitral proceedings, including the faculty of agreeing on the procedural provisions of a "foreign" law so long as they did not conflict with the mandatory provisions of the Model Law.

74. Another view was that the place of arbitration should not be exclusive in the sense that parties would be precluded from choosing the law of another State as the law applicable to the arbitration procedure. A State which adopted the Model Law might wish to apply it also to those cases where parties had chosen the law of that State even though the place of arbitration was in a different State. It was recognized that such choice might be subject to certain restrictions, in particular as regards fundamental notions of justice, reasons of public policy and rules of court competence intrinsic to the legal and judicial system of each State.

75. The Commission was agreed that the basic criterion for the territorial scope of application, whatever its precise final wording, would not govern the court functions envisaged in articles 8 (1), 9, 35 and 36, which were entrusted to the courts of the particular State adopting the Model Law irrespective of where the place of arbitration was located or under which law the arbitration was conducted.

76. As regards the court functions referred to in article 6, i.e. those envisaged in articles 11 (3), 11 (4), 13 (3), 14 and 34 (2), it was agreed that a decision should be made in the context of the discussion on each of those articles whether the basic criterion would be appropriate. In that connection, it was suggested that an extension of the territorial scope of application might be desirable with regard to the court functions envisaged in articles 11, 13 and 14 so as to make available the assistance of the court specified in article 6 even before the place of arbitration or other general connecting factor for the applicability of the (Model) Law of a particular State had been established. Various suggestions were made as to which should be the special connecting factor for that purpose: (a) defendant has place of business in this State; (b) claimant has place of business in this State; (c) claimant or defendant has place of business in this State; (d) arbitration agreement was concluded in this State; (e) for certain instances: place of residence of arbitrator concerned is in this State.

77. While some doubts were expressed as to the practical need for and feasibility of such an extension, others felt that such a need existed in many cases. The Commission was agreed that the question should be decided in the context of its discussion of the relevant articles (i.e. articles 11, 13 and 14).

78. The Commission requested the secretariat to prepare, on the basis of the above discussion, draft provisions on the territorial scope of application of the Model Law in general, including suggestions as to possible exceptions to the general scope.

79. The secretariat prepared the following draft of a new paragraph (1 *bis*) of article 1 for consideration by the Commission:

"(1 *bis*) The provisions of this Law apply if the place of arbitration is in the territory of this State. However, those provisions on functions of courts of this State set forth in articles 8, 9, 35 and 36 apply irrespective of whether the place of arbitration is in the territory of this State; those provisions on functions of courts of this State set forth in articles 11, 13 and 14 apply even where the place of arbitration is not yet determined, provided that the respondent [or the claimant] has his place of business in the territory of this State."

The secretariat added the suggestion that, if the Commission were to decide that the court assistance envisaged in articles 11, 13 and 14 need not be made available in those cases where the place of arbitration was not yet determined, the following short version of paragraph (1 *bis*) might be sufficient:

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

80. In discussing the above proposal, the Commission decided that, for reasons stated in support of the strict territorial criterion (see above, para. 73), the applicability of the Model Law should depend exclusively on the place of arbitration as defined in the Model Law. As to the question of extending the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined, some support was expressed for such an extension since it was important to provide court assistance in the cases where parties could not reach an agreement on the place of arbitration. However, the prevailing view was that the Model Law should not deal with court assistance to be available before the determination of the place of arbitration. In support of the prevailing view it was stated that neither the place of business of the claimant nor the place of business of the defendant provided an entirely satisfactory connecting factor for the purpose of determining whether court assistance should be provided. Moreover, a provision of that kind in the Model Law might interfere with other rules on court jurisdiction. It was also pointed out that even without such an extension of the applicability of the Model Law a party might be able to obtain court assistance under laws other than the Model Law. Previous discussion as to whether the applicability of articles 11, 13 and 14 should be extended to the time before the place of arbitration was determined is reported below, paras. 107-110 (article 11), para. 133 (article 13), para. 143 (article 14) and para. 148 (article 15 with reference to article 11).

81. The Commission agreed that a provision implementing that decision, which had to be included in article 1, should be formulated along the following lines: "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."

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CHAPTER II. ARBITRATION AGREEMENT

Article 7.

Definition and form of arbitration agreement

82. The text of article 7 as considered by the Commission was as follows:

"(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."

Paragraph (1)

83. The Commission adopted the paragraph; it referred to its Drafting Group a suggestion to replace the words "all or certain disputes which have arisen or which may arise" by the words "any existing or future dispute".

Paragraph (2)

84. The Commission noted that paragraph (2) did not cover cases, encountered in practice, where one of the parties did not declare in writing his consent to arbitration. Practical examples, which were recognized by some national laws as constituting valid arbitration agreements, included the arbitration clause in a bill of lading, in certain commodity contracts and reinsurance contracts which customarily become binding on a party by oral acceptance, and in other contracts which were concluded by a written offer and an oral acceptance or by an oral offer and a written confirmation.

85. Various suggestions were made with a view to expanding the scope of paragraph (2) in order to accommodate all or at least some such cases. One suggestion was to adopt the solution found in the 1978 version of article 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which referred to agreements "in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware". While there was considerable support for that suggestion, which was said to reflect the current trend towards a more liberal approach to the question of form, the Commission, after deliberation, did not accept it. It was felt that a more modest approach was appropriate in the different context of validity as to form of arbitration agreements, because the reference to trade usages was too vague to ensure uniform interpretation and entailed the possible risk that a consent to arbitration would be imposed upon a party unfamiliar with the customs prevailing in certain trades or regions.

86. Another suggestion was to add at the end of paragraph (2) the following sentence: "If a bill of lading or another document, signed by only one of the parties, gives sufficient evidence of a contract, an arbitration clause in the document, or a reference in the document to another document containing an arbitration clause, shall be considered to be an agreement in writing." While considerable support was expressed for the suggestion, the Commission, after deliberation, did not adopt the additional wording because it appeared unlikely that many States would be prepared to accept the concept of an arbitration agreement which, although contained in a document, was not signed or at least consented to in writing by both of the parties. It was also pointed out that there might be difficulties with regard to the recognition and enforcement under the 1958 New York Convention of awards based on such agreements.

87. A more limited suggestion was to include those cases where parties who had not concluded an arbitration agreement in the form required under paragraph (2) nonetheless participated in arbitral proceedings and where that fact, whether viewed as a submission or as the conclusion of an oral agreement, was recorded in the minutes of the arbitral tribunal, even though the signatures of the parties might be lacking. It was pointed out in support of the suggested extension that, although awards made pursuant to arbitration agreements evidenced in that manner would possibly be denied enforcement under the 1958 New York Convention, adoption of that extension in the Model Law might eventually lead to an interpretation of article II (2) of that Convention whereby arbitration agreements evidenced in the minutes of arbitral tribunals would be acceptable. It was noted that, if the suggestion were adopted, the condition of recognition and enforcement laid down in article 35 (2) of the Model Law, i.e. supply of original or certified copy of the arbitration agreement referred to in article 7, might have to be modified to accommodate that instance of submission (A/CN.9/264, note 91). The Commission, after deliberation, decided to extend the scope of paragraph (2) along the lines of the suggestion.

88. To implement that decision the Commission decided to add to the end of the second sentence of article 7 (2) such wording as "or in an exchange of statements of claim and defence in which one party has alleged and the other party has not denied the existence of an agreement".

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Article 8.

Arbitration agreement and substantive claim before court

89. The text of article 8 as considered by the Commission was as follows:

"(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."

90. It was suggested that paragraph (2) could be read to apply only if the arbitral proceedings had commenced prior to the commencement of the judicial proceedings. The Commission agreed that the text of paragraph (2) should be amended so as to make clear that a party was not precluded from initiating arbitral proceedings by the fact that the matter had been brought before a court.

91. There was a divergence of opinion in the Commission as to whether the text should be amended so as to preclude the possibility that proceedings might go

forward concurrently in both the arbitral tribunal and the court. Under one view, if the arbitral proceedings had already commenced, the court should normally postpone its ruling on the arbitral tribunal's jurisdiction until the award was made. That would prevent the protraction of arbitral proceedings and would be in line with article VI (3) of the European Convention on International Commercial Arbitration (Geneva, 1961). Under another view, once the issue as to whether the arbitration agreement was null and void was raised before the court, priority should be accorded to the court proceedings by recognizing a power in the courts to stay the arbitral proceedings or, at least, by precluding the arbitral tribunal from rendering an award.

92. The prevailing view was to leave the current text of paragraph (2) unchanged on that point. Permitting the arbitral tribunal to continue the proceedings, including the making of an award, while the issue of its jurisdiction was before the court contributed to a prompt resolution of the arbitration. It was pointed out that expenses would be saved by awaiting the decision of the court in those cases where the court later ruled against the jurisdiction of the arbitral tribunal. However, it was for that reason not recommendable to provide for a postponement of the court's ruling on the jurisdiction of the arbitral tribunal. Furthermore, where the arbitral tribunal had serious doubts as to its jurisdiction, it would probably either proceed to a final determination of that issue in a ruling on a plea referred to in article 16 (2) or, in exercising the discretion accorded to it by article 8 (2), await the decision of the court before proceeding with the arbitration.

93. It was noted that objections to the existence of a valid arbitration agreement were referred to in articles 8 (1), 16 (2), 34 (2) (a) (i) and 36 (1) (a) (i), which apparently allowed a party wishing to obstruct or delay the arbitration to raise the same objection at four different stages. The Commission was agreed that, while it was not possible in a model law to solve potential conflicts of competence between courts of different States or between any such court and an arbitral tribunal, when considering those articles account should be taken of the need for inner consistency with a view to reducing the effects of possible dilatory tactics.

94. The Commission, after deliberation, adopted article 8, subject to modifying paragraph (2) along the following lines: "The fact that an action is brought before a court as referred to in paragraph (1) of this article does not preclude a party from initiating arbitral proceedings or, if arbitral proceedings have already commenced, the arbitral tribunal from continuing the proceedings [including the making of an award,] while the issue of [its] jurisdiction is pending with the court."

* * *

Article 9.

Arbitration agreement and interim measures by court

95. The text of article 9 as considered by the Commission was as follows:

"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."

96. The Commission adopted the policy underlying the article and confirmed the view that the range of measures covered by the provision was a wide one and included, in particular, pre-award attachments. It was pointed out that the interim measures compatible with an arbitration agreement might, for example, also relate to the protection of trade secrets and proprietary information. It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by a court of "this State" was compatible with the fact that the parties had agreed to settle their dispute by arbitration.

97. That understanding also provided the answer to the question whether article 9 would prevent parties from excluding in the agreement resort to courts for all or certain interim measures. While the article should not be read as precluding such exclusion agreement, it should also not be read as positively giving effect to any such exclusion agreement. It was agreed that the correct understanding of article 9 might be made clearer by using the term "an arbitration agreement" instead of the term "the arbitration agreement". The Commission adopted article 9 subject to that modification.

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CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10.

Number of arbitrators

98. The text of article 10 as considered by the Commission was as follows:

"(1) The parties are free to determine the number of arbitrators.

"(2) Failing such determination, the number of arbitrators shall be three."

99. The Commission adopted the article.

* * *

Article 11.

Appointment of arbitrators

100. The text of article 11 as considered by the Commission was as follows:

"(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 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."

Paragraphs (1) and (2)

101. The Commission adopted those paragraphs. In that connection, it was noted that the Model Law did not contain an express provision to the effect that the arbitral tribunal had to be composed of impartial and independent members. It was understood, however, that that agreed principle was sufficiently clear from other provisions of the Model Law, in particular article 12, which set forth the grounds for challenge.

Paragraph (3)

102. The Commission adopted subparagraph (a), subject to replacing the words "within thirty days after having been requested to do so by the other party" by such words as "within thirty days of receipt of such request from the other party".

103. A suggestion was made to lay down in subparagraph (b) a time-limit, as was done in respect of the provision of subparagraph (a). The Commission was agreed that no such time-limit was required in subparagraph (b) since the persons expected to agree were the parties themselves whose inability to reach an agreement became evident by a request of one of them to the Court. Accordingly, subparagraph (b) was adopted in its current form.

Paragraph (4)

104. It was noted that the term "appointing authority" used in subparagraph (c) was not defined in the Model Law. The Commission was agreed that the term should be replaced by appropriate wording and the subparagraph be revised along the following lines: "(c) a third party, including an institution, entrusted by the parties with a function in connection with the appointment of arbitrators fails to perform this function". It was noted that such a modification made it unnecessary to include in article 2 a definition of the term "appointing authority".

Paragraph (5) and suggestions relating to functions of Court

105. The Commission adopted paragraph (5).

106. In respect of the functions of the Court envisaged under paragraphs (3), (4) and (5), an observation was made based on the concern which had earlier been expressed in the context of article 2 (e) (see above, para. 42). It was observed that the provisions of article 11 dealing with the functions of the Court, in particular if read together with the provisions of the Model Law on receipt of written communications, could be interpreted as precluding the Court from applying domestic procedural rules which, by requiring, for instance, a certain form of service or advertising, would help to reduce the risk of a party being caught in arbitral proceedings without his knowledge. The Commission decided to clarify that the provision on receipt of communications did not apply to court proceedings or measures but only to the arbitral proceedings proper, including any steps in the appointment process by a party, an arbitrator or an appointing authority.

107. As agreed in the context of the discussion on the territorial scope of application and any possible exceptions thereto (see above, paras. 76-77), the Commission considered whether court assistance in the appointment process, as provided for in article 11 (3), 11 (4) and 11 (5), should be made available even before the place of arbitration was determined, since it was the determination of the place of arbitration which triggered the general applicability of the (Model) Law in a State that had enacted it.

108. Under one view, the Model Law need not contain any such provision since it was difficult to find an acceptable connecting factor and, above all, there was no pressing need in view of the infrequency of cases where parties had agreed neither on a place of arbitration nor on an appointing authority and since even in such rare cases the existing applicable law or

laws might come to their assistance with a coherent system.

109. The prevailing view, however, was that a practical problem existed and the Model Law should provide for such assistance in order to facilitate international commercial arbitration by enabling the diligent party to secure the constitution of the arbitral tribunal. As to which should be the connecting factor, the following proposals were made: (a) place of business of defendant, (b) place of business of claimant, (c) place of business of either claimant or defendant.

110. The Commission, after deliberation, tentatively concluded that a State adopting the Model Law should make available the services of its Court referred to in article 6 for appointing an arbitrator under article 11 in those cases where the defendant had his place of business in "this State" and, possibly, in those cases where the claimant had his place of business in "this State", provided that the court in the defendant's country did not perform that function.

111. In the subsequent discussion concerning the territorial scope of application of the Model Law, the Commission decided not to extend the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined. (That discussion is reported above, paras. 79-81.)

* * *

Article 12. Grounds for challenge

112. The text of article 12 as considered by the Commission was as follows:

"(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."

Paragraph (1)

113. The Commission adopted paragraph (1).

Paragraph (2)

114. It was noted that parties sometimes agreed that arbitrators had to have certain professional or trade qualifications and it was proposed that the Model Law should respect that aspect of party autonomy by including in paragraph (2) a reference to any additional grounds for challenge on which the parties might agree.

While some doubt was expressed as to the necessity for making such an addition to article 12, the Commission decided to adopt the proposal and requested an *ad hoc* working party, composed of the representatives of Algeria, India and the United States, to prepare a draft reflecting the decision.

115. On the basis of a proposal by the *ad hoc* working party, the Commission adopted the following amended wording of the first sentence of article 12 (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."

116. Divergent views were expressed as to the word "only" in the first sentence of paragraph (2). Under one view, the word should be deleted because there might be grounds for challenge which would not necessarily be covered by the words "impartiality or independence". By way of example, it was suggested that, without calling into question the integrity or impartiality of an arbitrator, his nationality might be a sound ground for challenge in view of the policies followed by his Government.

117. Under another view, the word "only" was useful in that it excluded other grounds for challenge not dealt with in the model law. It was pointed out that in most cases of the type falling within the example cited above the circumstances would in any event give rise to justifiable doubts as to the impartiality or independence of the arbitrator.

118. Under yet another view, the first sentence of paragraph (2) should be interpreted as limiting the grounds for challenge to the grounds provided in the model law even without the word "only". However, in order to make that point clear, some proponents of that view suggested the retention of the word "only".

119. The Commission decided to retain the word "only" in the first sentence of paragraph (2). In doing so, the Commission observed that the corresponding provision of article 10 (1) of the UNCITRAL Arbitration Rules, on which the discussed provision of the Model Law was modelled, did not contain the word "only". However, it was suggested that the UNCITRAL Arbitration Rules as contractual rules could not affect the application of any other grounds for challenge provided in mandatory rules in the applicable law, whereas it might be desirable that the Model Law prevented such other grounds for challenge from being applied in international commercial arbitration.

* * *

Article 13. Challenge procedure

120. The text of article 13 as considered by the Commission was as follows:

"(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."

General discussion on appropriateness of court control during arbitral proceedings

121. The Commission, before considering the provisions of article 13 in detail, embarked on a general discussion on the appropriateness of court control during arbitral proceedings. Divergent views were expressed on that matter.

122. Under one view, the court control envisaged under article 13 (3) was inappropriate and should at least be limited, in order to reduce the risk of dilatory tactics. One suggestion was to delete the provision, thus excluding court control during the arbitral proceedings, or to restrict its application considerably, for example, to those rare cases where the sole arbitrator or a majority of the arbitrators were challenged. Another suggestion was to replace in paragraph (1) the words "subject to the provisions of paragraph (3) of this article" by the words "and the decision reached pursuant to that procedure shall be final". The thrust of the suggestion was to allow the court control envisaged in paragraph (3) only if the parties had not agreed on a procedure for challenges and, in particular, not entrusted an institution or third person with deciding on the challenge. Yet another suggestion was to let the arbitral tribunal decide whether court control should be allowed immediately or only after the award was made. The suggestion was advanced as a possible solution to the problem that under article 13 a challenged arbitrator appeared to have full freedom to withdraw and that as a result of such withdrawal the party who appointed the arbitrator might be adversely affected by additional costs and delay.

123. Under another view, the weight accorded to court intervention in article 13 (3) was not sufficient in that the provision empowered the arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings irrespective of the fact that the challenge was pending with the Court. It was stated in support of the view that such continuation would cause unnecessary waste of time and costs if the court later

sustained the challenge. At least, it should be expressed in article 13 that the arbitral tribunal was precluded from continuing the proceedings if the Court ordered a stay of the arbitral proceedings.

124. The prevailing view, however, was to retain the system adopted in article 13 since it struck an appropriate balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding unnecessary waste of time and money.

125. The Commission, after deliberation, adopted the prevailing view.

Paragraph (1)

126. The Commission adopted the provision.

Paragraph (2)

127. The Commission did not adopt a suggestion to provide in paragraph (2) that the mandate of a sole arbitrator who was challenged but did not withdraw from his office terminated on account of the challenge.

128. The Commission did not adopt a suggestion to exclude the challenged arbitrator from the deliberations and the decision of the arbitral tribunal on the challenge.

129. It was noted that the challenge procedure of paragraph (2) was applicable to a sole arbitrator as well as to the challenge of one or more arbitrators of a multi-arbitrator tribunal. The refusal of a sole arbitrator to resign would constitute a rejection of the challenge, making available resort to the court under paragraph (3).

130. The Commission adopted paragraph (2), subject to certain drafting suggestions which the Commission referred to the Drafting Group.

Paragraph (3)

131. Subsequently, the Commission decided to align article 13 (3) to the modified version of article 16 (3) (see below, para. 161) and replaced the period of time of fifteen days by thirty days.

132. As regards the words "which decision shall be final", the Commission was agreed that the wording was intended to mean that no appeal was available against that decision and that that understanding might be made clear by appropriate wording. Subject to those modifications, paragraph (3) was adopted by the Commission.

133. The Commission discussed whether the Model Law should provide for Court assistance for the functions envisaged in article 13 (3) even before the place of arbitration had been determined. The Commission was agreed that the Model Law could not effectively confer international competence on the court of one State to the exclusion of the competence of another State. What the Model Law could do was to

describe those cases, by using connecting factors such as the place of business of the defendant or of the claimant, in which the particular State would render the Court assistance envisaged under article 13 (3). It was pointed out, however, that there might be less need for such assistance than in the appointment process since court control on a challenge was either provided in the applicable arbitration law or, once the Model Law applied in the case, could be exercised in the setting aside proceedings under article 34.

134. In the subsequent discussion concerning the territorial scope of application of the Model Law, the Commission decided not to extend the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined. (That discussion is reported above, paras. 79-81.)

* * *

Article 14.

Failure or impossibility to act

135. The text of article 14 as considered by the Commission was as follows:

"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."

136. It was noted that article 14, unlike articles 11 and 13, did not expressly give the parties the freedom to agree on a procedure in cases of an arbitrator's inability or failure to act. It was understood, however, that the provision was not intended to preclude parties from varying the grounds which would give rise to the termination of the mandate or from entrusting a third person or institution with deciding on such termination.

137. As regards the grounds for termination set forth in the article, various suggestions were made. One suggestion was to delete the words "*de jure* or *de facto*" since they were unnecessary and a potential source of difficulty in interpretation. The Commission did not adopt the suggestion for the sake of harmony with the corresponding provision in the UNCITRAL Arbitration Rules (article 13 (2)).

138. Another suggestion was to describe more precisely what was meant by the words "fails to act", for instance, by adding such words as "with due dispatch and with efficiency" or "with reasonable speed". It was stated in reply that the criteria of speed and efficiency, while important guidelines for the conduct of an arbitration, should not be given the appearance of constituting absolute and primary criteria for assessing the value of an arbitration. It was pointed out that the criterion of efficiency was particularly inappropriate in the context of article 14 since it could open the door to court review and assessment of the substantive work of

the arbitral tribunal. There were fewer reservations to expressing the idea of reasonable speed, which was regarded as a concretization of the time element inherent in the term "failure to act".

139. While considerable support was expressed for leaving the wording of article 14 unchanged, which corresponded with the wording found in article 13 (2) of the UNCITRAL Arbitration Rules, the Commission, after deliberation, was agreed that the expression "fails to act" should be qualified by such words as "with reasonable speed". It was understood that the addition served merely to clarify the text and should not be construed as attaching to the words "fails to act" a meaning different from the one given to the wording in the UNCITRAL Arbitration Rules.

140. A proposal was made for redrafting article 14 with a view to covering also the instances of termination included in article 15, without changing the substance of those two articles. The Commission entrusted an *ad hoc* working party, composed of the representatives of India and the United Republic of Tanzania, with the task of preparing a draft of article 14.

141. The *ad hoc* working party suggested the following modified version of article 14:

"The mandate of an arbitrator terminates, if he becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act [with reasonable speed] or if he withdraws from his office for any reason or if the parties agree on the termination of his mandate. However, 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."

142. Concern was expressed in the Commission that the suggested redraft of article 14 might have changed the substance of the provision in unintended ways. In particular, it was not clear when the arbitrator's mandate terminated for his failure to act. After discussion the proposal was rejected and the original text retained with the addition of words such as "with reasonable speed", as had been previously decided.

143. In the subsequent discussion concerning the territorial scope of application of the Model Law, the Commission decided not to extend the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined. (That discussion is reported above, paras. 79-81.)

* * *

Article 14 bis

144. The text of article 14 *bis* as considered by the Commission was as follows:

"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."

145. The Commission adopted the substance of the article. It was subsequently incorporated by the Drafting Group into article 14 as new paragraph (2).

* * *

Article 15.

Appointment of substitute arbitrator

146. The text of article 15 as considered by the Commission was as follows:

"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."

147. The Commission adopted the suggestion to delete in article 15 the words "unless the parties agree otherwise" since those words might create difficulties. It was understood, however, that the party autonomy recognized in article 11 for the original appointment of an arbitrator applied with equal force to the procedure of appointing the substitute arbitrator, since article 15 referred to the rules that were applicable to the appointment of the arbitrator being replaced.

148. With reference to the cases where the place of arbitration had not yet been determined, it was observed that where it was for the claimant to appoint the substitute arbitrator and the claimant failed to do so, the rule envisaged for article 11 (i.e. competence of Court of State where defendant has place of business) might not be appropriate for the appointment of the substitute arbitrator. It was suggested that a possible solution might be to provide that assistance in the appointment of the substitute arbitrator would be rendered by the Court of the State in which the party who failed to appoint his arbitrator had his place of business, and only if the Court of that State did not render such assistance could the appointment be sought from the Court in the State where the other party had his place of business. However, according to a subsequent decision, reported above in para. 111, the applicability of article 11 was not extended to the time before the place of arbitration was determined.

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CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16.

Competence to rule on own jurisdiction

149. The text of article 16 as considered by the Commission was as follows:

"(1) The arbitral tribunal has the power to 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 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."

Paragraph (1)

150. The Commission was agreed that the words "including any objections with respect to the existence or validity of the arbitration agreement" were not intended to limit the *Kompetenz-Kompetenz* of the arbitral tribunal to those cases where a party had raised an objection. Consequently, the arbitral tribunal could decide on its own motion if there were doubts or questions as to its jurisdiction, including the issue of arbitrability.

151. As regards the power given to the arbitral tribunal in paragraph (1), concern was expressed that the provision would not be acceptable to certain States which did not grant such power to arbitrators or to those parties who did not want arbitrators to rule on their own jurisdiction. It was stated in reply that the principle embedded in the paragraph was an important one for the functioning of international commercial arbitration; nonetheless, it was ultimately for each State, when adopting the Model Law, to decide whether it wished to accept the principle and, if so, possibly to express in the text that parties could exclude or limit that power.

152. It was noted that the apparent vigor of the English words "has the power to rule" was, for example, not reflected in the French wording "*peut statuer*". The Commission, after deliberation, decided to use in all languages the less vigorous wording "may rule" without thereby intending to deviate in substance from the corresponding wording used in article 21 (1) of the UNCITRAL Arbitration Rules.

153. The Commission adopted paragraph (1) as so amended.

Paragraph (2)

154. It was stated that the third sentence of paragraph (2) was too imprecise in that it referred to the indication of the arbitral tribunal's intention to decide on a matter alleged to be beyond the scope of its authority. It was pointed out that such intention would normally be clear only when there was an award covering that matter. It was, therefore, suggested that the sentence should be replaced by a provision modelled on article V (1) of the 1961 Geneva Convention to the effect that the plea must be raised as soon as the question on which the arbitral tribunal was alleged to have no jurisdiction was raised during the arbitral proceedings.

155. It was recognized that the proposed text was more precise but also more rigid than the current text. For instance, it would cover not only those instances where there was an indication of the intention of the arbitral tribunal itself, e.g. where it requested or examined evidence relating to a matter outside its scope of authority, but also the case where one party in its written or oral statements raised such a matter. In such a case, under the proposed text the other party would have to raise his objection promptly. The concern was expressed that parties who were not sophisticated in international commercial arbitration might not realize that a matter exceeding the arbitral tribunal's jurisdiction had been raised and that they were compelled to object promptly. Moreover, it was suggested that in some cases the governing law, and therefore limitations on arbitrability of certain disputes, might not be determined until the time of award, making an earlier plea impossible. As a result, failure to raise the plea at an earlier time should not necessarily preclude its use in setting aside proceedings or in recognition and enforcement proceedings.

156. The Commission, after deliberation, adopted paragraph (2), subject to modification of the third sentence along the following lines: "A plea that the arbitral tribunal has exceeded the scope of its authority shall be raised as soon as the question on which the arbitral tribunal is alleged to have no jurisdiction is raised during the arbitral proceedings."

Paragraph (3)

157. The Commission adopted the principle underlying paragraph (3), namely that the competence of the arbitral tribunal to rule on its own jurisdiction was subject to court control. However, there was a divergence of views as to when and under what circumstances such resort to a court should be available.

158. Under one view, the solution adopted in paragraph (3) was appropriate in that it permitted such court control only in setting aside proceedings and, as should be clarified in the text, in the context of recognition and enforcement of awards. That solution was preferred to instant court control since it would prevent abuse by a party for purposes of delay or obstruction of the proceedings.

159. Under another view, paragraph (3) should be modified so as to empower the arbitral tribunal to grant leave for an appeal to the court or in some other way, for instance by making its ruling in the form of an award, permit instant court control. It was stated in support that such flexibility was desirable since it would enable the arbitral tribunal to assess in each particular case whether the risk of dilatory tactics was greater than the opposite danger of waste of money and time. As regards that possible danger, the suggestion was made to reduce its effect by providing some or all of the safeguards envisaged in the context of court control over a challenge of an arbitrator in article 13 (3), i.e. short time-period, finality of decision, discretion to continue the arbitral proceedings and to render an award.

160. Under yet another view, it was necessary to allow the parties instant resort to the court in order to obtain certainty in the important question of the arbitral tribunal's jurisdiction. Various suggestions were made for achieving that result. One suggestion was to adopt the solution found in article 13 (3) and thus to allow immediate court control in each case where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question. Another suggestion was to require the arbitral tribunal, if so requested by a party, to rule on its jurisdiction as a preliminary question, which ruling would be subject to immediate court control. Yet another suggestion was to reintroduce in the text previous draft article 17.⁸ It was pointed out that, if draft article 17 were reintroduced in the model law, it might not be necessary to adopt for the concurrent court control in article 16 (3) the strict solution which would exclude any discretion on the part of the arbitral tribunal.

161. The Commission, after deliberation, decided not to reintroduce previous draft article 17 but to provide for instant court control in article 16 (3) along the lines of the solution adopted in article 13 (3). The Commission adopted article 16 (3) in the following modified form, subject to redrafting by the Drafting Group:

"(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 determines in a preliminary ruling 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 not be subject to appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings."

⁸The text of draft article 17, which was deleted by the Working Group at its last session (A/CN.9/246, para. 52-56), was as follows:

"Article 17. *Concurrent court control*

"(1) [Notwithstanding the provisions of article 16,] a party may [at any time] request the Court specified in article 6 to decide whether a valid arbitration agreement exists and [, if arbitral proceedings have commenced,] whether the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].

"(2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay of the arbitral proceedings]."

162. The Commission decided to align article 13 (3) to that modified version of article 16 (3) and thus to replace in article 13 (3) the time-period of fifteen days by a time-period of thirty days and the expression "final" by such words as "not subject to appeal".

163. It was noted that the second sentence of article 16 (3) did not cover the case where the arbitral tribunal ruled that it had no jurisdiction. Consequently, in such a case, article 16 (3), read together with article 5, did not preclude resort to a court for obtaining a decision on whether a valid arbitration agreement existed. It was recognized that a ruling by the arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue the proceedings.

* * *

Article 18.

Power of arbitral tribunal to order interim measures

164. The text of article 18 as considered by the Commission was as follows:

"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."

165. A suggestion was made that the provision should not be retained since its scope was not clearly defined and because its was of limited practical relevance in view of the availability of enforceable interim measures by courts. Furthermore, the power granted to the arbitral tribunal could operate to the detriment of a party if it later turned out that the interim measure was not justified. Therefore, if the provision were to be retained, that risk should be reduced by enlarging the extent of the security referred to in the second sentence to cover not only the costs of such interim measure but also any possible or foreseeable damage to a party.

166. The Commission, after deliberation, decided to retain the article since it was useful in confirming that the arbitral tribunal's mandate included the faculty of ordering such measures, unless the parties had agreed otherwise. As regards the suggestion to enlarge the extent of the security which the arbitral tribunal might require from a party or the parties, the Commission was agreed that, on the one hand, any implied limitation on security for the costs of such measure should not be maintained but that, on the other hand, a reference to the damages of a party was not appropriate since the Model Law should not deal with questions relating to the basis or extent of possible liability for damages. The Commission, therefore, decided to use more general wording and to say that the arbitral tribunal might require any party to provide "appropriate security". It was pointed out that the modification should not lead to an interpretation of the words "security for the costs of such measures", as used in

article 26 (2) of the UNCITRAL Arbitration Rules, as excluding the possibility of including in the amount of such security any foreseeable damage of a party.

167. As regards the range of interim measures covered by the provision, it was observed that one of the possible measures was, under appropriate circumstances, an order relating to the protection of trade secrets and proprietary information.

168. It was noted that the range of interim measures covered by article 18 was considerably narrower than that envisaged under article 9 and that article 18 did not regulate the question of enforceability of such measures taken by the arbitral tribunal. It was observed that, nonetheless, there remained an area of overlapping and possible conflict between measures by the arbitral tribunal and by a court. Therefore, a suggestion was made that the Model Law should provide a solution for such conflicts, for instance, by according priority to the decision of the courts.

169. The Commission, after deliberation, was agreed that the Model Law should not embody a solution for such conflicts. It was stated that any such solution was a matter for each State to decide in accordance with its principles and laws pertaining to the competence of its courts and the legal effects of court decisions. It was noted, in that context, that article 9 itself neither created nor aggravated the potential of such conflict since it did not regulate whether and to what extent court measures were available under a given legal system but only expressed the principle that any request for, and the granting of, such interim measure, if available in a legal system, was not incompatible with the fact that the parties had agreed to settle their dispute outside the courts by arbitration.

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CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19.

Determination of rules of procedure

170. The text of article 19 as considered by the Commission was as follows:

"(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."

Paragraph (1)

171. Two suggestions of divergent significance were made with respect to paragraph (1). One suggestion was to make clear in the model law that the freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceedings. The other suggestion was to permit the parties to determine rules of procedure after the arbitrators had accepted their duties to the extent the arbitrators agreed.

172. Neither suggestion was adopted. Although the provision as it now stood implied that the parties had a continuing right to change the procedure, the arbitrators could not in fact be forced to accept changes in the procedure because they could resign if they did not wish to carry out new procedures agreed to by the parties. It was noted that the time-frame allowed for changing the procedures to be followed could be settled between the parties and the arbitrators.

Paragraph (2)

173. An observation was made that, since in some legal systems a question of admissibility, relevance, materiality and weight of evidence would be considered to be a matter of substantive law, the question arose as to the relationship between the second sentence of paragraph (2) and article 28.

174. It was understood that the objective of paragraph (2) was to recognize a discretion of the arbitral tribunal which would not be affected by the choice of law applicable to the substance of the dispute.

175. The Commission adopted paragraph (2).

Paragraph (3)

176. The Commission was agreed that the provision contained in paragraph (3) constituted a fundamental principle which was applicable to the entire arbitral proceedings and that, therefore, the provision should form a separate article 18 *bis* to be placed at the beginning of chapter V of the Model Law. That decision was tentatively made in the context of the discussion of article 22 (see below, paras. 189-194) and confirmed in a later discussion of article 19 (3).

* * *

*Article 20.
Place of arbitration*

177. The text of article 20 as considered by the Commission was as follows:

"(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."

178. A proposal was made to add to the end of the second sentence of paragraph (1) the words: "having regard to the circumstances of the arbitration, including the convenience of the parties". It was stated in support of the proposal that the venue of arbitration was of considerable practical importance and that inclusion of the convenience of the parties as a guiding factor could meet the concern felt by some persons, in particular in developing countries, that an inconvenient location might be imposed on them. It was noted that the concern was also felt in other countries.

179. Divergent views were expressed as to the appropriateness of the proposed wording. Under one view the additional words were unnecessary since they expressed a principle which was already implicit in article 19 (3). Particular opposition was expressed to the words "including the convenience of the parties". It was said to be unbalanced to mention only some circumstances to be taken into consideration by the arbitrators in determining the place of arbitration, since other factors such as the suitability of the applicable procedural law, the availability of procedures for recognition or enforcement of awards under the 1958 New York Convention or other multilateral or bilateral treaties or, eventually, whether a State had adopted the Model Law might be of at least equal importance. It was also noted that article 16 (1) of the UNCITRAL Arbitration Rules provided that in determining the place of arbitration the arbitrators were to have regard to the circumstances of the arbitration but that the convenience of the parties was not mentioned. It was suggested that a discrepancy between the two texts on that point was undesirable.

180. However, the prevailing view was that the Model Law should refer to the convenience of the parties as a circumstance of great importance in the determination of the place of arbitration in international commercial arbitration. It was understood at the same time that the convenience of the parties should be interpreted as including the above-mentioned considerations regarding the applicable procedural law and the recognition and enforcement of awards.

181. The Commission adopted article 20 as so amended.

* * *

*Article 21.
Commencement of arbitral proceedings*

182. The text of article 21 as considered by the Commission was as follows:

"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."

183. A proposal was made that had two parts. The first part would give a request which referred a dispute to arbitration the same legal effect as if the request had been filed with a court. The second part of the proposal would permit a claimant who commenced an action in court within a short period of time following receipt of a ruling by an arbitral tribunal rejecting jurisdiction or following receipt of a judgment setting aside an award to be free of the plea that the period of limitation had run.

184. It was suggested that the problem was important. The proposal would enhance the effectiveness of international commercial arbitration by providing a claimant in arbitration a degree of protection against the running of the period of limitation equivalent to that enjoyed by the plaintiff in a court proceeding. A number of legal systems had rules such as the one proposed while many legal systems did not, and uniformity in that respect would be useful. It was noted that a similar result was achieved by articles 14 (1) and 17 of the 1974 Convention on the Limitation Period in the International Sale of Goods, which had been elaborated by the Commission. Those provisions read as follows:

Article 14

"(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings."

Article 17

"(1) Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

"(2) If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended."

185. However, the prevailing view was not to include in the Model Law a provision on the proposed issues, although it was recognized that the problem existed and that a unified solution of the problem would be welcome. Such a provision touched upon issues regarded by many legal systems as matters of substantive law and might therefore be considered to be outside the scope of the Model Law. In some countries periods of limitation were to be found in a number of different statutes and, in some cases, were subject to different domestic legal rules. It would be anomalous and a source of confusion to have a special rule for the effects on the limitation period arising out of the commencement of an international commercial arbitration. As a result of those factors the elaboration of a rule of the proposed type, in order to be acceptable in different legal systems, required a close study of the issues involved, which, for lack of time, could not be undertaken during the current session.

186. It was especially for that last reason that the Commission, after deliberation, decided not to adopt the proposal. It was agreed, however, that the attention of States should be drawn to that problem of considerable practical importance with a view to inviting consideration of enacting provisions which, in harmony with the principles and norms of the given legal system, would place arbitral proceedings on equal footing with court proceedings in that respect.

187. The Commission did not adopt a proposal to include in article 21 a rule providing that in the case of arbitration administered by an arbitral institution the arbitral proceedings commenced on the date on which a request for arbitration was received by the arbitral institution. While some support was expressed for the proposal, the prevailing view was that, as a result of the wide variety of rules used by different arbitral institutions for the commencement of arbitral proceedings, including the fact that in some rules the request for arbitration need not be received by the institution, it would be difficult to formulate one approach to the issue. It was noted that, since article 21 was subject to contrary agreement by the parties, the purpose of the above proposal could be achieved by a provision in the arbitration rules, as is often found in standard rules of arbitral institutions, to the effect that the arbitral proceedings commenced on the date on which a request for arbitration was received by the arbitral institution.

* * *

*Article 22.
Language*

188. The text of article 22 as considered by the Commission was as follows:

"(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."

189. The Commission noted that the determination of the language or languages of the arbitral proceedings involved both a matter of principle and a matter of practicality. The principle, set forth in article 19 (3), was that the parties must be treated with equality and each party must be given a full opportunity of presenting his case. At the same time, it was recognized that extensive interpretation of oral proceedings and translation of written documents would increase the costs of the arbitration and, in the case of extensive translations, prolong the proceedings.

190. A proposal that article 22 should specifically provide that, failing agreement of the parties, the language or languages to be used in the proceedings should be determined by the arbitral tribunal in accordance with article 19 (3) was not accepted as being unnecessary. For the same reason the Commission did not accept a proposal to state expressly that a party had a right to express himself in his own language provided he arranged for interpretation into the language of the proceedings.

191. Yet another proposal was that the arbitral proceedings should be conducted in the languages of the parties unless the parties agreed on one language or the arbitral tribunal, on the basis of an express mandate conferred to it by the parties, determined the language of the proceedings. The proponents of that proposal suggested that, if this was not accepted, the Model Law should provide that any party whose language was not chosen as the language of the proceedings had the right of presenting his case in his language, and the costs of translation and interpretation should form part of the costs of the proceedings. However, the proposal was not accepted since it was considered to be too rigid and not capable of providing a suitable solution for the wide variety of situations which arose in practice. It was thought to be appropriate to leave the determination of the language or languages of the proceedings to the arbitral tribunal, which was in all circumstances bound by article 19 (3).

192. Noting that the word "translation" in paragraph (2) was not defined, a proposal was made that a translation should be duly certified. The proposal was not accepted on the ground that a general requirement of certification of translations would unnecessarily add to the costs of proceedings.

193. It was noted that where proceedings were to be conducted in more than one language, it might be reasonable and not prejudicial to the interests of the parties if a document was translated into only one of the languages of the proceedings. Consequently, it was proposed that article 22 should provide expressly that it would not be *per se* contrary to the Model Law if in a multi-language arbitration the arbitral tribunal decided that a particular document did not have to be translated into all the languages of the proceedings. While the Commission was of the view that such cost-saving practices were not prohibited by article 22, it referred to the Drafting Group the question whether the text expressed that view with sufficient clarity.

194. The Commission adopted article 22, subject to the review by the Drafting Group as indicated in the previous paragraph. In order to emphasize the fundamental nature of the principles embodied in article 19 (3) and to clarify that they governed all aspects of the arbitral proceedings, it was agreed that the paragraph should be presented in a separate article.

* * *

Article 23.

Statements of claim and defence

195. The text of article 23 as considered by the Commission was as follows:

"(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."

Paragraph (1)

196. The Commission was agreed that paragraph (1) expressed a basic principle of arbitral procedure from which the parties should not be able to derogate but that the specific rules of procedure in respect of the statements of claim and defence should be subject to the agreement of the parties. It was pointed out that the procedure provided in paragraph (1) was not entirely consistent with the procedure in some institutional arbitration rules. The Commission decided to express the distinction between the mandatory nature of the principle expressed in paragraph (1) and the non-mandatory nature of the procedural rules by adding to the end of the first sentence words along the lines of "unless the parties have otherwise agreed on the contents and form of such statements".

197. It was also noted that the verb "annex" contained in the second sentence of paragraph (1) might be interpreted to require a statement of claim or defence always to be in writing. The Commission, being in agreement that that was not the intended interpretation, referred the matter to the Drafting Group.

Paragraph (2)

198. Different views were expressed as to the power of the arbitral tribunal to allow an amendment of a statement of claim or defence. Under one view, the parties should not be prevented from amending their statements of claim or defence since any limitation in that respect would be contrary to their right to present their case. Under that view a full stop should be placed after the words "arbitral proceedings". Recognizing that a late amendment might cause delay in the proceedings, it was suggested that the appropriate way of dealing with the problem was by apportioning the costs of the proceedings or by deciding on the issues presented in good time in a partial award and postponing the settlement of the remaining issues.

199. However, under the prevailing view the arbitral tribunal should have a power not to allow amendments to the statement of claim or defence under certain circumstances. Several views were expressed as to how the scope of that power should be delimited. Under one view, which received considerable support, the entire text of paragraph (2) should be retained because it provided appropriate guarantees against delay in arbitral proceedings while allowing sufficient flexibility in justified cases. Under another view, the words "any other circumstances" were too vague and should either be replaced by the words "any other relevant circumstances" or deleted. Under yet another view, the desired precision could be achieved only by deletion of the words "or prejudice to the other party" as well since it was not clear what kind of prejudice was meant.

200. The Commission adopted the latter view and decided to delete the words "or prejudice to the other party or any other circumstances".

Counter-claim

201. A suggestion was made to add a provision, either in article 23 or in another appropriate place, that any provision of the Model Law referring to the claim would apply, *mutatis mutandis*, to a counter-claim. It was agreed that the Commission would consider the matter after it had completed its consideration of the entire draft Model Law. The subsequent decision in respect of counter-claims is reflected below in para. 327.

* * *

Article 24.

Hearings and written proceedings

202. The text of article 24 as considered by the Commission was as follows:

"(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 stage 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."

Paragraphs (1) and (2)

203. The Commission noted that article 24 dealt with the issue of the mode of arbitral proceedings as a

matter of principle and did not deal with the procedural aspects of deciding that issue. For example, the article did not deal with the question of the point of time when the arbitral tribunal would have to decide on the mode of the arbitral proceedings. That meant that the arbitral tribunal was free to decide that question at the outset of the proceedings, or it could postpone the determination of the mode of the proceedings and make such determinations in the light of the development of the case. Before so deciding the arbitral tribunal would normally request the parties to express their view or possible agreement on the question. The article also did not deal with, and therefore did not limit, the power of the arbitral tribunal to decide on the length of oral hearings, on the stage at which oral hearings could be held, or on the question whether the arbitral proceedings would be conducted partly on the basis of oral hearings and partly on the basis of documents. It was noted that such procedural decisions were governed by article 19, including its paragraph (3).

204. The Commission was agreed that an agreement by the parties that oral hearings were to be held was binding on the arbitral tribunal.

205. As to the question whether an agreement by the parties that there would be no oral hearings was also binding, different views were expressed. Under one view, the right to oral hearings was of such fundamental importance that the parties were not bound by their agreement and a party could always request oral hearings. Under another view, the agreement of the parties that no oral hearings would be held was binding on the parties but not on the arbitral tribunal so that the arbitral tribunal, if requested by a party, had the discretion to order oral hearings. However, the prevailing view was that an agreed exclusion of oral hearings was binding on the parties and the arbitral tribunal. Nevertheless, it was noted that article 19 (3), requiring that each party should be given a full opportunity to present his case, might in exceptional circumstances provide a compelling reason for holding an oral hearing. It was understood that parties who had earlier agreed that no hearings should be held were not precluded from later modifying their agreement, and thus to allow a party to request oral hearings.

206. The Commission was agreed that where there was no agreement on the mode of the proceedings a party had a right to oral hearings if he so requested. In that connection it was noted that the French version of paragraph (2) reflected that view while according to other versions of that paragraph the arbitral tribunal retained the discretion whether to hold oral hearings even if requested by a party.

207. The Commission was also agreed that where there was no agreement on the mode of the proceedings, and no party had requested an oral hearing, the arbitral tribunal was free to decide whether to hold oral hearings or whether the proceedings would be conducted on the basis of documents and other materials.

208. The Commission referred the implementation of its decisions to the Drafting Group.

209. During consideration of the second sentence of article 24 (1), as presented by the Drafting Group, which read as follows: "However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall, if so requested by a party at an appropriate stage of the proceedings, hold such hearings", the question was raised whether "at an appropriate stage" should refer to the request or to the proceedings. After discussion the Commission decided to re-word the sentence as follows: "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."

Paragraph (3)

210. The Commission was agreed that the words "for inspection purposes" were meant to include the inspection of goods, other property, or documents as referred to in article 20 (2), and that that should be made clear in the text. Subject to that modification, paragraph (3) was adopted.

Paragraph (4)

211. The Commission agreed with the first sentence of paragraph (4) that all documents supplied to the arbitral tribunal by one party, regardless of their nature, had to be communicated to the other party. However, the Commission was agreed that in the second sentence of paragraph (4) it should be made clear that such documents as research material prepared or collected by the arbitral tribunal did not have to be communicated to the parties. The Drafting Group was invited to consider whether that result should be achieved by deletion of the words "or other document".

* * *

Article 25. Default of a party

212. The text of article 25 as considered by the Commission was as follows:

"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."

213. The Commission agreed that the text of article 25 should make it clear that in order for the party in default to escape the consequences of article 25, he should show to the arbitral tribunal sufficient cause for

his failure to act as required. It was thought that the text was already sufficiently clear that the sufficient cause for the delay had to exist before the time the action was due. However, as to the point of time when sufficient cause was to be shown to the arbitral tribunal, it was thought that, although it was clear from the article that the question whether there was sufficient cause for the failure had to be settled before the arbitral tribunal decided on a consequence of default, a definition of a point of time in the text would be difficult and would unnecessarily interfere with the discretion of the arbitral tribunal to assess the cause for delay and to extend the period of time when the party must communicate a statement or produce evidence.

214. It was suggested that subparagraph (b) should not be interpreted as meaning that the arbitral tribunal would have no discretion as to how to assess the cause of the failure to communicate the statement of defence as required and that it would be precluded from drawing inferences from such failure. The Commission was agreed that the correct interpretation should be made clear in subparagraph (b) by using an expression such as "without treating such failure in itself . . .".

215. A proposal was made to restrict the discretion of the arbitral tribunal in subparagraph (c) by obliging it to continue the arbitral proceedings if the party not in default so requested. The Commission did not adopt the proposal on the ground that an obligation to continue the arbitral proceedings might be seen as a restriction of the discretion of the arbitral tribunal in assessing whether there was sufficient cause for a party's failure to appear at a hearing or to produce documentary evidence.

216. The Commission adopted article 25, subject to the amendments to the opening words of the article and to subparagraph (b), which were referred to the Drafting Group.

* * *

Article 26. Expert appointed by arbitral tribunal

217. The text of article 26 as considered by the Commission was as follows:

"(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."

218. A proposal was made to amend the opening words of paragraph (1) to read: "Unless otherwise agreed by the parties before an arbitrator is appointed, . . .". Under one view the proposal was desirable since it might be of great importance to a person when asked to serve as an arbitrator whether the arbitral tribunal would be empowered to order an expertise. The rules under which the arbitrators would be expected to function should be clear to them from the beginning.

219. However, under the prevailing view the parties should always have the right to decide that the arbitral tribunal was not free to appoint experts. Even though the parties could be expected to have confidence in the arbitrators they had named to settle their dispute, they might not have confidence in the expert or experts that the arbitral tribunal proposed to appoint. Moreover, the appointment of experts might increase the costs of the arbitration beyond the amount the parties were willing to spend. If the joint refusal of the parties to permit the arbitral tribunal to appoint an expert was of such importance to the arbitrators, they were free to resign. If such resignation was a likely result, it could be assumed that the parties would carefully consider their decision and the risk that the money already spent on the arbitration would be wasted. Since article 26 represented a compromise between the common law system of adjudication in which appointment of experts by the court or tribunal was not usual and the civil law system in which such appointments were common, the balance of the compromise should not be disturbed.

220. A proposal to delete the words "Unless otherwise agreed by the parties," was not retained.

221. The Commission adopted article 26.

* * *

Article 27.

Court assistance in taking evidence

222. The text of article 27 as considered by the Commission was as follows:

"(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."

Paragraph (1)

223. The commission was in agreement that, in conformity with a general decision previously taken, the scope of application of the article should be limited territorially. Subject to drafting changes called for as a result of the decision yet to be taken on the specific text in regard to territorial scope of application of the Model Law as a whole, the Commission decided to delete the words "or under this Law".

224. Subsequently, in light of the decision to adopt the text of article 1 (1 *bis*) (see above, para. 81), the Commission also decided to delete the words "held in this State" as being unnecessary since, except as provided in that article, the entire Model Law applied only to arbitral proceedings held in "this State".

225. The Commission was also in agreement that the question of international assistance in the taking of evidence in arbitral proceedings should not be governed by the Model Law. It noted that the Hague Conference on Private International Law was studying the possibility of preparing a protocol to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters to extend its application to arbitral proceedings and that the Hague Conference would be interested in the views of arbitration experts whether such a protocol would be desirable.

226. The Commission did not adopt a proposal to limit paragraph (1) to an indication that a competent court might be requested to assist in taking evidence without referring to whether it was the arbitral tribunal or the parties who might make the request to the court. It was noted that the current provision was a compromise between those legal systems in which only the arbitral tribunal might request the court for assistance and those legal systems in which a party might request the court for assistance. In the current text either the arbitral tribunal or a party might request such assistance, but in the latter case only if the arbitral tribunal approved.

227. It was noted that paragraph (1) indicated only the court to which the request should be addressed, but that the routing by which that request should reach the court would be determined by local procedures. An observation was made that States adopting the Model Law might wish to entrust the functions of court assistance in taking evidence to the court or other authority specified in article 6 and that that should be reflected by appropriate drafting.

228. The Commission decided to delete the second sentence of paragraph (1), including subparagraphs (a), (b) and (c), on the grounds that they entered into excessive detail that did not need to be expressed in the Model Law.

229. The Commission did not adopt a proposal to add a new provision to the effect that, where evidence was possessed by a party and the party refused to comply with an order to produce it, the arbitral tribunal should be expressly empowered to interpret the refusal to that party's disadvantage. It was suggested, and not contradicted in the Commission, that such a provision was unnecessary since the arbitral tribunal already had that power, particularly under article 25 (c).

Paragraph (2)

230. The Commission decided to place a full stop after the words "execute the request" and to delete the remainder of the sentence. It was felt that there was no need to indicate the manner in which the court should execute the request. Moreover, in some countries it would be difficult to imagine the court ordering that the evidence be provided directly to the arbitral tribunal.

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CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28.

Rules applicable to substance of dispute

231. The text of article 28 as considered by the Commission was as follows:

"(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."

Paragraphs (1) and (2)

232. In the discussion on paragraph (1), the Commission was divided on the question whether the Model Law should recognize the right of the parties to subject their legal relationship to "rules of law". Under one view, the Model Law should recognize that right of the parties since it was not appropriate in international commercial arbitration to limit the freedom of the parties to choosing the law of a given State. While recognizing the novel and imprecise character of the term "rules of law", which to date had been adopted only in one international convention and two national laws, it was stated in support that it would provide the necessary flexibility to allow parties in international commercial transactions to subject their relationship to those rules of law which they regarded as the most suitable ones for their specific case. It would enable them, for example, to choose provisions of different laws to govern different parts of their relationship, or to

select the law of a given State except for certain provisions, or to choose the rules embodied in a convention or similar legal text elaborated on the international level, even if not yet in force or not in force in any State connected with the parties or their transaction. It was pointed out that, as regards any interest of the State where the arbitration took place, to recognize such freedom was not essentially different from allowing the designation of the law of a State which was in no way connected with the parties or their relationship. Furthermore, since article 28 (3) permitted the parties to authorize the arbitral tribunal to decide *ex aequo et bono* (as *amiable compositeur*), there was no reason to deny the parties the right to agree on rules of law which offered more certainty than the rules to be applied in an *ex aequo et bono* arbitration.

233. Under another view, article 28 (1) should limit itself to providing that a dispute shall be decided in accordance with the law chosen by the parties. That was in line with the solution adopted in many international texts on arbitration (e.g. 1961 Geneva Convention, 1966 ECAFE Rules for International Commercial Arbitration and Standards for Conciliation, 1976 UNCITRAL Arbitration Rules, 1975 ICC Rules). That traditional approach provided a greater degree of certainty than the novel and ambiguous notion of "rules of law", which might cause considerable difficulties in practice. It was not appropriate for a model law designed for universal application to introduce a concept which was not known in, and unlikely to be accepted by, many States. Furthermore, it was stated that the right to select provisions of different laws for different parts of the relationship (the so-called *dépeçage*) was recognized by most legal systems even under the more traditional approach; if there was a need for clarification on that point, the report should express the understanding of the Commission that such a right was included in the freedom of the parties to designate the law applicable to the substance of the dispute.

234. In the light of that discussion the Commission decided to amend the first sentence of paragraph (1) to read as follows: "The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute." It was agreed that the formulation would allow parties to designate portions of the legal systems from different States to govern different aspects of their relationship. It was also agreed to state in the report that States when enacting the model law were free to give the term "law" a wider interpretation. It was understood that parties might agree in their contracts to apply rules such as those in international conventions not yet in force.

235. As regards the second sentence of paragraph (1), it was agreed that the rule of interpretation of the parties' designation of the law of a given State was useful in that it made clear that, unless otherwise expressed in such agreement, the dispute was to be decided in accordance with the substantive law of that State and not by the substantive law as determined by the conflict of laws rules of that State.

236. In the subsequent discussion on paragraph (2), views were divided as to whether the arbitral tribunal should be required to apply conflict of laws rules which it considered applicable in order to determine the substantive law to be applied or whether it could directly determine the applicable law it considered appropriate in the particular case. Under one view, the Model Law should provide guidance to the arbitral tribunal by providing that the applicable law was to be determined by a decision on the applicable conflict of laws rules. It was noted that, although a court, under the Model Law and most national laws, could not review the decision of the arbitral tribunal on the conflict of laws rules and consequently on the applicable substantive law, a desirable effect of the rule contained in paragraph (2) was that the arbitral tribunal would be expected to give reasons for its decision on the choice of the conflict of laws rule. Furthermore, that approach would provide the parties with a greater degree of predictability or certainty than the approach of allowing the arbitral tribunal to determine directly the law applicable to the substance of the dispute.

237. Under another view, it was not appropriate to limit the power of the arbitral tribunal to decide on the law applicable to the substance of the dispute by requiring it to decide first on an existing conflict of laws rule. In practice an arbitral tribunal did not necessarily first decide on conflict of laws rules but often arrived at a decision on substantive law by more direct means. It was suggested that it would not be appropriate for a model law on international commercial arbitration to disregard such practices which developed on the basis of a broad scope of party autonomy recognized in many legal systems. Furthermore, it was doubtful whether the requirement of applying first a conflict of laws rule would, in fact, provide a higher degree of certainty than a direct determination of the governing law since, on the one hand, the conflict of laws rules often differed from one legal system to another and since, on the other hand, the reasons which led the arbitral tribunal to select the appropriate applicable law were often similar to the connecting factors used in conflict of laws rules. It was also pointed out that the freedom of the arbitral tribunal under paragraph (2) should not be narrower than the one accorded to the parties under paragraph (1).

238. In view of the division of views on paragraphs (1) and (2), it was suggested that article 28 might be deleted since it was not necessary for a law on arbitral procedure to deal with the law relative to the substance of the dispute. Moreover, since the Model Law did not provide for court review of an award on the ground of wrong application of article 28, it served as little more than a guideline for the arbitral tribunal. However, there was wide support in the Commission for retaining article 28. It was pointed out that the Model Law would be incomplete without a provision on rules applicable to the substance of disputes, particularly in view of the fact that the Model Law dealt with international commercial arbitration where a lack of rules on that issue would give rise to uncertainty.

239. The Commission, after deliberation, decided to reverse its previous decision in respect of paragraph (1) and to adopt the original texts of paragraphs (1) and (2).

Paragraph (3)

240. The Commission adopted the text of paragraph (3).

New paragraph to be added to article 28

241. The Commission decided to include in article 28 a provision modelled on article 33 (3) of the UNCITRAL Arbitration Rules as follows: "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."

Freedom to authorize third person to determine applicable law

242. The Commission recalled a suggestion made in the context of article 2 (c) that the freedom of the parties to authorize a third person to determine a certain issue did not extend to the determination of the rules of law applicable to the substance of the dispute (see above, para. 40). It was agreed to make clear that article 2 (c) did not apply to article 28.

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Article 29.

Decision-making by panel of arbitrators

243. The text of article 29 as considered by the Commission was as follows:

"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."

244. It was suggested that article 29 should empower a presiding arbitrator, if no majority could be reached, to decide as if he were a sole arbitrator. The Commission did not adopt the suggestion since it might, under certain circumstances, lend itself to precluding the other members of the arbitral tribunal from having an appropriate influence on the decision-making. It was noted that parties who preferred that solution were free to agree thereon, since the provision was of a non-mandatory character.

245. The Commission decided to express in the second sentence of article 29 that a decision of the arbitral tribunal to authorize a presiding arbitrator to decide questions of procedure had to be unanimous. Subject to that modification, which was referred to the Drafting Group, the Commission adopted article 29.

246. It was noted that it was implicit in the Model Law that, subject to contrary agreement, arbitrators might

make decisions without necessarily being present at the same place.

* * *

Article 30. Settlement

247. The text of article 30 as considered by the Commission was as follows:

"(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."

248. A proposal was made to delete, in paragraph (1), the words "and not objected to by the arbitral tribunal". It was stated in support that if the parties wanted their settlement to be in the form of an award, rendering it enforceable as an award under the 1958 New York Convention or other applicable procedures, the arbitral tribunal should not be able to disagree.

249. It was stated in reply that a distinction should be drawn between the right of the parties to have the arbitral proceedings terminate as a result of their settlement and their right to have their settlement recorded as an award. It was pointed out that arbitrators should not be forced to attach their signatures to whatever settlement the parties have reached since the terms of such settlement might, in exceptional cases, be in conflict with binding laws or public policy, including fundamental notions of fairness and justice. Furthermore, even if the words were deleted, arbitrators who felt sufficiently strongly that they should not record the settlement in the form of an award might resign. After discussion, the proposal was not adopted.

250. Another proposal was that the request to record the settlement as an award needed to be made by only one of the parties. The Commission, after deliberation, was agreed that there must be the dual will of the two parties that the settlement be recorded as an award, but that the formal request needed to be made by only one of them.

* * *

Article 31. Form and contents of award

251. The text of article 31 as considered by the Commission was as follows:

"(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."

Paragraphs (1) and (2)

252. Paragraphs (1) and (2) were adopted.

Paragraph (3)

253. Various views were expressed in respect of a proposal made to amend the second sentence of paragraph (3) to read "The award shall be deemed to have been made at that place and on that date." Under one view the amendment was desirable because it would make the second sentence consistent with the first sentence. Moreover, the date of the award might be significant in a number of different contexts. Since an award might be circulated among the arbitrators by mail for their signature, it might be difficult to know the date of the award. The only date that could be certain was the date on the award, even if that date was a deemed date.

254. Under another view there was a basic difference between the place stated on the award being deemed to be the place of the award and the date stated on the award being deemed to be the date of the award. The former is an irrebuttable presumption to assure the territorial link between the award and the place of arbitration. The latter must be rebuttable, since the arbitrators, as well as the parties, might have reasons for stating the date of the award to be earlier or later than the date it was actually rendered.

255. The Commission, after discussion, did not adopt the proposal.

Date on which award becomes binding

256. It was observed that according to article 36 (1) (a) (v) of the Model Law and article V (1) (e) of the 1958 New York Convention, recognition or enforcement of an award might be refused if the award had not yet become binding on the parties and that article 35 (1) in dealing with the binding nature of an award did not specify the moment when an award became binding. In the light of that observation it was proposed that the Model Law should define that moment. The Commission considered the following three variants of a possible rule: an arbitral award becomes binding on the parties as of (a) the date on which the award is made, (b) the date on which the award is delivered to the

parties, or (c) the date on which the period of time for making an application for setting aside the award expires.

257. There was general approval of the idea that it would be useful to have such a provision, although some doubt was raised as to whether it was necessary. In that regard it was pointed out that under article 34 (3) the setting aside procedure already specified that it was the date on which the party making the application received the award that commenced the three-month period after which application for setting aside could not be made. There was little agreement as to the date on which the award should become binding. The previous discussion had demonstrated the difficulties of relying either on the date stated on the award or the date of the award. As regards the date on which one or both parties were notified of the award, the practical difficulties of establishing that date in the various factual situations arising in arbitration were described. Moreover, it was difficult to conceive of an award becoming binding on the parties on different dates simply because they were notified of it on different dates.

258. After discussion the Commission did not adopt the proposal.

Res judicata

259. A proposal was made to include in article 31 a provision clarifying that the award made in the form provided in article 31 had the effect of *res judicata*. While not disagreeing with the general principle that awards were binding on the parties, the Commission did not adopt the proposal because it was considered that the term *res judicata* was a complex one which could have different applications in various legal systems.

* * *

Article 32.

Termination of proceedings

260. The text of article 32 as considered by the Commission was as follows:

"(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)."

261. The Commission decided to move the reference to the agreement of the parties from paragraph (1) to paragraph (2) so as to make clear that such agreement was a basis for the arbitral tribunal's order for the termination of the arbitral proceedings.

262. Concern was expressed that paragraph (2) (a) might operate unfairly against a claimant in that he might be forced to continue participation in arbitral proceedings although he had good reasons for withdrawing his claim. It was stated in reply that the provision was balanced in that it enabled the arbitral tribunal to meet such concern in a particular case and, in appropriate circumstances, to meet the possible concern of a respondent that the claimant might withdraw his claim at a late stage of the proceedings and then compel the respondent to participate in other proceedings.

263. The Commission was agreed that paragraph (2) (b) should express more clearly that its intended meaning was that the arbitral tribunal had to make a judgement whether the continuation of the arbitral proceedings was unnecessary or inappropriate, but that, when the arbitral tribunal found continuation of the proceedings to be unnecessary or inappropriate, it had to issue an order for termination. The Commission was also agreed that the word "inappropriate" in paragraph (2) (b) might be seen as giving too much discretion to the arbitral tribunal and that it should be replaced by a word of a more precise meaning such as "impossible".

264. The Commission adopted article 32, subject to the above modifications which were referred to the Drafting Group.

* * *

Article 33.

Correction and interpretation of awards and additional awards

265. The text of article 33 as considered by the Commission was as follows:

"(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 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. 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 or to an additional award."

266. Divergent views were expressed in respect of a proposal to delete subparagraph (1) (b). Under one view, the provision granting either party the right to request an interpretation of a specific point or of a part of the award might permit parties to open new proceedings in the guise of an interpretation or be used as a means for the losing party to harass the arbitral tribunal. During the period when a request for interpretation might be made and until the interpretation of the award had been given by the arbitral tribunal, the finality of the award was disturbed and some questions were raised as to the interrelationship with setting aside proceedings by the losing party or enforcement proceedings by the winning party.

267. Under another view it would be too rigid not to allow for some procedure of interpretation of the award by the arbitral tribunal. The award might have been written in a language other than the mother tongue of its drafter, increasing the possibility of ambiguity. If the award was too ambiguous, it might be difficult to enforce it.

268. Several suggestions were made for modification of the provision. It was suggested that, since the word "interpretation" might imply too broad a power to re-examine the dispute, the word "interpretation" might be replaced by "clarification". It was also suggested that an interpretation of only the motives of the award but not its dispositive portion might be allowed. Yet another suggestion was that interpretation of the award by the arbitral tribunal should be allowed only if both parties requested the interpretation.

269. The Commission, after discussion, decided that a request for interpretation might be made only if so agreed by the parties.

270. The Commission adopted the suggestion that the words "if it considers the request to be justified", found in paragraph (3), should also be added to paragraph (1).

271. The Commission was of the view that it was not necessary to indicate any procedural details for the interpretation procedure other than that the other party must be notified of the request. It was noted that article 19 (3), especially if it was set out as a separate article,

would give the basis for assuring procedural regularity and fairness to the parties.

* * *

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34.

Application for setting aside as exclusive recourse against arbitral award

272. The text of article 34 as considered by the Commission was as follows:

"(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."

273. The Commission was agreed that the Model Law should regulate the setting aside of arbitral awards and decided to retain provisions along the lines of article 34.

Paragraph (1)

274. The Commission adopted the principle underlying paragraph (1) to provide for one exclusive type of recourse against an arbitral award. It was understood that the application for setting aside was exclusive in the sense that it constituted the only means for actively attacking the award. A party was not precluded from defending himself by requesting refusal of recognition or enforcement in proceedings initiated by the other party.

275. An observation was made that the words "Recourse to a court" were too vague and that they might be made more precise by adding such words as "competent for arbitration matters".

276. As regards the words placed between square brackets "[in the territory of this State] [under this Law]", it was noted that they addressed the question of the territorial scope of application which the Commission had discussed at an earlier stage (see above, paras. 72-81). In conformity with the clearly prevailing view, the Commission was agreed that the Court of the given State, which enacted the Model Law, was competent for setting aside those awards made in its territory. It was agreed to determine at a later stage, when the final wording of a general provision on the territorial scope of application of the Model Law would be considered, whether the territorial restriction should be expressed in article 34 or whether the general provision sufficed. Subsequently, in light of the adoption of article 1 (1 *bis*) containing a general provision on the territorial scope of application of the Model Law (see above, para. 81), the Commission decided that an expression of the territorial restriction in article 34 was not necessary. It was noted that the adoption of the so-called strict territorial criterion did not preclude parties from selecting the procedural law of a State other than that of the place of arbitration, provided that the selected provisions were not in conflict with the mandatory provisions of the (Model) Law in force at the place of arbitration.

Paragraph (2)

Concern about restrictive list of grounds

277. Concern was expressed that the list of grounds on which an award may be set aside under paragraph (2) might be too restrictive to cover all cases of procedural injustice where annulment was justified. To illustrate the point, it was questioned whether the following cases were covered by any of the grounds set forth in article 34 (2), more specifically subparagraphs (a) (ii) and (iv), read together with article 19 (3), or subparagraph (b) (ii): 1. the award was founded on evidence which was proved or admitted to have been perjured; 2. the award was obtained by corruption of the arbitrator or of the witnesses of the losing party; 3. the award was subject to a mistake, admitted by the arbitrator, of a type which did not fall within article 33 (1) (a); 4. fresh evidence had been discovered that could not have been discovered by the exercise of due diligence during the arbitral proceedings, which demonstrated that through no fault on the part of the arbitrator the award was fundamentally wrong. It was suggested that, unless the Commission was agreed that such serious instances of procedural injustice were covered by paragraph (2) and the understanding was clearly reflected in the report of the session and any commentary on the final text, the provision should be modified by appropriate wording so as to cover those instances.

278. Another suggestion was to make the list of grounds non-exhaustive so as to allow for future inclusion of worthy cases which might not be foreseeable by the Commission.

279. The Commission postponed its consideration of the above concern and suggestions until after it had examined the grounds set forth in paragraph (2). As fully discussed during that later consideration (see below, paras. 298-302) and known from the deliberations of the Working Group, there were divergent opinions on whether or to what extent the concern was met by the existing text or should be met by additional wording. One view was, for example, that only some and not all of the grounds presented in the above illustrative cases justified setting aside an award.

Subparagraph (a) (i)

280. As regards the first ground set forth in the subparagraph, it was suggested that the wording, which was taken from article V (1) (a) of the 1958 New York Convention, was unsatisfactory in two respects. First, the reference to "the parties" was inappropriate since it sufficed that one of the parties lacked the capacity to conclude an arbitration agreement. Second, the words "under the law applicable to them" were inappropriate in that they appeared to contain a conflict of laws rule which in fact was either incomplete or misleading in that the rule might be understood as referring to the law of the nationality, domicile or residence of the parties. It was, therefore, proposed to modify the wording of the first ground along the following lines: "a party to the arbitration agreement referred to in article 7 lacked the capacity to conclude such an agreement".

281. In response to that proposal, it was stated that it was unnecessary and even dangerous to deviate from the wording embodied in the 1958 New York Convention and other international texts on arbitration such as the 1961 Geneva Convention. It was unnecessary since the original wording did not appear to have led to considerable difficulties or disparities and certainly had not led in general to an interpretation different from the one aimed at by the proposed clarification. The deviation was dangerous in that it might lead to divergent interpretations, based on the different wordings, in an issue which should be dealt with in a uniform manner.

282. The Commission, after deliberation, decided to adopt the proposal. It was noted that in the context of article 34 the need for harmony with the 1958 New York Convention was less strong than in the context of article 36.

283. As regards the second ground set forth in subparagraph (a) (i), a proposal was made to substitute the words "or there is no valid arbitration agreement" for the words "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". It was pointed out that the conflict of laws rule contained in that latter wording, which was taken from the 1958 New York Convention, was inappropriate in that it declared as applicable, failing a choice of law by the parties, the law of the place of arbitration. The place of arbitration, however, was not necessarily connected with the subject-matter of the dispute. It was unjustified to let the law of that State determine the issue with global effect, which would be the effect of a setting aside by virtue of article 36 (1) (a) (v) of the Model Law or article V (1) (e) of the 1958 New York Convention; it was also said that such a result would be in conflict with a modern trend to determine the issue in accordance with the law of the main contract.

284. It was stated in reply that it was preferable to retain the present text not simply because it was the wording of the 1958 New York Convention but also because the rule was in substance a sound one. It was pointed out that the rule recognized party autonomy, which was important in view of the fact that some legal systems applied the *lex fori*. Furthermore, to use the place of arbitration as a secondary criterion was beneficial in that it provided the parties with a degree of certainty which was lacking under the proposed formula. There were also doubts as to whether in fact a trend could be discerned in favour of determining the question of the validity of the arbitration agreement according to the law of the main contract.

285. The Commission, after deliberation, did not adopt the proposal. Accordingly, subparagraph (a) (i) was adopted in its original form, subject to modifying the first ground along the following lines: "a party to the arbitration agreement referred to in article 7 lacked the capacity to conclude such an agreement".

Subparagraph (a) (ii)

286. The Commission decided to replace in subparagraph (a) (ii) the words "appointment of the arbitrator(s)" by the words "appointment of an arbitrator". It was understood that in arbitral proceedings with more than one arbitrator, failure to give proper notice of the appointment of any one of them constituted a ground for setting aside an award.

287. As regards the ground that a party "was otherwise unable to present his case", it was suggested that the wording should be aligned with that used in article 19 (3). The Commission accepted the suggestion but postponed its implementation until after a decision was reached in respect of article 19 (3). It was suggested, in that connection, that the alignment, coupled with the inclusion of the second principle embodied in article 19 (3), could go a long way towards meeting the above expressed concern about the restrictive list of grounds contained in paragraph (2) (see above, para. 277). (See, however, below, para. 302.)

Subparagraph (a) (iii)

288. In the context of the discussion of the subparagraph, a suggestion was made to clarify, either in that article or in article 16, that a party who had failed to raise a plea as to the jurisdiction of the arbitral tribunal in accordance with article 16 (2) would be precluded from relying on such objection in setting aside proceedings. It was noted that the same question of preclusion or waiver arose with regard to other grounds set forth in article 34 (2) (a), in particular subparagraph (a) (i). It was recognized that the failure to raise such plea could not have the effect of a waiver in all circumstances, especially where the plea under subparagraph (2) (b) was that the dispute was non-arbitrable or that the award was in conflict with public policy.

289. The Commission decided not to embark on an in-depth discussion with a view to elaborating a comprehensive provision covering all eventualities and details. It was agreed not to modify the text and, thus, to leave the question to the interpretation, and possibly regulation, by the States adopting the Model Law.

Subparagraph (a) (iv)

290. As regards the standards set forth in the subparagraph, it was understood that priority was accorded to the agreement of the parties. However, where the agreement was in conflict with a mandatory provision of "this Law" or where the parties had not made an agreement on the procedural point at issue, the provisions of "this Law", whether mandatory or not, provided the standards against which the composition of the arbitral tribunal and the arbitral procedure were to be measured. The Commission requested the Drafting Group to consider whether that understanding was clearly expressed by the current wording of the subparagraph.

Subparagraph (b) (i)

291. Divergent views were expressed as to the appropriateness of the provision. Under one view, the provision should be deleted since it declared as applicable to the question of arbitrability the law of the State where the award was made. That solution was not appropriate in view of the fact that the place of arbitration might not be connected in any way with the transaction of the parties or the subject-matter of their dispute. The solution was not acceptable in the context of article 34 since a decision to set aside the award had effect *erga omnes*.

292. Under another view, the provision should be retained without that or any other conflict of laws rule. It was stated in support that, while the conflict of laws rule set forth in the provision was not appropriate, non-arbitrability had to be maintained as a ground for setting aside. It was noted that, if the entire subparagraph (b) (i) were deleted, the question of arbitrability would, in certain legal systems, be regarded as a matter concerning the validity of the arbitration agreement (under subparagraph (a) (i)) and by others as a matter of public policy of "this State" under subparagraph (b) (ii).

293. Under yet another view, the provision should be retained in its current form. It was stated in support that deletion of the entire provision or of the conflict of laws rule would be contrary to the need for predictability and certainty in that important issue. It was noted that parties could in fact achieve that goal by selecting a suitable place of arbitration and, thus, the governing law.

294. The Commission, after deliberation, adopted the latter view and retained the provision in its current form.

Subparagraph (b) (ii)

295. It was proposed that the provision should be deleted since the term "public policy" was too vague and because it did not constitute a justified ground for setting aside, while it might be appropriate in the context of article 36.

296. In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was noted, however, that in some common law jurisdictions that term might be interpreted as not covering notions of procedural justice while in legal systems of civil law tradition, inspired by the French concept of "*ordre public*", principles of procedural justice were regarded as being included. It was observed that the divergence of interpretation might have contributed to the above expressed concern that the list of reasons in paragraph (2) did not cover all serious instances of procedural injustice (see above, para. 277).

297. The Commission, after deliberation, was agreed that the provision should be retained, subject to

deletion of the words "or any decision contained therein", which were superfluous. It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

Suggestions for widening the scope of paragraph (2)

298. After having examined the grounds contained in paragraph (2), the Commission continued its consideration of the above concerns and suggestions as to the restrictive list of grounds (above, paras. 277-278). It was agreed that the list of grounds should retain its exclusive character for the sake of certainty.

299. Thus, considering whether any ground should be added, divergent views were expressed as to the need for such addition. Under one view, there was a need for adding wording to subparagraph (a) (ii) which would cover instances of serious departure from fundamental principles of procedure. Under another view, there was a need for establishing a separate régime, providing for a considerably longer period of time than the one set forth in article 34 (3), for such cases as fraud or false evidence which had materially affected the award.

300. Under yet another view, there was no need for any addition in view of the understanding agreed to by the Commission as regards the ground set forth in subparagraph (b) (ii). In reply to the suggestion for allowing a considerably longer period of time in which to apply for setting aside an award on the grounds of fraud, or that evidence was false or discovered only later, it was stated that such extension was contrary to the need for speedy and final settlement of disputes in international commercial relationships.

301. The Commission, after deliberation, decided to incorporate in subparagraph (a) (ii) the text of article 19 (3).

302. In connection with the subsequent decision to transfer the provision of article 19 (3) to the beginning of chapter V of the Model Law as a separate article 18 *bis* (see above, para. 176), the Commission reversed its decision to incorporate in subparagraph (a) (ii) the text of article 19 (3) and restored the text of subparagraph (a) (ii) as it had been elaborated by the Working Group. The reasons for the restoration of the text of subparagraph (a) (ii) were that the alignment between articles 34 and 36 was thought to be more important than the alignment between articles 34 and 18 *bis* and that it was the Commission's understanding that, in spite of the resulting difference between the text of article 18 *bis* and article 34 (2) (a) (ii), any violation of article 18 *bis* would constitute a ground for setting aside

the award under article 34 (2) subparagraph (a) (ii), subparagraph (a) (iv) or subparagraph (b) and that the concerns which led to the proposal to amend subparagraph (a) (ii) were, therefore, already met.

303. It was understood that an award might be set aside on any of the grounds listed in paragraph (2) irrespective of whether such ground had materially affected the award.

Paragraph (3)

304. The Commission did not adopt a proposal to make the period of time set forth in paragraph (3) subject to contrary agreement by the parties. The Commission adopted paragraph (3) in its current form.

Paragraph (4)

305. Divergent views were expressed as to the appropriateness of the provision. Under one view, the paragraph should be deleted since it dealt with a procedure which was of limited practical relevance and known only in certain legal systems. Furthermore, the provision was obscure, in particular, as regards the relationship between the court and the arbitral tribunal and as regards the scope of the function expected from the arbitral tribunal in a case of remission. In that respect, it was proposed that, if the provision were to be retained, it should be restricted to defects which were remediable without reopening the proceedings or that guidelines should be elaborated as to the steps expected from the arbitral tribunal.

306. The prevailing view, however, was that the provision should be retained. The mere fact that the procedure of remitting the award to the arbitral tribunal was not known in all legal systems was no compelling reason for excluding it from the realm of international commercial arbitration where it should prove useful and beneficial. It was pointed out in support that the procedure, where found appropriate by the court, would enable the arbitral tribunal to cure certain defects which otherwise would necessarily lead to the setting aside of the award. Furthermore, the general wording of paragraph (4) was advantageous in that it provided the court and the arbitral tribunal sufficient flexibility to meet the needs of the particular case.

307. The Commission did not adopt a proposal to delete the requirement that the remission procedure of the paragraph must be requested by a party. After deliberation, the Commission adopted the paragraph in its current form.

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CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

308. Divergent views were expressed as to whether the Model Law should contain provisions on the recognition and enforcement of both domestic and foreign awards.

Under one view, the draft chapter on recognition and enforcement should be deleted. It was not appropriate to retain in the Model Law provisions which would cover foreign awards, in view of the existence of widely adhered-to multilateral treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was stated that those States which had not ratified or acceded to that Convention should be invited to do so, but that a State which decided not to adhere to that Convention was unlikely to adopt the almost identical rules laid down in articles 35 and 36. It was pointed out that provisions on recognition and enforcement of foreign awards were not needed by those States which adhered to the 1958 New York Convention. In addition, such provisions in the Model Law might cast doubt on the effect of the reciprocity reservation made by many member States and might create other difficulties in the application of the Convention. Furthermore, retention in the Model Law of provisions on enforcement of domestic awards raised problems of co-ordination with the provisions on setting aside in article 34 and, in some States at least, were unnecessary in view of the existing law, which treated domestic awards as self-enforcing by equating them with judgements of local courts.

309. The prevailing view, however, was to retain provisions covering both domestic and foreign awards. It was pointed out that the existence and generally satisfactory operation of the 1958 New York Convention, to which many States adhered, was no compelling reason for deleting the draft chapter on recognition and enforcement. There were a great number of States, in fact a majority of all States members of the United Nations, that had not ratified or acceded to that Convention. Some of those States might, for constitutional or other reasons, find it easier to adopt the provisions on recognition and enforcement as part of the Model Law than to ratify or accede to that Convention. A model law on arbitration would be incomplete if it lacked provisions on such an important subject as recognition and enforcement of arbitral awards. As regards those States that were parties to that Convention, the draft chapter might provide supplementary assistance by providing a régime for non-convention awards, without adversely affecting the operation of that Convention. It was pointed out, in that respect, that the Model Law, as expressed in its article 1 (1), was subject to any such treaty, that any State adopting the Model Law could consider incorporating certain restrictions, for instance, based on the idea of reciprocity, and that articles 35 and 36 were closely modelled on the provisions of that Convention. Furthermore, the concept of uniform treatment of all awards irrespective of the country of origin was beneficial for the functioning of international commercial arbitration.

310. The Commission, after deliberation, decided to retain in the Model Law the chapter on recognition and enforcement of awards, irrespective of where they were made. It was noted that it was compatible with that decision and in fact desirable to invite the General Assembly of the United Nations to recommend to those

States that had not already done so to consider adhering to the 1958 New York Convention.

* * *

*Article 35.
Recognition and enforcement*

311. The text of article 35 as considered by the Commission was as follows:

"(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."

"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."

Paragraph (1)

312. It was noted that the scope of application of articles 35 and 36 was not identical to that of the 1958 New York Convention and that the classification of awards was not the same as in that Convention. Articles 35 and 36 covered only those awards arising out of an international commercial arbitration in the terms of article 1, even as regards awards made in a foreign State. It was understood that that did not mean that the State in which the award was made must have itself adopted the Model Law in order for those provisions to apply to the enforcement of the award.

313. It was noted that article 35 (1) did not determine the point of time when an award became binding. As regards foreign arbitral awards, that question would have to be answered, in conformity with the rule laid down in article 36 (1) (a) (v), by the law of the State in which, or under the law of which, the award was made. As regards awards made in the State where recognition or enforcement is sought under article 35, the discussion of that issue was subsequently held in the context of article 31 (see above, paras. 256-258).

314. The Commission adopted the paragraph.

Paragraph (2)

315. The Commission adopted the paragraph.

Paragraph (3)

316. It was suggested that the question as to whether an award must be filed, registered or deposited should be left to each State. It was also suggested that it would be inconsistent for a State to require awards to be registered but to enforce those awards even though they were not registered.

317. The Commission deleted the paragraph.

* * *

*Article 36.
Grounds for refusing recognition or enforcement*

318. The text of article 36 as considered by the Commission was as follows:

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

319. The Commission rejected a proposal that article 36 should be made applicable only to international commercial arbitration awards made in a State other than "this State". It was felt that the general policy decision to retain chapter VIII on recognition and enforcement applicable to awards irrespective of where they were made should be confirmed.

Paragraph (1)

320. The suggestion was made that article 36 should be interpreted in the sense that an award would not be recognized where the court found that the arbitral tribunal had proceeded without jurisdiction or had infringed the exclusive jurisdiction of the court before which the recognition or enforcement was sought. It was suggested that that matter might have become of greater importance in light of the Commission's decision in respect of article 1 (2) (c) that an arbitration was international if the parties had expressly agreed that the subject-matter of the arbitration agreement related to more than one country.

321. The Commission adopted the proposal to modify article 36 (1) (a) (i) to conform to the change previously made in article 34 (2) (a) (i). The change involved replacing the words "the parties" with the words "a party" and the words "were, under the law applicable to them, under some incapacity," with such words as "lacked the capacity to conclude such an agreement". The Commission adopted the suggestion for the purpose of maintaining textual harmony between articles 34 and 36. However, the Commission expressed the view that the modification did not entail any substantive discrepancy between article 36 (1) (a) (i) and the corresponding provision in the 1958 New York Convention.

322. The Commission decided, in line with its decision on article 34 (2) (a) (ii) (above, para. 286), to replace in subparagraph (1) (a) (ii) the words "appointment of the arbitrator(s)" by the words "appointment of an arbitrator".

323. It was proposed that subparagraph (b) (ii) be deleted since in some common law jurisdictions the term "public policy" might be interpreted as not covering notions of procedural justice. However, the Commission was agreed that the subparagraph should be retained under the same understanding which the Commission expressed in connection with article 34 (2) (b) (ii) (see above, paras. 296-297).

324. Paragraph (1) was adopted with the modifications indicated above.

Paragraph (2)

325. The Commission adopted the paragraph.

* * *

D. Discussion of other matters

Article headings

326. The Commission decided to retain the footnote annexed to the heading of article 1 in order to inform the recipients of the Model Law about the understanding of the Commission that article headings were for reference purposes only and were not to be used for purposes of interpretation.

Counter-claim

327. The Commission recalled a suggestion made in the context of article 23 for adding a new provision that any provision of the Model Law referring to the claim would apply, *mutatis mutandis*, to a counter-claim (see above, para. 201). On the basis of a proposal prepared by the representatives of Czechoslovakia and the United States, the Commission decided to add the following provision to article 2 as new subparagraph (f):

"(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."

Burden of proof

328. It was proposed to make clear in the Model Law that each party was to have the burden of proving the facts relied on to support his claim or defence. In support of the proposal it was stated that, absent such clarification, some parties might not be diligent or some arbitral tribunals might misconceive their role as being investigatory. The Commission decided not to include in the Model Law a provision on that point. In support of the decision it was stated that certain aspects of burden of proof might be regarded to be issues of substantive law and therefore subject to the provisions of article 28; moreover, such a provision could unnecessarily interfere with the general principle of article 19, according to which it was for the parties, and sub-ordinately for the arbitral tribunal, to determine the rules of procedure. However, it was understood that it was a generally recognized principle that reliance of a party on a fact in support of his claim or defence required that party to prove the fact.

Evidence of witnesses

329. A proposal was made to provide in the Model Law that evidence of witnesses might also be presented in the form of written statements signed by them, since it would be useful if the Model Law dispelled any doubt

about that cost-saving, and sometimes the only available, method of taking evidence of witnesses. The Commission did not adopt the proposal since it was considered better to leave a point of detail like the one proposed under the aegis of the general principle of article 19.

Reciprocal application of articles 35 and 36

330. A proposal was made to include in article 35, or in a footnote to article 35, an indication that, following the example of the 1958 New York Convention, articles 35 and 36 might be made subject to the condition of reciprocity as regards the recognition and enforcement of foreign arbitral awards. However, in response to the proposal it was stated that the idea of reciprocity might be appropriate in a convention but was not desirable in a unification by way of a model law. It was also stated that, since a reciprocity provision would have to be a detailed one specifying what kind of reciprocity was meant and it would be difficult to agree on a unified approach to the question, it was better to leave the formulation of any reciprocity provision to each State adopting the Model Law. The Commission, after deliberation, adopted the view that, while the use of territorial links in international commercial arbitration should not be promoted, each State that wanted to subject the application of the provisions on recognition or enforcement of foreign awards to a requirement of reciprocity should express the requirement in its legislation, specifying the basis or connecting factor and the technique used by it.

E. Consideration of the draft articles by the Drafting Group

331. After consideration of the individual articles of the draft Model Law by the Commission, they were submitted to the Drafting Group for implementation of the decisions taken by the Commission and revision to ensure consistency within the text and between language versions. In the final version, all article numbers were maintained, with the following exceptions: article 2 (e) was placed in a separate article, numbered as article 3, article 14 *bis* was incorporated into article 14 as its paragraph (2), article 18 was renumbered as article 17, and article 19 (3) was placed in a separate article, numbered as article 18.

F. Adoption of the Model Law

332. The Commission, after consideration of the text of the draft Model Law as revised by the Drafting Group, at its 333rd meeting on 21 June 1985 decided to adopt the UNCITRAL Model Law on International Commercial Arbitration as it appears in Annex I to this report.

333. The Commission invited the General Assembly to recommend to States that they should consider the Model Law when they enact or revise their laws to meet the current needs of international commercial arbitration and to request the Secretary-General to send the text of the Model Law, together with the *travaux préparatoires* from the current session of the Commission, to Governments and to arbitral institutions and other interested bodies such as chambers of commerce.

B. Analytical commentary on draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN.9/264)*

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*For consideration by the Commission, see *Report*, chapter II, A (part one, A, above).

Introduction

1. The United Nations Commission on International Trade Law, at its fourteenth session, decided to entrust its Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration.¹ The Commission, at that session, had before it a report of the Secretary-General entitled "Possible features of a model law on international commercial arbitration" (A/CN.9/207). It was agreed that this report, setting forth the concerns and purposes underlying the project and the possible contents of a model law, would provide a useful basis for the preparation of such a law.²

2. The Working Group commenced its work, at its third session, by discussing a series of questions designed to establish the basic features of a draft model law.³ At its fourth session, it considered draft articles prepared by the secretariat⁴ and reviewed, at its fifth and sixth sessions, redrafted and revised articles of a model law.⁵ The Working Group, at its seventh session, considered a composite draft text and, after a drafting group had established corresponding language versions in the six languages of the Commission, adopted the draft text of a model law as annexed to its report.⁶

3. The Commission, at its seventeenth session, requested the Secretary-General to transmit this draft text of a model law on international commercial arbitration to all Governments and interested international organizations for their comments and requested the secretariat to prepare an analytical compilation of the comments.⁷ It also decided to consider, at its eighteenth session, the draft text in the light of these comments, with a view to finalizing and adopting the text of a model law on international commercial arbitration.⁸

4. At the seventeenth session, a suggestion was made that the secretariat should prepare a commentary on the draft Model Law which would assist Governments in preparing their comments on the draft text and later in their consideration as to any legislative action based on the Model Law. The Commission was of the view that such a commentary, although it could not be prepared in time to be of assistance to Governments in preparing their comments, would be useful if it were made available at the eighteenth session of the Commission.⁹ Accordingly, the Commission decided to

request the secretariat to submit to the eighteenth session of the Commission a commentary on the draft text of a model law on international commercial arbitration.⁹

5. The present report has been prepared pursuant to that request. It provides a summary of why a certain provision has been adopted and what it is intended to cover, often accompanied by explanations and interpretations of particular words. It does not give a complete account of the *travaux préparatoires*, including the manifold proposals and draft variants that were not retained. For the benefit of those seeking fuller information on the history of a given provision, the commentary lists the references to the relevant portions of the five session reports of the Working Group.¹⁰

6. In preparing the commentary, the secretariat has taken into account the fact that it is not a commentary on a final text but that its foremost and immediate purpose is to assist the Commission in reviewing and finalizing the text. The secretariat has, therefore, taken the liberty of noting possible ambiguities and inconsistencies, occasionally accompanied by suggestions which the Commission may wish to consider. An attempt has been made to distinguish such views of the secretariat, by using expressions like "it is submitted" or "it is suggested", from those explanations or interpretations which accord with the unanimous or prevailing view of the Working Group.

Analytical commentary¹¹

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.

*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.

¹*Ibid.*, para. 101.

¹⁰In order to avoid confusion, no special reference is made to previous article numbers, which, in the course of the preparation, were altered twice. However, any earlier number will be apparent from the relevant discussion in the session report or may be seen from the comparative tables of article numbers set forth in documents A/CN.9/WG.II/WP.40 and A/CN.9/WG.II/48, which were submitted to the Working Group at its fifth and seventh sessions.

¹¹The draft text of a model law reproduced here and commented upon is the one which the Working Group on International Contract Practices adopted at the close of its seventh session (A/CN.9/246, para. 14 and annex).

¹Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17 (A/36/17)*, para. 70.

²*Ibid.*, para. 65.

³A/CN.9/216.

⁴A/CN.9/232.

⁵A/CN.9/233 and A/CN.9/245.

⁶A/CN.9/246.

⁷Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17 (A/39/17)*, para. 101.

⁸*Ibid.*, para. 100.

(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.

References

A/CN.9/216, paras. 16-21

A/CN.9/232, paras. 26-36

A/CN.9/233, paras. 47-60

A/CN.9/245, paras. 160-168, 173

A/CN.9/246, paras. 156-164

Commentary

1. Article 1 of the draft text of a model law on international commercial arbitration (hereinafter referred to as "the Model Law") deals with the intended scope of application of the Model Law. In particular, it lays down the substantive field of application, which is, in accordance with the Commission's mandate to the Working Group,¹² "international commercial arbitration". Before considering this substantive scope of application, some general comments on the form of the Model Law and on further aspects of its application are made.

*"This Law applies..."**The Model Law as "this Law" of a given State*

2. The mode of unification and improvement of national arbitration laws envisaged by the Working Group, subject to final decision by the Commission, is that of a model law. The text, in its final form, would be recommended by the Commission and then by the General Assembly to all States for incorporation into their national legislation.

¹²Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 81.

3. To facilitate such incorporation, the text has been drafted in a form in which it could be enacted in a given State. The commentary follows this direction towards a particular State and refers to "this State",¹³ where "this Law" would apply, as State X.

Territorial scope of application (not yet decided)

4. "This Law", in its present form, does not generally state to which individual arbitrations (of international commercial nature) it applies. One possibility would be to use as a determining factor the place of arbitration, that is, to cover all arbitrations taking place in "this State" (X). Another possibility would be to recognize the parties' freedom to select a law other than that of the place of arbitration and to cover all arbitrations taking place in State X, unless the parties have chosen the law of another State, as well as those "foreign" arbitrations for which the parties have selected the law of "this State" (X).

5. The prevailing view in the Working Group was in favour of the first solution (i.e. strict territorial criterion), but the decision was not to deal expressly in article 1 with this issue.¹⁴ The question was also left undecided in the context of article 34, as indicated by the two variants placed between square brackets: "award made [in the territory of this State] [under this Law]".¹⁵ Similarly non-committal is the present wording of article 27 ("arbitral proceedings held in this State or under this Law"), which would accommodate both of the above possibilities.¹⁶

6. The question of the territorial scope of application, which remains to be solved by the Commission, needs to be answered in respect of most but not all provisions of the Model Law. The reason is that certain provisions, dealing with the role of the courts of State X in respect of recognition of arbitration agreements (articles 8 and 9)¹⁷ and recognition and enforcement of awards (articles 35 and 36), are intended to cover arbitration agreements or awards without regard to the place of arbitration or any choice of procedural law.

The Model Law as "lex specialis"

7. Once the Model Law is enacted in State X, "this Law applies" as *lex specialis*, i.e. to the exclusion of all other pertinent provisions of non-treaty law,¹⁸ whether contained, for example, in a code of civil procedure or

¹³A State, when adopting the Model Law, may wish not to retain the expression "this State" (found in articles 1(1), 27(1), 34(1), (2), 35(2), (3) and 36(1)) but, following its normal legislative technique, either substitute appropriate wording (e.g. name of the State) or regard the reference as unnecessary on the ground that it would be clear from the context of the Law and its promulgation.

¹⁴A/CN.9/246, paras. 165-168.

¹⁵*Ibid.*, paras. 169-171. See also commentary to article 34, para. 4.

¹⁶*Ibid.*, paras. 92-97. See also commentary to article 27, para. 3.

¹⁷As regards article 9, a distinction must be made between the right of a party to request an interim measure of protection and the power of the court to grant such measure; see commentary to article 9, paras. 2-3.

¹⁸As to "treaty law", which prevails over the Model Law, see below, paras. 9-11.

in a separate law on arbitration. This priority, while not expressly stated in the Model Law, follows from the legislative intent to establish a special régime for international commercial arbitration.

8. It should be noted (and possibly should be expressed in article 1) that the Model Law prevails over other provisions only in respect of those subject-matters and questions covered by the Model Law. Therefore, other provisions of national law remain applicable if they deal with issues which, though relevant to international commercial arbitration, have been left outside the Model Law (e.g. capacity of parties to conclude arbitration agreement, impact of State immunity, consolidation of arbitral proceedings, competence of arbitral tribunal to adapt contracts, contractual relations between arbitrators and parties or arbitration bodies, fixing of fees and requests for deposits, security for fees or costs, period of time for enforcement of arbitral award).

Model law yields to treaty law

9. According to paragraph (1) of article 1, "this Law" applies "subject to any multilateral or bilateral agreement which has effect in this State". This proviso might be regarded as superfluous since the priority of treaty law would follow in most, if not all, legal systems from the internal hierarchy of sources of law. Nevertheless, it has been retained as a useful declaration of the legislative intent not to affect the validity and operation of multilateral and bilateral agreements in force in State X.

10. The proviso would be of primary relevance with regard to treaties devoted to the same subject-matter as that dealt with in the Model Law. Prominent examples of such multilateral treaties are the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958; hereinafter referred to as the 1958 New York Convention), the European Convention on International Commercial Arbitration (Geneva, 1961; hereinafter referred to as the 1961 Geneva Convention), the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington, 1965; hereinafter referred to as the 1965 Washington Convention) and the Inter-American Convention on International Commercial Arbitration (Panama, 1975).¹⁹

11. It should be noted, however, that the scope of the proviso is wider in that it also covers treaties which are devoted to other subject-matters but contain provisions on arbitration. An example would be the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg), which, by its article 22 (3), reduces the effect of an original agreement on the place of arbitration by providing some alternative places at the

option of the claimant.²⁰ This provision, if in force in State X and applicable to the case at hand, would prevail over article 20 of the Model Law, which recognizes the freedom of the parties to agree on the place of arbitration and gives full effect to such choice, whether made before or after the dispute has arisen.

Substantive scope of application: "international commercial arbitration"

12. The substantive scope of application of the model law, as expressed in its title, is "international commercial arbitration". This widely used term consists of three elements which are, in the Model Law defined, illustrated or accompanied by a declaratory remark.

"Arbitration"

13. The Model Law, like most conventions and national laws on arbitration, does not define the term "arbitration". It merely clarifies, in its article 7 (1), that it covers any arbitration "whether or not administered by a permanent arbitral institution". Thus, it applies to pure *ad hoc* arbitration and to any type of administered or institutional arbitration.

14. Of course, the term "arbitration" is not to be construed as referring only to on-going arbitrations, i.e. arbitral proceedings. It relates also to the time before and after such proceedings, as is clear, for example, from the provisions on recognition of arbitration agreements and, later, of arbitral awards.

15. While the Model Law is generally intended to cover all kinds of arbitration, two qualifications should be mentioned here which are not immediately apparent from the text but may be expressed by any State adopting the Model Law.²¹ The Model Law is designed for consensual arbitration, i.e. arbitration based on voluntary agreement of the parties (as regulated in article 7 (1)); thus, it does not cover compulsory

¹⁹Official Records of the United Nations Conference on the Carriage of Goods by Sea (United Nations publication, Sales No. E.80.VIII.1), part 1, Final Act of the United Nations Conference on the Carriage of Goods by Sea (A/CONF.89/13), annex 1.

Article 22 (3), (5), (6) of the Hamburg Rules reads as follows:

"3. The arbitration proceedings shall, at the option of the claimant, be instituted at one of the following places:

"(a) a place in a State within whose territory is situated:

"(i) the principal place of business of the defendant or, in the absence thereof, the habitual residence of the defendant; or

"(ii) the place where the contract was made, provided that the defendant has there a place of business, branch or agency through which the contract was made; or

"(iii) the port of loading or port of discharge; or

"(b) any place designated for that purpose in the arbitration clause or agreement.

"

"5. The provisions of paragraphs 3 and 4 of this article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

"6. Nothing in this article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen."

²¹A/CN.9/216, para. 17.

¹⁹Another important such treaty is the Convention on the Decision by way of Arbitration of Civil Litigations Resulting from Relations of Economic and Scientific-Technological Co-operation (Moscow, 1972), which, however, deals primarily with compulsory arbitration, while the Model Law is designed for consensual arbitration only (see below, para. 15).

arbitration. Also not covered are the various types of so-called "free arbitration" such as the Dutch *bindend advies*, the German *Schiedsgutachten* or the Italian *arbitrato irrituale*.

"Commercial"

16. The term "commercial" has been left undefined in the Model Law, as in conventions on international commercial arbitration. Although a clear-cut definition would be desirable, no such definition, which would draw a precise line between commercial and non-commercial relationships, could be found. Yet, it was deemed undesirable to leave the matter to the individual States or to provide some guidance for uniform interpretation merely in the session reports of the Working Group or any commentary on the model law. As an intermediate solution, a footnote is annexed to article 1 as an aid in the interpretation of the term "commercial".

17. As regards the form, there may be some uncertainty as to the addressee and the legal effect of this footnote, since such legislative technique is not used in all systems. At the least, the footnote could provide some guidance to the legislator of a State even where it would not be reproduced in the national enactment of the model law. A more far-reaching use, which the Commission may wish to recommend, would be to retain the footnote in the national enactment and, thus, to provide some guidance in the application and interpretation of "this Law".

18. The content of the footnote reflects the legislative intent to construe the term commercial in a wide manner. This call for a wide interpretation is supported by an illustrative list of commercial relationships. Although the examples listed include almost all types of contexts known to have given rise to disputes dealt within international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquefied gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business. Of course, the fact that a transaction is covered by the Model Law by virtue of its commercial nature does not necessarily mean that all disputes arising from the transaction are capable of settlement by arbitration (as to the requirement of arbitrability, see commentary to article 7, para. 5).

19. The footnote, while not giving a clear-cut definition, provides guidance for an autonomous interpretation of the term "commercial"; it does not refer, as does the 1958 New York Convention (article I (3)), to what the existing national law regards as commercial. Therefore, it would be wrong to apply national concepts which define as commercial, for example, only those types of relationship dealt with in the commercial code or only those transactions the parties to which are commercial persons.

20. This latter idea of preclusion had been expressed in a previous draft of the footnote by the words (following the first sentence) "irrespective of whether the parties are 'commercial persons' (merchants) under any given national law". This wording, which was exclusively intended to clarify that the commercial nature of the relationship is not dependent on the qualification of the parties as merchants (as used in some national laws for distinguishing between commercial and civil relationships), was nevertheless deleted lest it might be construed as dealing with the issue of State immunity.²²

21. In this connection, it may be noted that the Model Law does not touch upon the sensitive and complex issue of State immunity. For example, it does not say whether the signing of an arbitration agreement by a State organ or governmental agency constitutes a waiver of any such immunity. On the other hand, it seems equally noteworthy that the Model Law covers those relationships to which a State organ or governmental entity is a party, provided, of course, the relationship is of a commercial nature.

"International", paragraph (2)

22. In accordance with the mandate of the Commission, the Model Law is designed to establish a special régime for international cases. It is in these cases that the present disparity between national laws creates difficulties and adversely affects the functioning of the arbitral process. Furthermore, in these cases more flexible and liberal rules are needed in order to overcome local constraints and peculiarities. Finally, in these cases the interest of a State in maintaining its traditional concepts and familiar rules is less strong than in a strictly domestic setting. However, despite this design and legislative self-restraint, any State is free to take the Model Law, whether immediately or at a later stage, as a model for legislation on domestic arbitration and, thus, avoid a dichotomy within its arbitration law.

23. Unless a State opts for such unitary treatment, the test of "internationality" set forth in article 1 (2) is of utmost importance and crucial for the applicability of "this Law". Since it determines whether a given case would be governed by the special régime embodied in the Model Law or by the law on domestic arbitration, the definition should be as precise as possible so as to provide certainty to all those concerned. Unfortunately, the search for an appropriate test reveals a dilemma: A precise formula tends to be too narrow to cover all cases encountered in the practice of international commercial arbitration; and the wider the scope of the test, the more it is likely to lack precision. The solution presented in paragraph (2) starts with a rather precise criterion in subparagraph (a), which covers the great bulk of worthy cases, and then widens its scope in subparagraphs (b) and (c) with an increasing reduction in precision.

²²A/CN.9/246, para. 158.

(a) *Parties' places of business in different States, subparagraph (a)*

24. The basic criterion, laid down in subparagraph (a), is modelled on the test of internationality adopted in article 1 (1) of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980;²³ hereinafter referred to as the 1980 Vienna Sales Convention). It uses as determining factor the location of the places of business of the parties to the arbitration agreement. Accordingly, other characteristics of a party such as its nationality or place of incorporation or registration are not determinative.

25. Since a given case is international if the parties have their places of business "in different States", it is irrelevant whether any of these States is State X (i.e. the one enacting "this Law"). Included, thus, is any arbitration between "foreigners" (e.g. parties with place of business in State Y and State Z) and any arbitration between a party in State X and a party in a foreign State (Y). However, whether and to what extent this Law would apply in any such international case is a different question, to be answered according to other rules on the scope of application (discussed above, paras. 4-6). While articles 8, 9, 35 and 36, dealing with recognition of arbitration agreements and awards by the courts of State X, apply without regard to the place of arbitration or any choice of procedural law, the remaining bulk of provisions, dealing in particular with arbitration procedure, would apply only if the case falls within the territorial scope of application.

(b) *Other relevant places, subparagraph (b)*

26. Either of the places listed in subparagraph (b) establishes an international link if situated in a State other than the one where the parties have their places of business. Again, it is without relevance to the test of internationality whether any of these States is State X. Thus, an arbitration would be international under subparagraph (b) in any of the following situations: Parties' places of business in State X and other relevant place in State Y; parties' places of business in State Y and other relevant place in State X; parties' places of business in State Y and other relevant place in State Z. However, whether in fact "this Law" would apply in full depends, again, on whether the case falls within the territorial scope of application.²⁴

27. The places listed in subparagraph (b) relate either to the arbitration (subparagraph (i)) or to the subject-matter of the relationship or the dispute (subparagraph (ii)). The first relevant place is the place of arbitration,

as the only arbitration-related criterion. Thus, the international link would not be established by any other arbitration-related element such as appointment of foreign arbitrator or choice of foreign procedural law (if permissible).

28. The place of arbitration is relevant if determined in, or pursuant to, the arbitration agreement. Where the place of arbitration is specified in the arbitration agreement, the parties know from the start whether their case is international under subparagraph (i). Where the place of arbitration is determined pursuant to the agreement, there may be a long period of uncertainty about this point. It is submitted that this requirement would not be met by a stipulation authorizing the arbitral tribunal to determine the place of arbitration.

29. Under subparagraph (ii), internationality is established if a substantial part of the obligations of the commercial relationship is to be performed in a State other than the one where the parties have their places of business. This would be the case, for example, where a producer and a trader conclude a sole distributorship agreement concerning a foreign market or where a general contractor employs an independent sub-contractor for certain parts of a foreign construction project. While the arbitration agreement must cover any dispute or certain disputes arising out of this relationship, it is not necessary that the dispute itself relates to the international element.

30. Even where no substantial part of the obligations is to be performed abroad, an arbitration would be international under subparagraph (ii) if the subject-matter of the dispute is most closely connected with a foreign place. Since instances of this kind will be very exceptional, one may accept the disadvantage of this criterion which lies in the fact that the international character cannot be determined before the dispute arises.

(c) *Yet other international link, subparagraph (c)*

31. The final criterion, laid down in subparagraph (c), is that "the subject-matter of the arbitration agreement is otherwise related to more than one State". This "residual" test is designed to catch all worthy cases not covered by subparagraphs (a) or (b); it is apparent that this wide scope is accompanied by a considerable degree of imprecision. It may be added that "the subject-matter of the arbitration agreement" is not to be construed as referring to the arbitration itself but to the substantive matters that may be subject to arbitration.

(d) *Determination of place of business, paragraph (3)*

32. If a party has two or more places of business, one of which is in the same State as is the other party's place of business, it is necessary to determine which of his places is relevant for the purposes of paragraph (2). According to paragraph (3), first sentence, it is the one which has the closest relationship to the arbitration agreement. An instance of such close relationship

²³See *Official Records of the United Nations Conference on Contracts for the International Sale of Goods* (United Nations publication, Sales No. E.81.IV.3), United Nations Convention on Contracts for the International Sale of Goods (A/CONF.97/18), annex I.

²⁴In particular with regard to subparagraph (i), it is noteworthy that "this Law" would apply in full only if the place of arbitration is in State X, assuming that the strict territorial criterion is adopted. The thrust of subparagraph (i) is thus to cover cases where the parties have their places of business not in State X but in another State (provided that the latter State does not prohibit these "domestic" parties from selecting a foreign place of arbitration).

would be that a contract, including an arbitration clause, is fully negotiated by the branch or office in question, even if it is signed at another place (e.g. the principal place of business).

33. As indicated in this example, the location of the principal place of business (or head office) is irrelevant. If one were to take the principal place of business as the decisive criterion, one would have a somewhat wider application of the Model Law since it would cover also those cases where the "closely connected" place of business, but not the principal place of business, is in the same State as is the other party's place of business. Nevertheless, the criterion of "closest connection" was adopted because it was thought to reflect better the expectations of the parties and, in particular, for the sake of consistency with the 1980 Vienna Sales Convention (article 10 (a)).²³

34. The second sentence of paragraph (3) deals with the rare situation that a person involved in a commercial transaction does not have an established "place of business". In such case, his habitual residence would be the decisive place for the purposes of paragraph (2).

* * *

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

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

²³In this Convention, the test serves two purposes which tend to balance overall the effects of widening or narrowing the scope of application. One is, as in the Model Law, to distinguish between strictly domestic cases and those of an international character; the other one, foreign to the Model Law, is to distinguish between those international cases where the parties have their places in Contracting States and those international cases where one party has his place of business in a non-contracting State.

References

A/CN.9/233, paras. 75, 101-102

A/CN.9/245, paras. 28, 169-172

A/CN.9/246, paras. 172-173

Commentary

"Arbitral tribunal" and "court" defined, paragraphs (a) and (b)

1. The definition of the terms "arbitral tribunal" and "court" may be regarded as self-evident and, thus, superfluous. However, they have been retained, in particular, for a terminological reason. Their juxtaposition is intended to draw a clear distinction between the two different types of dispute settlement organs. This is to avoid, for example, the misunderstanding, possible in languages such as French and Spanish, that the word "tribunal" is an abbreviated form of the term "tribunal arbitral" or that the term "court" would include any arbitration body or administering institution bearing the name "court" (e.g. ICC Court of Arbitration or London Court of International Arbitration).

2. Paragraph (b) simply refers to, without interfering with, the national judicial system, which is not necessarily the system of State X (cf. articles 9, 35 (3), 36 (1) (a) (v), (2)). Taking into account the varied nomenclature, the term "court" is not restricted to those organs actually called "court" in a given country but would include any other "competent authority" (such is the expression used in the 1958 New York Convention). The reference to the judicial system of "a country" (instead of "a State") has been used for the sole purpose of avoiding the misconception, possible in a federation of states, that merely "state courts" are covered but not "federal courts".²⁴

Interpretation of "parties' freedom" and "agreement", paragraphs (c) and (d)

3. Paragraphs (c) and (d) are designed to prevent too literal an interpretation of the references in the Model Law to the parties' freedom to determine an issue or to their agreement. According to the reasonable interpretation laid down in paragraph (c), such freedom covers the liberty of the parties not only to decide the issue themselves but also to authorize a third person or institution to determine the issue on their behalf. Practical examples of such issues would be the number of arbitrators, the place of arbitration and other procedural points.

4. Paragraph (d) recognizes the common practice of parties to refer in their agreement to arbitration rules (of institutions, associations or other bodies), instead of negotiating and drafting a fully original and individual ("one-off") arbitration agreement. A general rule of interpretation seems preferable to including a clar-

²⁴The Commission may wish to examine the appropriateness of the term "country", used also in articles 35 (1), (3) and 36 (1), with a view to achieving consistency throughout the Model Law by using exclusively the expression "State".

fication in each of the many provisions of the Model Law where this matter may be relevant.

5. Paragraphs (c) and (d) are overlapping rules in that the freedom to determine an issue (under (c)) is included in the notion that the parties may agree (under (d)) and in that the authorization of a third party (under (c)) is often envisaged in arbitration rules (under (d)). However, this is not so in all cases: an authorization may be added to the régime established by arbitration rules (e.g. designation of an appointing authority), it may be made to replace a provision in these rules, or it may be made in a "one-off" arbitration agreement.

"Receipt of communication" defined, paragraph (e)

6. Paragraph (e), which is modelled on article 2 (1) of the UNCITRAL Arbitration Rules, lists a variety of instances in which a written communication, by a party or the arbitral tribunal, "is deemed to have been received". Despite this latter wording, the list starts with instances of actual (i.e. non-fictional) receipt and then enters into the realm of legal fiction. The last sentence makes it clear that any such instance is not only conclusive of the fact of receipt but also determines the date of receipt.

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(Article 3 deleted)²⁷

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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 therefor, within such period of time, shall be deemed to have waived his right to object.

References

- A/CN.9/233, para. 66
- A/CN.9/245, paras. 176-178
- A/CN.9/246, paras. 178-182

Commentary

1. Where a procedural requirement, whether laid down in the Model Law or in the arbitration agreement, is not complied with, any party has a right to object with a view to getting the procedural defect cured. Article 4 implies a waiver of this right under certain conditions, based on general principles such as estoppel or *venire contra factum proprium*.

²⁷Previous draft article 3 was deleted by the Working Group at its seventh session (A/CN.9/246, paras. 174-177). To avoid confusion, the re-numbering of articles has been postponed until the final stages of the revision of the draft by the Commission.

2. The first condition is that the procedural requirement, which has not been complied with, is contained either in a non-mandatory provision of the Model Law or in the arbitration agreement. The restriction of this rule to provisions of law from which the parties may derogate was adopted on the ground that an estoppel rule which also covered fundamental procedural defects would be too rigid. It may be mentioned, however, that the Model Law contains specific rules concerning objections with regard to certain fundamental defects such as lack of a valid arbitration agreement or the arbitral tribunal's exceeding its mandate (article 16 (2)). As regards non-compliance with a requirement under the arbitration agreement, it may be noted that the procedural stipulation by the parties must be valid and, in particular, not be in conflict with a mandatory provision of "this Law".

3. The second condition is that the party knew or ought to have known of the non-compliance. It is submitted that the expression "ought to have known" should not be construed as covering every kind of negligent ignorance but merely those instances where a party could not have been unaware of the defect. This restrictive interpretation, which might be expressed in the article, seems appropriate in view of the principle which justifies statutory impliance of a waiver.

4. The third condition is that the party does not state his objection without delay or, if a time-limit is provided therefor, within such period of time. This latter reference to time is, logically speaking, the first one to be examined since a time-limit, whether provided for in the Model Law or the arbitration agreement, has priority over the general formula "without delay".

5. There is yet another condition which should not be overlooked. A party loses his right to object only if, without stating his objection, he proceeds with the arbitration. Acts of such "proceeding" would include, for example, appearance at a hearing or a communication to the arbitral tribunal or the other party. Therefore, a party would not be deemed to have waived his right if, for instance, a postal strike or similar impediment prevented him for an extended period of time from sending any communication at all.

6. Where, by virtue of article 4, a party is deemed to have waived his right to object, he is precluded from raising the objection during the subsequent phases of the arbitral proceedings and, what may be of greater practical relevance, after the award is rendered. In particular, he may not then invoke the non-compliance as a ground for setting aside the award or as a reason for refusing its recognition or enforcement. Of course, a waiver has this latter effect only in cases where article 4 is applicable, i.e. with regard to those awards which are made "under this Law" (whatever criterion may be adopted for the territorial scope of application). It is submitted that a court from which recognition or enforcement of any other award is sought could also disregard late objections of a party by applying any similar rule of the applicable procedural law or the general idea of estoppel.

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Article 5. *Scope of court intervention*

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

References

- A/CN.9/233, paras. 69-73
A/CN.9/245, paras. 183-184
A/CN.9/246, paras. 183-188

Commentary

1. This article relates to the crucial and complex issue of the role of courts with regard to arbitrations. The Working Group adopted it on a tentative basis and invited the Commission to reconsider that decision in the light of comments by Governments and international organizations.²⁶ In assessing the desirability and appropriateness of this provision, the following considerations should be taken into account.

2. Although the provision, due to its categorical wording,²⁷ may create the impression that court intervention is something negative and to be limited to the utmost, it does not itself take a stand on what is the proper role of courts. It merely requires that any instance of court involvement be listed in the Model Law. Its effect would, thus, be to exclude any general or residual powers given to the courts in a domestic system which are not listed in the Model Law. The resulting certainty of the parties and the arbitrators about the instances in which court supervision or assistance is to be expected seems beneficial to international commercial arbitration.

3. Consequently, the desired balance between the independence of the arbitral process and the intervention by courts should be sought by expressing all instances of court involvement in the Model Law but cannot be obtained within article 5 or by its deletion. The Commission may, thus, wish to consider whether any further such instance need be included, in addition to the various instances already covered in the present text. These are not only the functions entrusted to the Court specified in article 6, i.e. the functions referred to in articles 11 (3), (4), 13 (3), 14 and 34 (2), but also those instances of court involvement envisaged in articles 9 (interim measures of protection), 27 (assistance in taking evidence), 35 and 36 (recognition and enforcement of awards).

4. Another important consideration in judging the impact of article 5 is that the above necessity to list all instances of court involvement in the Model Law applies only to the "matters governed by this Law".

²⁶A/CN.9/246, para. 186.

²⁷A less categorical wording was suggested at the seventh session of the Working Group but was not adopted: "In matters governed by this Law concerning the arbitral proceedings or the composition of the arbitral tribunal, courts may exercise supervisory or assisting functions only if so provided in this Law" (A/CN.9/246, paras. 183-184).

The scope of article 5 is, thus, narrower than the substantive scope of application of the Model Law, i.e. "international commercial arbitration" (article 1), in that it is limited to those issues which are in fact regulated, whether expressly or impliedly, in the Model Law.

5. Article 5 would, therefore, not exclude court intervention in any matter not regulated in the Model Law. Examples of such matters include the impact of State immunity, the contractual relations between the parties and the arbitrators or arbitral institution, the fees and other costs, including security therefor, as well as other issues mentioned above in the discussion on the character of the Model Law as "lex specialis" where the same distinction has to be made.³⁰

6. It is submitted that the distinction is reasonable, even necessary, although it is not in all cases easily made. For example, article 18 governs the arbitral tribunal's ordering of interim measures of protection, by implying an otherwise doubtful power, but it does not regulate the possible enforcement of these orders. A State would, thus, not be precluded (by article 5) from either empowering the arbitral tribunal to take itself certain measures of compulsion (as known in some legal systems) or providing for enforcement by courts (as known in other systems).³¹ On the other hand, where the Model Law, for example, grants the parties freedom to agree on a certain point (e.g. appointment of arbitrator, article 11 (2)), the matter is thereby fully regulated, to the exclusion of court intervention (e.g. any court confirmation, as required under some laws even in the case of a party-appointed arbitrator).

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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).

References

- A/CN.9/232, paras. 89-98
A/CN.9/233, paras. 82-86
A/CN.9/245, paras. 190-191
A/CN.9/246, paras. 189-190

Commentary

1. Article 6 calls upon each State adopting the model law to designate a particular Court which would perform certain functions of arbitration assistance and supervision. The functions referred to in this article relate to the appointment of an arbitrator (article 11 (3), (4)), the challenge of an arbitrator (article 13 (3)), the

³⁰See commentary to article 1, para. 8.

³¹See commentary to article 18, para. 4.

termination of the mandate of an arbitrator because of his failure to act (article 14) and the setting aside of an arbitral award (article 34 (2)).

2. To concentrate these arbitration-related functions in a specific Court is expected to result in the following advantages. It would help parties, in particular foreign ones, more easily to locate the competent court and obtain information on any relevant features of that "Court", including its policies adopted in previous decisions. Even more beneficial to the functioning of international commercial arbitration would be the expected specialization of that Court.

3. Although these two advantages would best be achieved by a full centralization, the designation of a Court does not necessarily mean that it will in fact be only one individual court in each State. In particular, larger countries may wish to designate one type or category of courts, for example, any commercial courts or commercial chambers of district courts.

4. The designated Court need not necessarily be a full court or a chamber thereof. It may well be, for example, the president of a court or the presiding judge of a chamber for those functions which are of a more administrative nature and where speed and finality are particularly desirable (i.e. articles 11, 13 and 14). To what extent this further expected advantage will materialize depends on each State's provisions on court organization or procedure, whether they already exist or are adopted together with "this Law". It is submitted that a State may entrust these administrative functions even to a body outside its court system, for example, a national arbitration commission or institution handling international cases.

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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.

References

- A/CN.9/216, paras. 22-24, 26
- A/CN.9/232, paras. 37-46
- A/CN.9/233, paras. 61-68
- A/CN.9/245, paras. 179-182
- A/CN.9/246, paras. 17-19

Commentary

Definition (and recognition), paragraph (1)

1. Paragraph (1) describes the important legal instrument which forms the basis and justification of an arbitration. The term "arbitration agreement" is defined along the lines of article II (1) of the 1958 New York Convention; as more clearly expressed in that Convention, there is an implied guarantee of recognition which goes beyond a mere definition.

2. The Model Law recognizes not only an agreement concerning an existing dispute (*compromis*) but also an agreement concerning any future dispute (*clause compromissoire*). Inclusion of this latter type of agreement seems imperative in view of its frequent use in international arbitration practice and will, it is hoped, contribute to global unification in view of the fact that at present some national laws do not give full effect to this type.

3. The Model Law recognizes an arbitration agreement irrespective of whether it is in the form of an arbitration clause contained in a contract or in the form of a separate agreement. Thus, any existing national requirement that the agreement be in a separate document would be abolished. By the nature of things, an arbitration clause in a contract would be appropriate for future disputes, while a separate agreement is suitable not only for an existing dispute but also for any future disputes.

4. The Model Law recognizes an arbitration agreement if the existing or future dispute relates to a "defined legal relationship, whether contractual or not". It is submitted that the expression "defined legal relationship" should be given a wide interpretation so as to cover all non-contractual commercial cases occurring in practice (e.g. third party interfering with contractual relations; infringement of trade mark or other unfair competition).

5. The Model Law provisions on the arbitration agreement do not retain the requirement, expressed in article II (1) of the 1958 New York Convention, that the dispute concern "a subject-matter capable of settlement by arbitration". However, this does not mean that the Model Law would give full effect to any arbitration agreement irrespective of whether the subject-matter is arbitrable. The Working Group, when discussing pertinent proposals, recognized the importance of the requirement of arbitrability but saw no need for an express provision.²² It was noted, for example, that an arbitration agreement covering a non-arbitrable subject-

²²A/CN.9/246, para. 21; similarly, A/CN.9/245, para. 187; cf. also A/CN.9/232, para. 40.

matter would normally, or at least in some jurisdictions, be regarded as null and void and that the issue of non-arbitrability was adequately addressed in articles 34 and 36.³³ In this connection, it may be noted that the Working Group decided at an early stage not to deal with the material validity of the arbitration agreement and not to attempt to achieve unification or at least certainty as to which subject-matters are non-arbitrable, either by listing them in the Model Law or calling upon each State to list them exclusively in "this Law".³⁴

Requirement of written form, paragraph (2)

6. The Model Law follows the 1958 New York Convention in requiring written form, although, in commercial arbitration, oral agreements are not unknown in practice and are recognized by some national laws. In a way, the Model Law is even stricter than that Convention in that it disallows reliance on a "more favourable provision" in the subsidiary national law (on domestic arbitration), as would be possible under that Convention by virtue of its article VII (1). The Model Law is intended to govern all international commercial arbitration agreements and, as provided in article 7 (2), requires that they be in writing.³⁵ However, non-compliance with that requirement may be cured by submission to the arbitral proceedings, i.e. participation without raising the plea referred to in article 16 (2).³⁶

7. The definition of written form is modelled on article II (2) of the 1958 New York Convention but with two useful additions. It widens and clarifies the range of means which constitute a writing by adding "telex or other means of telecommunication which provide a record of the agreement", in order to cover modern and future means of communication.

8. The second addition, contained in the last sentence, is intended to clarify a matter which, in the context of the 1958 New York Convention, has led to problems and divergent court decisions. It deals with the not-infrequent case where parties, instead of including an arbitration clause in their contract, refer to a document (e.g. general conditions or another contract) which contains an arbitration clause. The reference constitutes an arbitration agreement if it is such as to make that clause part of the contract and, of course, if the contract itself meets the requirement of written form as defined in the first sentence of paragraph (2). As the text clearly states, the reference need only be to the document; thus, no explicit reference to the arbitration clause contained therein is required.³⁷

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³³As regards article 34, where the inclusion of the non-arbitrability of the subject-matter is controversial, see commentary to article 34, para. 12.

³⁴A/CN.9/216, paras. 25, 30-31.

³⁵A/CN.9/233, para. 66; A/CN.9/232, para. 46.

³⁶As to the possible need for modifying article 35 (2) in order to accommodate the situation of a cured defect of form, see footnote 91.

³⁷Cf. A/CN.9/246, para. 19.

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.

References

- A/CN.9/216, paras. 35-36
- A/CN.9/232, paras. 49-51, 146, 151
- A/CN.9/233, paras. 74-81
- A/CN.9/245, paras. 66-69, 185-187
- A/CN.9/246, paras. 20-23

Commentary

1. Article 8 deals with an important "negative" effect of an arbitration agreement. The agreement to submit a certain matter to arbitration means that this matter shall not be heard and decided upon by any court, irrespective of whether this exclusion is expressed in the agreement. If, nevertheless, a party starts litigation, the court shall refer the parties to arbitration unless it finds the agreement to be null and void, inoperative or incapable of being performed.

2. Article 8 is closely modelled on article II (3) of the 1958 New York Convention, with two useful elements added. Due to the nature of the Model Law, article 8 (1) of "this Law" is addressed to all courts of State X; it is not limited to agreements providing for arbitration in State X and, thus, wide acceptance of the Model Law would contribute to the universal recognition and effect of international commercial arbitration agreements.

3. As under the 1958 New York Convention, the court would refer the parties to arbitration, i.e. decline (the exercise of its) jurisdiction, only upon request by a party and, thus, not on its own motion. A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute. It is submitted that this point of time should be taken literally and applied uniformly in all legal systems, including those which normally regard such a request as a procedural plea to be raised at an earlier stage than any pleadings on substance.

4. As regards the effect of a party's failure to invoke the arbitration agreement by way of such a timely request, it seems clear that article 8 (1) prevents that party from invoking the agreement during the subsequent phases of the court proceedings. It may be noted that the Working Group, despite the wide

support for the view that the failure of the party should preclude reliance on the agreement also in other proceedings or contexts, decided not to incorporate a provision on such general effect because it would be impossible to devise a simple rule which would satisfactorily deal with all the aspects of this complex issue.¹⁴

5. Another addition to the original text in the 1958 New York Convention is the rule in paragraph (2) which confirms that paragraph (1) applies irrespective of whether arbitral proceedings have already commenced. It empowers an arbitral tribunal to continue the arbitral proceedings (if governed by "this Law") while the issue of its jurisdiction is pending with a court. The purpose of giving such discretion to the arbitral tribunal is to reduce the risk and effect of dilatory tactics of a party reneging on his commitment to arbitration.

. . .

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.

References

- A/CN.9/216, para. 39
- A/CN.9/232, paras. 52-56
- A/CN.9/233, paras. 74, 81
- A/CN.9/245, paras. 185, 188-189
- A/CN.9/246, paras. 24-26

Commentary

1. Article 9 relates—like article 8—to recognition and effect of the arbitration agreement but in another respect. It lays down the principle, disputed in some jurisdictions, that resort to a court and subsequent court action with regard to interim measures of protection are compatible with an arbitration agreement. It thus makes it clear that the "negative" effect of an arbitration agreement, which is to exclude court jurisdiction, does not operate with regard to such interim measures. The main reason is that the availability of such measures is not contrary to the intentions of parties agreeing to submit a dispute to arbitration and that the measures themselves are conducive to making the arbitration efficient and to securing its expected results.

2. Article 9 expresses the principle of compatibility in two directions with different scope of application. According to the first part of the provision, a request by a party for any such court measures is not incompatible with the arbitration agreement, i.e. neither prohibited nor

to be regarded as a waiver of the agreement. This part of the rule applies irrespective of whether the request is made to a court of State X or of any other country. Wherever it may be made, it may not be invoked or treated as an objection against, or disregard of, a valid arbitration agreement under "this Law", i.e. in arbitration cases falling within its territorial scope of application or in the context of articles 8 and 36.

3. However, the second part of the provision is addressed only to the courts of State X and declares their measures to be compatible with an arbitration agreement irrespective of the place of arbitration. Assuming wide adherence to the Model Law, these two parts of the provision would supplement each other and go a long way towards global recognition of the principle of compatibility, which, in the context of the 1958 New York Convention, has not been uniformly accepted.

4. The range of interim measures of protection covered by article 9 is considerably wider than that under article 18, due to the different purposes of these two articles. Article 18 deals with the limited power of the arbitral tribunal to order any party to take an interim measure of protection in respect of the subject-matter of the dispute and does not deal with enforcement of such orders. Article 9 deals with the compatibility of the great variety of possible measures by courts available in different legal systems, including not only steps by the parties to conserve the subject-matter or to secure evidence but also other measures, possibly required from a third party, and their enforcement. This would, in particular, include pre-award attachments and any similar seizure of assets.

5. It may be noted that the Model Law does not deal with the possible conflict between an order by the arbitral tribunal under article 18 and a court decision under article 9 relating to the same object or measure of protection. However, it is submitted that the potential for such conflict is rather small in view of the above disparity in the range of measures covered by the two articles.

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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.

References

- A/CN.9/216, paras. 46-48
- A/CN.9/232, paras. 78-82
- A/CN.9/233, paras. 92-93
- A/CN.9/245, paras. 194-195
- A/CN.9/246, paras. 27-28

¹⁴A/CN.9/246, para. 22.

Commentary

1. Article 10 is the first article presenting and illustrating the "two-level system" so typical of the Model Law. The first provision falls in the category of articles which recognize the parties' freedom and give effect to their agreement, to the exclusion of any existing national law provision on the issue.³⁹ The second provision falls in the category of suppletive rules which provide those parties failing to regulate the procedure by agreement with a set of rules for getting the arbitration started and proceeding to a final settlement of the dispute.⁴⁰

2. Paragraph (1) recognizes the parties' freedom to determine the number of arbitrators. Thus, the choice of any number would be given effect, even in those legal systems which at present require an uneven number. As generally stated in article 2(c), the freedom of the parties is not limited to determining the issue themselves but includes the right to authorize a third party to make that determination.

3. For those cases where the number of arbitrators has not been determined in advance or cannot be determined in time, paragraph (2) prevents a possible delay or deadlock by supplying the number. The number three was adopted, as in the UNCITRAL Arbitration Rules (article 5), in view of the fact that it appears to be the most common number in international commercial arbitration. However, arbitrations conducted by a sole arbitrator are also common, in particular in less complex cases. It is thought that those parties who want only one arbitrator for the sake of saving time and costs would normally agree thereon, with an inducement to do so added by this paragraph.

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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.

References

- A/CN.9/216, paras. 41, 49-50
- A/CN.9/232, paras. 73-74, 83-88
- A/CN.9/233, paras. 87-88, 94-100
- A/CN.9/245, paras. 192-193, 196-201
- A/CN.9/246, paras. 29-32

*Commentary**No legislative discrimination of foreign nationals, paragraph (1)*

1. Some national laws preclude foreigners from acting as arbitrators even in international cases. Paragraph (1) is designed to overcome such national bias on the part of the legislator.⁴¹ As indicated by the words "unless otherwise agreed by the parties", it is not intended to preclude parties (or trade associations or arbitral institutions) from specifying that nationals of certain States may, or may not, be appointed as arbitrators.

Freedom to agree on appointment procedure, paragraph (2)

2. Paragraph (2) recognizes the freedom of the parties to agree on a procedure of appointing the arbitrator or

⁴¹At the sixth session of the Working Group, a concern was expressed that it would be difficult to implement this provision in States where nationals of certain other States were precluded from serving as arbitrators; it was noted in response that the Model Law, not being a convention, would not exclude the possibility for a State to reflect its particular policies in national legislation (A/CN.9/245, para. 193).

³⁹CI A/CN.9/207, para. 13.

⁴⁰CI A/CN.9/207, paras. 17-18.

arbitrators. This freedom to agree is to be given a wide interpretation in accordance with the general provisions of article 2 (c) and (d).

3. The scope of the parties' freedom is, however, somewhat limited by the mandatory provisions in paragraphs (4) and (5). Parties may not exclude, in their agreement on the appointment, the right of a party under paragraph (4) to resort to the Court specified in article 6 in any of the situations described in that paragraph, or exclude the finality of the Court's decision provided for in paragraph (5).⁴²

Court assistance in agreed appointment procedure, paragraph (4)

4. Paragraph (4) describes three possible defects in typical appointment procedures and provides a cure thereof by allowing any party to request the Court specified in article 6 to take the necessary measure instead (i.e. instead of the "failing" party, persons or authority referred to in subparagraphs (a), (b) or (c)). Assistance by this Court is provided in order to avoid any deadlock or undue delay in the appointment process. Such assistance is not needed if the parties themselves have, in their agreement on the appointment procedure, provided other means for securing the appointment. It may be noted, however, that the mere designation of an appointing authority is not fully sufficient in this regard since it would not meet the contingency described in subparagraph (c).

Suppletive rules on appointment procedure, paragraph (3)

5. Paragraph (3) supplies those parties that have not agreed on a procedure for the appointment with a system for appointing either three arbitrators or one arbitrator, these numbers being the two most common ones in international cases. Subparagraph (a) lays down the rules for the appointment of three arbitrators, whether this number has been agreed upon by the parties under article 10 (1) or whether it follows from article 10 (2). Subparagraph (b) lays down the method of appointing a sole arbitrator for those cases where the parties have made no provision for the appointment, except to agree on the number (i.e. one).

6. In both cases a last resort to the Court specified in article 6 is envisaged in order to avoid any deadlock in the appointment process. There is a difference, however, as regards the time element. While subparagraph (a) sets twice a time-limit (of thirty days) for the sake of certainty, subparagraph (b) does not fix a time-limit but merely refers to the parties' inability to agree. This general wording seems acceptable in this latter case since the persons expected to agree are the parties and their inability to do so becomes apparent from the request to the Court by one of them.

Rules and guidelines for decision of Court, paragraph (5)

7. According to paragraph (5), the decision of the Court shall be final, whether it relates to a matter

entrusted to it by the suppletive rules of paragraph (3) or by the mandatory provision of paragraph (4) in cases where an agreed appointment procedure fails to secure the appointment. Finality seems appropriate in view of the administrative nature of the function and essential in view of the need to constitute the arbitral tribunal as soon as possible.

8. In any case of appointment, the Court shall have due regard to any qualifications required by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator. It is submitted that these criteria are binding since they follow from the arbitration agreement or, as regards impartiality and independence, from article 12, while the special guideline for the appointment of a sole or third arbitrator could be invalidated by a contrary stipulation 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.

References

- A/CN.9/216, paras. 42-43
- A/CN.9/232, paras. 57-60
- A/CN.9/233, paras. 103-106
- A/CN.9/245, paras. 202-204
- A/CN.9/246, paras. 33-34

Commentary

1. Article 12 implements in two ways the principle that arbitrators shall be impartial and independent. Paragraph (1) requires any prospective or appointed arbitrator to disclose promptly any circumstances likely to cast doubt on his impartiality or independence. Paragraph (2) lays the basis for securing impartiality and independence by recognizing those circumstances which give rise to justifiable doubts in this respect as reasons for a challenge.

2. The duty of a prospective arbitrator to disclose any circumstances of the type referred to in paragraph (1) is designed to inform and alert the person approaching

⁴²It is submitted that the last part of paragraph (5) relating to the appointment of a sole or third arbitrator should not be mandatory (see below, para. 8).

him at an early stage about possible doubts and, thus, helps to prevent the appointment of an unacceptable candidate. Disclosure is required not only where a party or the parties approach the candidate but also where he is contacted by an arbitral institution or other appointing authority involved in the appointment procedure.

3. As stated in the second sentence of paragraph (1), even an appointed arbitrator is, and continues to be, under that duty, essentially for two purposes. The first is to provide the information to any party who did not obtain it before the arbitrator's appointment. The second is to secure information about any circumstances which only arise at a later stage of the arbitral proceedings (e.g. new business affiliation or share acquisitions).

4. Paragraph (2), like article 10 (1) of the UNCITRAL Arbitration Rules, adopts a general formula for the grounds on which an arbitrator may be challenged. This seems preferable to listing all possible connections and other relevant situations. As indicated by the word "only", the grounds for challenge referred to here are exhaustive. Although reliance on any specific reason listed in a national law (often applicable to judges and arbitrators alike) is precluded, it is submitted that it would be difficult to find any such reason which would not be covered by the general formula.

5. It may be noted that the Working Group was of the view that the issue of the arbitrator's competence or other qualifications, specified by the parties, was more closely related to the conduct of the proceedings than to the initial appointment.⁴³ It would, thus, have to be considered under article 14 and possibly article 19 (3).⁴⁴ However, it is submitted in this connection that the conduct of an arbitrator may be relevant under article 12 (2), for example, where any of his actions or statements gives rise to justifiable doubts as to his impartiality or independence. The Commission may wish to consider expressing this interpretation in the text since the word "circumstances" and the close connection with paragraph (1) could lead to a narrower interpretation which would not cover such instances of biased behaviour or misconduct.

6. The second sentence of paragraph (2) estops a party from challenging an arbitrator, whom he himself appointed or in whose appointment he participated, on any ground which he already knew before the appointment. In such case, that party should not have appointed, or agreed to the appointment of, the candidate whose impartiality or independence was in doubt. It is submitted that "participation in the appointment" covers not only the case where the parties jointly appoint an arbitrator (e.g. under article 11 (3) (b)) but also a less direct involvement such as the one under the list procedure envisaged in the UNCITRAL Arbitration Rules (article 6 (3)).

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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.

References

- A/CN.9/216, paras. 44-45
- A/CN.9/232, paras. 61-65
- A/CN.9/233, paras. 107-111
- A/CN.9/245, paras. 205-212
- A/CN.9/246, paras. 36-39

Commentary

Freedom to agree, and its limits, paragraph (1)

1. Paragraph (1) recognizes the freedom of the parties to agree on a procedure for challenging an arbitrator, while the reasons for such a challenge are exhaustively laid down in the mandatory provision of article 12 (2).

2. The Model Law thus gives full effect to any agreement on how a challenge may be brought and decided upon. However, there is one specific restriction.⁴⁵ The parties may not exclude the last resort to the Court provided for in paragraph (3). This restriction, unlike the one in article 11 (2) and (4),⁴⁶ applies irrespective of whether the parties have authorized any other body, e.g. an appointing authority, to take the final decision on the challenge. It is submitted that in such a case the challenging party would have to exhaust the available remedies and seek a decision by that body; but that decision would not be final since the last resort to the Court specified in article 6 cannot be excluded by agreement of the parties.

⁴³There is also a general restriction since, it is submitted, the fundamental principles laid down in article 19 (3) extend to such procedural agreement. See commentary to article 19, para. 7.

⁴⁴Cf. commentary to article 11, paras. 3-4.

⁴⁵A/CN.9/233, para. 105.

⁴⁶See commentary to article 14, para. 4, and to article 19, para. 9.

Suppletive rules on challenge procedure, paragraph (2)

3. Paragraph (2) supplies those parties who have not agreed on a challenge procedure with a system of challenge by specifying the period of time and the form for bringing a challenge and the mode of deciding thereon, subject to ultimate judicial control as provided in paragraph (3).

4. As stated in the second sentence of paragraph (2), the challenge would be decided upon by the arbitral tribunal if a decision is needed, i.e. where the challenged arbitrator does not withdraw from his office or the other party disagrees with the challenge. To let the arbitral tribunal decide on the challenge is obviously without practical relevance in the case of a sole arbitrator who has been challenged and does not resign. However, where one of three arbitrators is challenged it has some merits, despite the possible psychological difficulties of making the arbitral tribunal decide on a challenge of one of its members. At least where the challenge is not frivolous or obviously unfounded, an advantage could be to save time and expense by making the last resort to the Court unnecessary. It may be added that such a decision is not one on a question of procedure within the meaning of article 29 (second sentence) and would, thus, have to be made by all or a majority of the members (article 29, first sentence).⁴⁷ This means that a challenge will be sustained only if the two other members decide in favour of the challenging party.

Ultimate judicial control, paragraph (3)

5. Paragraph (3) grants any challenging party who was unsuccessful in the procedure agreed upon by the parties or in the one under paragraph (2) a last resort to the Court specified in article 6. The provision, in its most crucial part, adopts a compromise solution with regard to the controversy of whether any resort to a court should be allowed only after the final award is made or whether a decision during the arbitral proceedings is preferable. The main reason in support of the first position is that it prevents dilatory tactics; the main reason in support of the second position is that a prompt decision would soon put an end to the undesirable situation of having a challenged arbitrator participate in the proceedings and would, in particular, avoid waste of time and expense in those cases where the court later sustains the challenge.

6. Paragraph (3), like article 14 but unlike article 16 (3), provides for court intervention during the arbitral proceedings; however, it includes three features designed to minimize the risk and adverse effects of dilatory tactics. The first element is the short period of time of fifteen days for requesting the Court to overrule the negative decision of the arbitral tribunal or any other body agreed upon by the parties. The second feature is that the decision by the Court shall be final; in addition to excluding appeal, other measures relating to the organization of the Court specified in article 6 may accelerate matters.⁴⁸ The third feature is that the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings while the request

is pending with the Court; it would certainly do so if it regards the challenge as totally unfounded and serving merely dilatory purposes.

* * *

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.

References

- A/CN.9/216, para. 50
- A/CN.9/232, paras. 66-69
- A/CN.9/233, paras. 112-117
- A/CN.9/245, paras. 213-216
- A/CN.9/246, paras. 40-42

Commentary

1. Article 14 deals with the termination of the mandate of an arbitrator who becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act. In any such case his mandate terminates if he withdraws from his office or if the parties agree on the termination or where this consequence is so self-evident that neither withdrawal nor agreement is needed as, for example, in the case of death.

2. Otherwise, the Court specified in article 6 shall, upon request of a party, make a final decision on the termination of the mandate if there remains a controversy concerning any of the above grounds. A need for such court assistance will rarely arise with regard to *de jure* or *de facto* impossibility and will most probably relate to the less precise ground of "failure to act".

3. This formula, taken from the UNCITRAL Arbitration Rules (article 13 (2)), is admittedly vague, in particular as regards the (undefined) time element inherent in the term "failure". It is, nevertheless, used here since no other acceptable, more detailed formula could be found which would be sufficiently flexible to cover the great variety of situations in which retention of a "non-performing" arbitrator becomes intolerable.

4. It is submitted that in judging whether an arbitrator failed to act, the following considerations may be relevant: Which action was expected or required of him in the light of the arbitration agreement and the specific procedural situation? If he has not done anything in this regard, has the delay been so inordinate as to be unacceptable in the light of the circumstances, including technical difficulties and the complexity of the case? If he has done something and acted in a certain way, did his conduct fall clearly below the standard of what may reasonably be expected from an arbitrator? Amongst

⁴⁷Cf. A/CN.9/246, para. 38.

⁴⁸See commentary to article 6, para. 4.

the factors influencing the level of expectations are the ability to function efficiently and expeditiously and any special competence or other qualifications required of the arbitrator by agreement of the parties.

5. It may be noted that article 14 does not cover all grounds which lead to a termination of the mandate of an arbitrator. Other grounds are to be found in article 15.⁴⁹

* * *

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.

References

- A/CN.9/233, paras. 107, 109
A/CN.9/245, paras. 208, 213, 215
A/CN.9/246, paras. 33, 35

Commentary

1. Article 14 *bis* provides that the withdrawal of an arbitrator or the consent of a party to the termination of his mandate, whether under article 13 (2) or 14, does not imply acceptance of any ground on which the termination was requested. This provision, precluding any inference as to the validity of the grounds, is designed to facilitate such withdrawal or consent in order to prevent lengthy controversies.

2. The provision is presented in a separate article since it relates to two different articles. If retained in this form, it might be given the following heading: "No inference of validity of grounds".

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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.

References

- A/CN.9/216, para. 50
A/CN.9/232, paras. 70-72
A/CN.9/233, paras. 118-120
A/CN.9/245, paras. 217-219
A/CN.9/246, paras. 42-48

⁴⁹See commentary to article 15, paras. 1-3.

Commentary

Further cases of termination of mandate

1. Article 15 deals primarily with the question how a substitute arbitrator would be appointed. Yet, in order to embrace all possible cases where such a need may arise, it deals, in a less conspicuous manner, also with those manifold situations of termination of mandate which are not covered by articles 13 and 14.

2. The two most important instances added here are the arbitrator's withdrawal from his office "for any reason" (other than the ones covered by articles 13 and 14) and the revocation of the mandate by agreement of the parties. The latter instance, i.e. removal of an arbitrator by consent of the parties, seems to be justifiably included in view of the consensual nature of arbitration, which gives the parties unrestricted freedom to agree on the termination of the mandate of an arbitrator.

3. Inclusion of the first instance, however, is less easily justified and may, for example, be objected to on the ground that a person who had accepted to act as an arbitrator should not be allowed to resign for capricious reasons. Nevertheless, it is impractical to require just cause for the resignation (or to attempt to list all possible causes justifying resignation) since an unwilling arbitrator could not, in fact, be forced to perform his functions.⁵⁰ It should be noted, in respect of both above instances, that the Model Law does not deal with the legal responsibility of an arbitrator or other issues pertaining to the contractual party-arbitrator relationship.

Rules of appointing substitute arbitrator

4. Whenever a substitute arbitrator needs to be appointed, this shall be done in accordance with the rules that were applicable to the appointment of the arbitrator being replaced, whether these rules are laid down in the arbitration agreement or, as suppletive rules, in the Model Law.

5. This provision is non-mandatory, as is clear from the words "unless the parties agree otherwise". Such agreement would normally set forth a new appointment procedure for replacing an arbitrator whose mandate has terminated.⁵¹ Yet, it might relate to the preliminary question whether a substitute arbitrator should be appointed at all. For example, where the parties named a specific sole arbitrator in their original agreement,

⁵⁰Cf. A/CN.9/246, para. 44.

⁵¹For example, the parties could in their arbitration agreement include a stipulation intended to eliminate the possible danger that, in the case of a party-appointed arbitrator, the mechanism of resignation and replacement under article 15, in particular by using it repeatedly, could be abused for the purposes of obstructing the proceedings. This concern—which the Working Group, without denying its validity, decided not to deal with (A/CN.9/245, para. 19)—could be met by a stipulation, inspired by article 56 (3) of the 1965 Washington Convention, to the effect that a party-appointed arbitrator who resigns without the consent of the arbitral tribunal (i.e. the other two members) would not be replaced by another party-appointed arbitrator but by one who would be appointed by either the third arbitrator (chairman) or a specified appointing authority.

they may wish not to continue the arbitral proceedings without him.

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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 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 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.

References

A/CN.9/216, paras. 34, 81-83

A/CN.9/232, paras. 47-48, 146-150, 152-157

A/CN.9/245, paras. 58-65

A/CN.9/246, paras. 49-52, 54-56

Commentary

A. "Kompetenz-Kompetenz" and separability doctrine, paragraph (1)

1. Article 16 adopts the important principle that it is initially and primarily for the arbitral tribunal itself to determine whether it has jurisdiction, subject to ultimate court control (see below, paras. 12-14). Paragraph (1) grants the arbitral tribunal the power to rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. This power, often referred to as *Kompetenz-Kompetenz*, is an essential and widely accepted feature of modern international arbitration but, at present, is not yet recognized in all national laws.

2. The same is true with regard to the second principle adopted in article 16 (1), i.e. the doctrine of separability (or autonomy) of the arbitration clause. This doctrine complements the power of the arbitral tribunal to determine its own jurisdiction in that it calls for treating such a clause as an agreement independent of the other terms of the contract. A finding by the arbitral tribunal that the contract is null and void, therefore, does not require the conclusion that the arbitration clause is invalid. The arbitral tribunal would, thus, not lack jurisdiction to decide on the nullity of the contract (and on further issues submitted to it) unless it finds that the defect which causes the nullity of the contract affects also the arbitration clause itself. It may be mentioned that the principle of separability as adopted in article 16 (1), in contrast to some national laws which distinguish in this respect between initial defects and later grounds of nullity, applies whatever the nature of the defect.

3. Article 16 does not state according to which law the arbitral tribunal would determine the various possible issues relating to its jurisdiction. It is submitted that the applicable law should be the same as that which the Court specified in article 6 would apply in setting aside proceedings under article 34, since these proceedings constitute the ultimate court control over the arbitral tribunal's decision (article 16 (3)). This would mean that the capacity of the parties and the validity of the arbitration agreement would be decided according to the law determined pursuant to the rules contained in article 34 (2) (a) (i) and that the question of arbitrability and other issues of public policy would be governed by the law of "this State" (see present text of article 34 (2) (b)).⁵² As regards these latter issues, including arbitrability, it is further submitted that the arbitral tribunal, like the Court under article 34 (2) (b), should make a determination *ex officio*, i.e. even without any plea by a party, as referred to in article 16 (2).⁵³

B. Time-limits for raising objections, paragraph (2)

4. Paragraph (2) deals with the possible plea of a party that the arbitral tribunal does not have jurisdiction to decide the case before it or that it is exceeding the scope of its authority. It aims, in particular, at ensuring that any such objections are raised without delay.

5. The respondent may not invoke lack of jurisdiction after submitting his statement of defence (as referred to in article 23 (1)) unless the arbitral tribunal admits a later plea since it considers the delay justified. With respect to a counter-claim, which is no longer dealt with expressly in the text,⁵⁴ the relevant cut-off point

⁵²As regards subparagraph (i), the reference to the law of "this State" is tentative and controversial; see commentary to article 34, para. 12.

⁵³If the Commission accepts this interpretation, it may wish to consider expressing this understanding in the text of article 16, possibly combined with a provision on the effect, and its limits, of a waiver or submission, as discussed below, paras. 8-10.

⁵⁴The Working Group, at its seventh session, decided to delete, at the end of the first sentence of article 16 (2), the words "or, with respect to a counter-claim, in the reply to the counter-claim", on the understanding that any provisions of the Model Law referring to the claim would apply, *mutatis mutandis*, to a counter-claim (A/CN.9/246, para. 196).

would be the time at which the claimant submits his reply thereto.

6. As stated in the second sentence of paragraph (2), the respondent is not precluded from invoking lack of jurisdiction by the fact that he has appointed, or participated in the appointment of, an arbitrator. Thus, if, despite his objections, he prefers not to remain passive but to take part in, and exert influence on, the constitution of the arbitral tribunal, which would eventually rule on his objections, he need not make a reservation, as would be necessary under some national laws for excluding the effect of waiver or submission.

7. The second type of plea dealt with in paragraph (2), which is that the arbitral tribunal is exceeding the scope of its authority, must be raised promptly after the tribunal has indicated its intention to decide on the matter alleged to be beyond the scope of its authority; here again, a later plea may be admitted if the arbitral tribunal considers the delay to be justified. While any instance of the arbitral tribunal's exceeding its authority may often occur or become certain only in the context of the award or other decision, the above time-limit would be relevant and useful in those cases where there are clear indications at an earlier stage, for example, where the arbitral tribunal requests evidence relating to an issue not submitted to it.

C. Effect of failure to raise plea

8. The Model Law does not state whether a party's failure to raise his objections within the time-limit set by article 16 (2) has effect at the post-award stage. The pertinent observation of the Working Group was that a party who failed to raise the plea as required under article 16 (2) should be precluded from raising such objections not only during the later stages of the arbitral proceedings but also in other contexts, in particular, in setting aside proceedings or enforcement proceedings, subject to certain limits such as public policy, including those relating to arbitrability.⁵⁵

9. It is submitted that this observation accords with the purpose underlying paragraph (2) and might appropriately be expressed in the Model Law.⁵⁶ It would mean, in practical terms, that any objection, for example to the validity of the arbitration agreement, may not later be invoked as a ground for setting aside under article 34 (2) (a) (i), or for requesting, under article 36 (1) (a) (i), refusal of recognition or enforcement of an award (made under this Law); these provisions on grounds for setting aside or refusing recognition or enforcement would remain applicable and of practical relevance to those cases where a party raised the plea in time but without success or where a party did not participate in the arbitration, at least not

submit a statement or take part in hearings on the substance of the dispute.

10. As expressed in the above observation of the Working Group, there are limits to the effect of a party's failure to raise his objections. These limits arise from the fact that certain defects such as violation of public policy, including non-arbitrability, cannot be cured by submission to the proceedings. Accordingly, such grounds for lack of jurisdiction would be decided upon by a court in accordance with article 34 (2) (b) or, as regards awards made under this Law, article 36 (1) (b) even if no party had raised any objections in this respect during the arbitral proceedings. It may be added that this result is in harmony with the understanding (stated above, para. 3) that these latter issues are to be determined by the arbitral tribunal *ex officio*.

D. Ruling by arbitral tribunal and judicial control, paragraph (3)

11. Objections to the arbitral tribunal's jurisdiction go to the very foundation of the arbitration. Jurisdictional questions are, thus, antecedent to matters of substance and usually ruled upon first in a separate decision in order to avoid possible waste of time and costs. However, in some cases, in particular where the question of jurisdiction is intertwined with the substantive issue, it may be appropriate to combine the ruling on jurisdiction with a partial or complete decision on the merits of the case. Article 16 (3) therefore grants the arbitral tribunal discretion to rule on a plea referred to in paragraph (2) either as a preliminary question or in an award on the merits.

12. As noted earlier (above, para. 1), the power of the arbitral tribunal to rule on its own competence is subject to judicial control. Where a ruling by the arbitral tribunal that it has jurisdiction is, exceptionally, included in an award on the merits, it is obvious that the judicial control of that ruling would be exercised upon an application by the objecting party for the setting aside of that award. The less clear, and in fact controversial, case is where such affirmative ruling is made on a plea as a preliminary question. The solution adopted in article 16 (3) is that also in this case judicial control may be sought only after the award on the merits is rendered, namely in setting-aside proceedings (and, although this is not immediately clear from the present text,⁵⁷ in any recognition or enforcement proceedings).

13. It was for the purpose of preventing dilatory tactics and abuse of any immediate right to appeal that this solution was adopted, reinforced by the deletion of previous draft article 17, which provided for concurrent

⁵⁵A/CN.9/246, para. 51.

⁵⁶This understanding would also be in line with the one accepted by the Working Group on the effect of a waiver under article 4, concerning non-compliance with a non-mandatory provision of the Model Law or a clause of the arbitration agreement (see commentary to article 4, para. 6).

⁵⁷The reason for referring in article 16 (3) only to the application for setting aside was that the thrust of this provision concerns the faculty of an objecting party to attack the arbitral tribunal's ruling by initiating court proceedings for review of that ruling. However, the Commission may wish to consider the appropriateness of adding, for the sake of clarity, a reference to recognition or enforcement proceedings, which, although initiated by the other party, provide a forum for the objecting party to invoke lack of jurisdiction as a ground for refusal (under article 36 (1) (a) (i)).

court control.³⁴ The disadvantage of this solution, as was pointed out by the proponents of immediate court control, is that it may lead to considerable waste of time and money where, after lengthy proceedings with expensive hearings and taking of evidence, the Court sets aside the award for lack of jurisdiction.

14. It is submitted that the weight of these two conflicting concerns, i.e. fear of dilatory tactics and obstruction versus waste of time and money, is difficult to assess at a general level imagining all possible cases. It seems that the assessment could better be made with respect to each particular case. Thus, it may be worth considering giving the arbitral tribunal discretion, based on its assessment of the actual potential of these concerns, to cast its ruling in the form either of an award, which would be subject to instant court control,³⁵ or of a procedural decision, which may be contested only in an action for setting aside the later award on the merits. In considering this suggestion, which would help to avoid the present inconsistency between article 16 (3) and article 13 (3), thought may be given to adopting the special elements of article 13 (3) designed to minimize the risk of dilatory tactics, i.e. short time-limit for resort to court, finality of court decision and discretion of arbitral tribunal to continue proceedings.

15. Article 16 (3) does not regulate the case where the arbitral tribunal rules that it has no jurisdiction. A previous draft provision which allowed recourse to the court, not necessarily with the aim of forcing the arbitrators to continue the proceedings but in order to obtain a decision on the existence of a valid arbitration agreement, was not retained by the Working Group.³⁶ It was stated that such ruling of the arbitral tribunal was final and binding as regards these arbitral proceedings but did not settle the question whether the substantive claim was to be decided by a court or by an arbitral tribunal. It is submitted that it thus depends on the general law on arbitration or civil procedure whether court control on such ruling may be sought, other than by way of request in any substantive proceedings as referred to in article 8 (1).

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³⁴A/CN.9/246 paras. 52-56. The text of article 17, which covered not only the case of article 16 (3), i.e. ruling of arbitral tribunal affirming its jurisdiction, was as follows:

"Article 17. *Concurrent court control*

"(1) [Notwithstanding the provisions of article 16,] a party may [at any time] request the Court specified in article 6 to decide whether a valid arbitration agreement exists and [if arbitral proceedings have commenced,] whether the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].

"(2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay of the arbitral proceedings]."

³⁵It may be noted that the present solution in article 16 (3) does not give the arbitral tribunal that option, irrespective of whether a ruling on jurisdiction would be classified as an "award"; as to the desirability of including in the Model Law a definition of "award", see commentary to article 34, para. 3.

³⁶A/CN.9/245, paras. 62-64. The deleted provision read as follows: "A ruling by the arbitral tribunal that it has no jurisdiction may be contested by any party within 30 days before the Court specified in article [6]."

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.

References

A/CN.9/216, paras. 65-69

A/CN.9/232, paras. 119-123

A/CN.9/245, paras. 70-72

A/CN.9/246, paras. 57-59

Commentary

1. According to article 18, the arbitral tribunal has the implied power, unless excluded by agreement of the parties, to order any party to take such interim measure of protection as the arbitral tribunal considers necessary in respect of the subject-matter of the dispute. The general purpose of such order would be to prevent or minimize any disadvantage which may be due to the duration of the arbitral proceedings until the final settlement of the dispute and the implementation of its result.

2. Practical examples of interim measures designed to prevent or mitigate loss include the preservation, custody or sale of goods which are the subject-matter of the dispute. However, article 18 is not limited to sales transactions and would, for example, cover measures designed provisionally to determine and "stabilize" the relationship of the parties in a long-term project. Examples of such *modus vivendi* orders include the use or maintenance of machines or works or the continuation of a certain phase of a construction if necessary to prevent irreparable harm. Finally, an order may serve the purpose of securing evidence which would otherwise be unavailable at a later stage of the proceedings.

3. As is clear from the text of article 18, the interim measure must relate to the subject-matter of the dispute and the order may be addressed only to a party (or both parties). This restriction, which follows from the fact that the arbitral tribunal derives its jurisdiction from the arbitration agreement, constitutes one of the main factors narrowing the scope of article 18 as compared with the considerably wider range of court measures envisaged under article 9.³⁷

4. Another major difference is that article 18 neither grants the arbitral tribunal the power to enforce its orders nor provides for judicial enforcement of such orders of the arbitral tribunal; an earlier draft provision envisaging court assistance in this respect was not retained by the Working Group. Nevertheless, it was understood that a State would not be precluded from

³⁷See commentary to article 9, paras. 4-5.

rendering such assistance under its procedural law,⁴² whether by providing judicial enforcement or by empowering the arbitral tribunal to take certain measures of compulsion.

5. Yet, even without such possibility of enforcement, the power of the arbitral tribunal under article 18 is of practical value. It seems probable that a party will comply with the order and take the measure considered necessary by the arbitrators who, after all, will be the ones to decide the case. This probability may be increased by the use of the power to require any party to provide security for the costs of such measure, in particular where the arbitral tribunal would order the other party to provide such security, which, it is submitted, may also cover any possible damages. Finally, if a party does not take the interim measure of protection as ordered by the arbitral tribunal, such failure may be taken into account in the final decision, in particular in any assessment of damages.

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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.

References

- A/CN.9/216, para. 56
 A/CN.9/232, paras. 101-106
 A/CN.9/245, paras. 73-75
 A/CN.9/246, paras. 60-63

Commentary

"Magna Carta of Arbitral Procedure"

1. Article 19 may be regarded as the most important provision of the Model Law. It goes a long way towards establishing procedural autonomy by recognizing the parties' freedom to lay down the rules of procedure (paragraph (1)) and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings (paragraph (2)), both

subject to fundamental principles of fairness (paragraph (3)). Taken together with the other provisions on arbitral procedure, a liberal framework is provided to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place.

Freedom of parties, to lay down procedural rules, paragraph (1)

2. Paragraph (1) guarantees the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to tailor the rules according to their specific needs and wishes. They may do so by preparing their own individual set of rules or, as clarified in article 2 (d), by referring to standard rules for institutional (supervised or administered) arbitration or for pure *ad hoc* arbitration. The parties may, thus, take full advantage of the services of permanent arbitral institutions or of established arbitration practices of trade associations. They may choose those features familiar to them and even opt for a procedure which is anchored in a particular legal system. However, if they refer to a given law on civil procedure, including evidence, such law would be applicable by virtue of their choice and not by virtue of being the national law.

3. The freedom of the parties is subject only to the provisions of the Model Law, that is, to its mandatory provisions. The most fundamental of such provisions, from which the parties may not derogate, is the one contained in paragraph (3). Other such provisions concerning the conduct of the proceedings or the making of the award are contained in articles 23 (1), 24 (2)-(4), 27, 30 (2), 31 (1), (3), (4), 32 and 33 (1), (2), (4), (5).

Procedural discretion of arbitral tribunal, paragraph (2)

4. Where the parties have not agreed, before or during the arbitral proceedings,⁴³ on the procedure (i.e. at least not on the particular matter at issue), the arbitral tribunal is empowered to conduct the arbitration in such manner as it considers appropriate, subject only to the provisions of the Model Law, which often set forth special features of the discretionary powers (e.g. articles 23 (2), 24 (1), (2), 25) and sometimes limit the discretion to ensure fairness (e.g. articles 19 (3), 24 (3), (4), 26 (2)). As stated in paragraph (2), this power includes the power to determine the admissibility, relevance, materiality and weight of any evidence.⁴⁴ This, in turn,

⁴³As was noted by the Working Group, the freedom of the parties under paragraph (1) to agree on the procedure is a continuing one throughout the arbitral proceedings and not limited, for example, to the time before the first arbitrator is appointed (A/CN.9/246, para. 63). It is submitted, however, that the parties themselves may in their original agreement limit their freedom in this way if they wish their arbitrators to know from the start under what procedural rules they are expected to act.

⁴⁴Not regulated in article 16 (or any other provision of the Model Law) is the question of which party bears the burden of proof, which is, for example, answered in article 24 (1) of the UNCITRAL Arbitration Rules as follows: "Each party shall have the burden of proving the facts relied on to support his claim or defence".

⁴²A/CN.9/245, para. 72.

includes the power of the arbitral tribunal to adopt its own rules of evidence, although that is no longer expressed in the text.

5. Except where the parties have laid down detailed and stringent rules of procedure, including evidence, the discretionary powers of the arbitral tribunal are considerable in view of the fact that the Model Law, with its few provisions limiting the procedural discretion, provides a liberal framework. This enables the arbitral tribunal to meet the needs of the particular case and to select the most suitable procedure when organizing the arbitration, conducting individual hearings or other meetings and determining the important specifics of taking and evaluating evidence.

6. In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them). For example, where both parties are from a common law system, the arbitral tribunal may rely on affidavits and order pre-hearing discovery to a greater extent than in a case with parties of civil law tradition, where, to mention another example, the mode of proceedings could be more inquisitorial than adversarial. Above all, where the parties are from different legal systems, the arbitral tribunal may use a liberal "mixed" procedure, adopting suitable features from different legal systems and relying on techniques proven in international practice, and, for instance, let parties present their case as they themselves judge best. Such procedural discretion in all these cases seems conducive to facilitating international commercial arbitration, while being forced to apply the "law of the land" where the arbitration happens to take place would present a major disadvantage to any party not used to that particular and possibly peculiar system of procedure and evidence.

Fundamental requirements of fairness, paragraph (3)

7. Paragraph (3) adopts basic notions of fairness in requiring that the parties be treated with equality and each party be given a full opportunity of presenting his case. As expressed by the words "in either case", these fundamental requirements shall be complied with not only by the arbitral tribunal when using its discretionary powers under paragraph (2) but also by the parties when using their freedom under paragraph (1) to lay down the rules of procedure. It is submitted that these principles, in view of their fundamental nature, are to be followed in all procedural contexts, including, for example, the procedures referred to in articles 13 and 14.

8. The principles which paragraph (3) states in a general manner are implemented and put in more concrete form by provisions such as articles 24 (3), (4) and 26 (2).⁴⁵ Other provisions, such as articles 16 (2), 17 (2) and 25 (c), present certain refinements or

restrictions in specific procedural contexts in order to ensure efficient and expedient proceedings. These latter provisions, which like all other provisions of the Model Law are in harmony with the principles laid down in article 19 (3), make it clear that "full opportunity of presenting one's case" does not entitle a party to obstruct the proceedings by dilatory tactics and, for example, present any objections, amendments, or evidence only on the eve of the award.

9. Of course, the arbitral tribunal must be guided, and indeed abide, by this principle when determining the appropriate conduct of the proceedings, for example, when fixing time-limits for submission of statements or evidence or when establishing the modalities of hearings. It must, for instance, not require more from a party than what may be reasonably expected under the circumstances. With regard to the observation of the Working Group noted in the commentary to article 12 (para. 5), it might be doubted whether a party is given a full opportunity of presenting his case where, although he is able to state in full his claim and the evidence supporting it, the conduct of an arbitrator reveals a clear lack of competence or of another qualification required of him by agreement of the parties.

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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.

References

- A/CN.9/216, paras. 53-55
- A/CN.9/232, paras. 99-100, 112-113
- A/CN.9/245, paras. 76-79
- A/CN.9/246, paras. 64-65

Commentary

Determination of place of arbitration, paragraph (1)

1. Paragraph (1) recognizes the freedom of the parties to agree on the place of arbitration. The parties may either themselves determine that place or, as is clear from article 2 (c), authorize a third party, including an institution, to make that determination. Failing any such agreement, the place of arbitration shall be determined by the arbitral tribunal.

2. The place of arbitration is of legal relevance in three respects. First, it is one of the various possible

⁴⁵Another example would be article 24 (2), although there may be some doubt whether this provision as presently drafted fully implements and accords with the requirement that each party shall be given a full opportunity of presenting his case (see commentary to article 24, para. 4).

factors establishing the international character of the arbitration, provided it is determined in, or pursuant to, the arbitration agreement (article 1 (2) (b) (i)). Second, it is a connecting factor for the "territorial" applicability of the Model Law, either as exclusive criterion, if the Commission adopts the view prevailing in the Working Group, or as subsidiary connecting factor, if the Model Law would in its final form allow the parties to select a procedural law other than that of the State where the arbitration is held.⁴⁴ Third, the place of arbitration is, by virtue of article 31 (3), the place of origin of the award and as such relevant in the context of recognition or enforcement proceedings, in particular, by determining, for the purposes of article 36 (1) (a) (v), "the country in which . . . that award was made".

Meeting at place other than place of arbitration, paragraph (2)

3. The factual significance of the place of arbitration, in particular when determined by the parties themselves, is that, in principle, the arbitral proceedings, including any hearings or other meetings, would be expected to be held at that place. However, there may be good reasons for meeting elsewhere, not merely in the case where a change of locale is necessary (e.g. for purposes of inspection of premises). For example, where witnesses are to be heard or where the arbitrators meet among themselves for consultations, another place may be more appropriate for the sake of convenience of the persons involved and for keeping down the costs of the arbitration. Yet another of the many possible considerations would be to balance the parties' own expenses by scheduling some of the meetings at the place of one party and some of the meetings at the place of the other party.

4. For all such purposes, paragraph (2) empowers the arbitral tribunal, unless otherwise agreed by the parties, to meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts or (only) the parties, or for inspection of goods, other property, or documents.

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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.

References

- A/CN.9/233, paras. 21-23
- A/CN.9/245, paras. 24-27
- A/CN.9/246, paras. 66-67

Commentary

1. Article 21 provides a rule for determining the point of time at which the arbitral proceedings in respect of a

⁴⁴See remarks on the territorial scope of application of the Model Law in commentary to article 1, paras. 4-6.

particular dispute commence. Such determination relevant not only for the purposes of the Model Law itself but also for legal consequences regulated in other laws, e.g. cessation or interruption of any limitative period.

2. The relevant point of time is the date on which request for the particular dispute to be referred to arbitration is received by the respondent.⁴⁷ Such request, whether in fact called "request", "notice", "application" or "statement of claim", must identify the particular dispute and make clear that arbitration resorted to thereby and not, for example, indicate merely the intention of later initiating arbitral proceedings.

3. As stated in the text, the parties may derogate from this provision and select a different point of time. I take an example which is not uncommon in institution arbitration, they may agree, by reference to the institutional rules, that the relevant date is the one on which the request for arbitration is received by the arbitral institution.

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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.

References

- A/CN.9/233, paras. 27-30
- A/CN.9/245, paras. 34-36
- A/CN.9/246, paras. 68-70

Commentary

1. Article 22 deals with an issue which, while not commonly dealt with in national laws on arbitration, of considerable practical importance in international commercial arbitration, i.e. the determination of the language or languages to be used in the arbitral proceedings. It is clear from this provision, if there ever could be any doubt on this point, that the arbitral proceedings are not subject to any local language requirement, for example, any "official" language or languages for court proceedings at the place of arbitration.

⁴⁷As to what constitutes "receipt" and when a communication received or deemed to be received, see article 2 (e).

2. According to paragraph (1), it is primarily for the parties to determine the language or languages of the arbitral proceedings. Autonomy of the parties is particularly important here since such determination affects their position in the proceedings and the expediency and costs of the arbitration. They are in the best position to judge, for example, whether a single language would be feasible and acceptable or, if more than one language need be used, which languages they should be. An agreement by the parties would have the advantage of providing certainty on that point from the start. It would also assist in selecting suitable arbitrators and save the arbitrators, upon their appointment, from having to make a procedural decision, which in practice often turns out to be a rather delicate one.

3. Where the parties have not settled the language question, the arbitral tribunal will make that determination in accordance with paragraph (1). In doing so, it will take into account the factors mentioned above and the language capabilities of the arbitrators themselves. Above all, it must comply with the fundamental principles laid down in article 19 (3).

4. However, it is submitted, these principles do not necessarily mean that the language of each party must be adopted as a language "to be used in the arbitral proceedings". For instance, where parties have used only one language in their business dealings, in particular in their contract and their correspondence, a decision by the arbitral tribunal to conduct the proceedings in this language would not *per se* conflict with the principle of equal treatment of the parties or deprive that party whose language is not adopted of having a full opportunity of presenting his case. That party may, in fact, use his language in any hearing or other meeting but he must arrange, or at least pay, for the interpretation into the language of the proceedings. As this example may show, the determination of the language or languages to be used is, to a certain degree, a decision on costs. To use the opposite example, in the case of proceedings with two languages, any cost for interpretation or translation between the two languages would form part of the overall costs of the arbitration and as such be borne in principle by the unsuccessful party (cf., e.g. article 40 (1) of the UNCITRAL Arbitration Rules).

5. Article 22 indicates the scope of the determination of the language or languages by listing those items which must be in such language, i.e. any written statement by a party, any hearing and any award, decision or other communication by the arbitral tribunal. Yet, the parties or the arbitrators may determine the scope differently. As regards documentary evidence, paragraph (2) leaves it to the arbitral tribunal to decide whether and to what extent translation into the language of the proceedings is required. This discretion is appropriate in view of the fact that such documents may be voluminous and only in part truly relevant to the dispute.

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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.

References

Λ/CN.9/233, paras. 24-26

Λ/CN.9/245, paras. 29-30, 33

Λ/CN.9/246, paras. 71-73

Commentary

Essential contents of statement of claim or defence, paragraph (1)

1. Paragraph (1) deals with the preparation of the case in writing. The first sentence sets forth those elements of the initial pleadings which are essential for defining the dispute on which the arbitral tribunal is to give a decision. It is then up to the arbitral tribunal to require further statements or explanations, under its general power of article 19 (2). The required contents of the initial statement of claim and of the respondent's reply may be regarded as so basic and necessary as to conform with all established arbitration systems and rules. It is in this spirit that the provision does not go into particulars such as to whom the statements must be addressed.⁴⁴

2. Nevertheless, it is submitted that the provision should be non-mandatory, at least as regards its details. For example, arbitration rules may describe these essential contents in slightly different form or may require their inclusion already in the initial request for arbitration, in which case the reference in paragraph (1) to the period of time would be obsolete.

3. The second sentence of paragraph (1) leaves it to each party, and his procedural strategy, whether to submit all relevant documents or at least refer to the documents or other evidence at this stage. While these documents or listing of evidence are, thus, not part of the essential contents of the initial pleadings, the parties are not fully at liberty to select the point of time for revealing or submitting the documents or other evidence

⁴⁴Article 24 (4) ensures that any statement submitted to the arbitral tribunal would be communicated to the other party.

they intend to rely on. Unless specific provision is made in the arbitration agreement, the arbitral tribunal may, in its general discretion under article 19 (2), require a party to submit a summary of the documents and other evidence which that party intends to present in support of his claim or defence and, as is clear from article 25 (c), require a party to produce documents, exhibits or other evidence within a certain period of time.

Amending or supplementing the claim or defence, paragraph (2)

4. Paragraph (2) leaves it to the discretion of the arbitral tribunal to determine, on the basis of certain criteria, whether a party may amend or supplement his statement of claim or defence. One major criterion would be the extent and the reason for the delay in making the amendment (or supplement⁴⁹). Another criterion would be prejudice to the other party, i.e. procedural prejudice (such as upsetting the normal course of the proceedings or unduly delaying the final settlement of the dispute as defined in the initial pleadings). Yet, since there may be further reasons which would make it inappropriate to allow any later amendment, the arbitral tribunal may, under paragraph (2), take into account "any other circumstances".

5. However, there is one important point in respect of which the arbitral tribunal has no discretion at all: The amendment or supplement must not exceed the scope of the arbitration agreement. This restriction, while not expressed in the article, seems self-evident in view of the fact that the jurisdiction of the arbitral tribunal is based on, and given within the limits of, that agreement.

6. Paragraph (2), as stated therein, is non-mandatory. The parties may, thus, derogate therefrom and provide, for example, that amendments are generally prohibited or that they are allowed as a matter of right or that they are subject to specified limits.

Analogous application to counter-claim and set-off

7. As noted earlier,⁵⁰ the Model Law no longer refers expressly to counter-claims, but any provision referring to the claim would apply, *mutatis mutandis*, to a counter-claim. Thus, paragraph (1) would provide, by analogy, that the respondent shall state the facts supporting his counter-claim, the points at issue and the relief or remedy sought, and that he may annex all documents he considers to be relevant or may add a reference to the documents or other evidence he will submit in support of his counter-claim. It is submitted that the same would apply to a claim relied on by the respondent for the purpose of a set-off.

8. As regards paragraph (2), the analogy takes two forms. The first is a true analogy with the claim, that is, the respondent may amend or supplement his counter-claim unless the arbitral tribunal considers it inappropriate to allow such amendment for any of the reasons

listed in paragraph (2). The second, and more fundamental, issue covered by analogy is whether the respondent is allowed to "amend or supplement" his statement of defence by bringing at a later stage a counter-claim or a claim for the purpose of a set-off. It may be noted that in both cases the above restriction to the scope of the arbitration agreement applies.

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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 stage 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.

References

- A/CN.9/216, para. 57
- A/CN.9/232, paras. 107-111, 113
- A/CN.9/245, paras. 80-83
- A/CN.9/246, paras. 74-80

Commentary

Proceedings with or without oral hearing, paragraph (1) and (2)

1. Paragraphs (1) and (2) deal with the important procedural question whether there will be any oral hearing or whether, as is less common, the arbitral proceedings will be conducted exclusively on the basis of documents and other materials (i.e. as "written proceedings"). Under paragraph (1), the arbitral tribunal shall decide that question,⁵¹ subject to any contrary agreement by the parties and subject to paragraph (2) which should, thus, be commented upon together with paragraph (1). In order to facilitate understanding of the inter-play of these two paragraphs, it seems advisable to distinguish three situations.

⁵¹As a practical matter, "decision" does not mean that the arbitral tribunal would have to render a "decree" on this question at an early stage with binding effect for the whole proceedings. What is meant is a continuing discretion to determine in the light of the developments of the case whether an oral hearing is needed or at least desirable.

⁴⁹The word "amendment" was intended by the drafting group to include "supplement".

⁵⁰Commentary to article 16, para. 5, and footnote 54.

2. The first situation is that the parties have agreed that there shall be an opportunity for oral argument or hearings for the presentation of evidence, either upon request of a party or even without any such specific request. In such case, which is probably not very common, the arbitral tribunal would have to comply with that agreement, although a literal interpretation of the words "notwithstanding the provisions of paragraph (1)" could lead to the conclusion that even in such case the arbitral tribunal would have discretion as to whether to follow any later request of a party.

3. The second situation is that the parties have agreed on written proceedings. In such case, which is probably even less common than the first one, the arbitral tribunal would have to comply with the wish of the parties (paragraph (1)). However, if a party later requests a hearing, paragraph (2) empowers the arbitral tribunal to disregard the original agreement of the parties and, in exercising its discretion, to hold a hearing at an appropriate stage of the proceedings.⁷¹ The underlying philosophy is that the right of a party to request a hearing is of such importance, as emphasized by article 19 (3), that the parties should not be allowed to exclude it by agreement, while, on the other hand, it is desirable to envisage a certain control by the arbitral tribunal in order to avoid its abuse for purposes of delaying or obstructing the proceedings.

4. The third situation is that the parties have not made any stipulation on the mode of the proceedings. In such case, which appears to be the most common of all three situations, the arbitral tribunal would have discretion under paragraph (1) to decide whether to hold an oral hearing. According to paragraph (2), it would retain this discretion even if a party requests an oral hearing. It is submitted that this latter rule, which appears to be the result of a legislative oversight,⁷² should be reconsidered since it may be regarded as not being consistent with article 19 (3). Under the present text, a party would have the fundamental right to present his views or evidence in an oral hearing, unrestricted by any discretion of the arbitral tribunal, only if so provided in the agreement of the parties, which, as mentioned above, is rarely the case and should not be made a necessity by the Model Law.

5. As regards the particulars of paragraph (2), it may be noted that the wording "hearings for the presentation of evidence or for oral argument" is intentionally adopted in such general form. The formula "presentation of evidence" is intended to cover all possible types of evidence recognized in various legal systems and potentially admitted under article 19 (1) or (2), e.g. evidence by witness, expert witness, cross-examination of any such witness, testimony and cross-examination

of a party.⁷³ The formula "oral argument" is intended to cover arguments not only on the substance of the dispute but also on procedural issues.⁷⁴

Sufficient advance notice, paragraph (3)

6. Paragraph (3) implements in a certain respect the principles of article 19 (3) by providing that the parties shall be notified sufficiently in advance of any hearing and of any meeting of the arbitral tribunal for the purpose of inspecting goods, other property, or documents. The required notification is fundamental in that it enables the parties to participate effectively in the proceedings and to prepare and present their case. It is also fundamental in that it is a condition, based on the principle of fairness, for continuing the proceedings in the case of default of a party under article 25 (c).

7. Since the provision expresses merely a principle as an essential requirement, it does not deal with specifics such as who is in fact to notify the parties (e.g. arbitral tribunal, presiding arbitrator, secretary, or arbitral institution). It also refrains from setting a fixed period of time, in view of the great variety of circumstances. While, thus, a period of time may be agreed upon by the parties, including any reference to arbitration rules, such agreement (under article 19 (1)) might not be effective for the reason that it does not provide for "sufficient" advance notice.

Forwarding of communications, paragraph (4)

8. Paragraph (4) also implements in a certain respect the principles of article 19 (3) by providing that each party shall receive a copy of any communication by the other party to the arbitral tribunal, and of any expert report or other document on which the arbitral tribunal may rely in making its decision. It is submitted that "other document" means any written material of similar, i.e. evidentiary, nature (e.g. weather report or exchange rate listing of a given day).

9. Paragraph (4) is based upon the essential principle that both parties should have full and equal access to information. It does not regulate specifics, such as who is in fact to communicate any statement, report, document or other information to the party who needs to be informed. It is submitted, however, that in the instances covered by the first sentence of paragraph (4) the arbitral tribunal (or an administering institution) is under a duty either to ensure that a party sends a copy to the other party or itself to communicate the statement or document of one party to the other party.

* * *

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;

⁷¹As regards the hearing and interrogation of an expert appointed by the arbitral tribunal, see article 26 (2).

⁷²A/CN.9/245, para. 81.

⁷³The text set forth in the annex of A/CN.9/246 speaks of "any" appropriate stage. However, as is clear from para. 75 of that report, this is a typographical error; it should read "an" appropriate stage.

⁷⁴It appears from the report of the seventh session of the Working Group (A/CN.9/246, paras. 77-78) that the discussion focused on the second situation and that the view prevailing there, which was to allow a certain control by the arbitral tribunal, was inadvertently extended to cover the third situation.

(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.

References

- A/CN.9/216, para. 71
- A/CN.9/232, paras. 124-131
- A/CN.9/245, para. 86
- A/CN.9/246, paras. 81-84

Commentary

1. Article 25 deals with those cases where a party, in particular the respondent, fails to play his part in the proceedings in disregard of his earlier commitment to arbitration. The provision, which is non-mandatory, lays down the consequences of such failure and thereby ensures the effectiveness of the parties' agreement.

2. Article 25 would especially contribute to the desired harmonization of national arbitration laws in view of the fact that some existing laws do not give effect to *ex parte* awards. Of course, not only these States would be opposed to recognizing such an award if they were not convinced that fundamental requirements of fairness had been met. The Model Law, therefore, adopts as procedural safeguards the requirements that the defaulting party had been requested or notified sufficiently in advance and that he defaulted without showing sufficient cause therefor.

3. These procedural safeguards are of particular importance in the cases dealt with in article 25 (b) and (c) where the arbitral tribunal is empowered to continue the arbitral proceedings and make an award. However, for the sake of completeness, article 25 also covers the case where a party initiates arbitral proceedings but then fails to communicate his statement of claim (article 25 (a)); in such case, the arbitral proceedings shall be terminated.

4. As regards the failure of the respondent to communicate his statement of defence, article 25 (b) ensures that the arbitration cannot be frustrated by such failure. It obliges the arbitral tribunal to continue the proceedings "without treating such failure as an admission of the claimant's allegations". This rule concerning the assessment of the respondent's failure seems useful in view of the fact that under many national laws on civil procedure default of the defendant in court proceedings is treated as an admission of the claimant's allegations. However, this does not mean that the arbitral tribunal

would have no discretion as to how to assess the failure and would be bound to treat it as a full denial of the claim and all supporting facts.

5. As regards the failure of a party to appear at a hearing or to produce documentary evidence, article 25 (c) empowers the arbitral tribunal to continue the proceedings and make the award on the evidence before it. In practical terms, this includes the power not to admit or to disregard any documentary evidence presented by that party after the specified time-limit for producing such evidence. Moreover, the arbitral tribunal is not precluded from drawing inferences from a party's failure to produce any evidence as requested. Although the provision does not itself say so, "failure to appear at a hearing" presupposes that the party was given sufficient advance notice (article 24 (3)) and "failure to produce documentary evidence" presupposes that the party was requested to do so within a specified period of time which was reasonable in accordance with the fundamental principles of article 19 (3).

* * *

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.

References

- A/CN.9/216, paras. 63-64
- A/CN.9/232, paras. 105, 114-118
- A/CN.9/245, paras. 80-81, 84-85
- A/CN.9/246, paras. 85-89

Commentary

1. Article 26 deals with experts appointed by the arbitral tribunal; it does not deal with expert witnesses which a party may present. Paragraph (1) grants the arbitral tribunal an implied power, i.e. without special authorization by the parties, to appoint one or more experts to report to it on specific issues and to order a party to co-operate in a certain way with the expert.

2. Since the provision is non-mandatory, the parties may exclude such power. This would mean that the arbitral tribunal would have to decide the dispute without obtaining the necessary expertise which it itself lacks. While not everyone would like to act as arbitrator under such conditions, the solution of paragraph (1) was adopted in recognition of the paramount nature of party autonomy (and of the underlying practical considerations that the parties know best by what means their dispute should be decided, that they are the ones to pay for any expert, and that they are wise enough not to put their arbitrators in a dilemma of the type described above). It is also for this reason that the parties may exclude such power at any time during the proceedings and not, as suggested in an earlier draft version, only before the appointment of the first arbitrator.⁷⁶

3. Article 26, like most provisions of the Model Law concerning the conduct of the arbitral proceedings, embodies a statement of principle without regulating all particulars, as often treated in detail by arbitration rules. Paragraph (2) is no exception since it guarantees a fundamental procedural right, which is another concrete implementation of the principles laid down in article 19 (3). The parties are given the opportunity to interrogate the expert, after he has delivered his written or oral report, and to present expert witnesses in order to testify on the points at issue. Such opportunity may be taken in a hearing, which the arbitral tribunal must hold if one party so requests or which the arbitral tribunal may call on its own if it considers it necessary.

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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.

⁷⁶ A/CN.9/246, para. 87.

References

- A/CN.9/216, paras. 61-62
- A/CN.9/233, paras. 31-37
- A/CN.9/245, paras. 37-46
- A/CN.9/246, paras. 90-101

Commentary

Purpose of provision

1. Article 27 calls upon the courts to render assistance in taking evidence, in particular by compelling appearance of a witness, production of a document or access to a property for inspection. Such assistance, although not frequently sought in practice and at times sought for dilatory purposes, is considered useful in view of the fact that the arbitral tribunal, under the Model Law and most existing laws, does not itself possess powers of compulsion.⁷⁷

2. Article 27 has effect beyond the realm of arbitral procedure in that it does not merely cover the admissibility or mechanics of a request for court assistance. It rather attaches to such a request the expectation that the national law under certain circumstances provides for assistance by courts. Article 27 is designed to change, for example, a national law which envisages court assistance only to other courts but not to arbitral tribunals, however, without interfering with national rules on civil procedure concerning the taking of evidence and the organization of the judicial system including court competence.

Territorial scope of provision

3. Assistance by courts of the State adopting the Model Law is envisaged for arbitral proceedings "held in this State or under this Law" (paragraph (1)). Conceivably, this double criterion might be retained if the Commission were to allow party autonomy in respect of the applicable procedural law.⁷⁸ The criterion "in this State" would then extend to arbitral proceedings held under a law other than the Model Law, and the criterion "under this Law" would extend to arbitrations held elsewhere under the law of "this State". It is submitted, however, that it would be more appropriate to use only the general criterion which the Commission may wish to adopt for the applicability of the Model Law, in which case there may not be any need for expressing the territorial scope in article 27.

4. More important than this issue of detail is the observation that article 27 is limited essentially to arbitrations taking place in "this State"; unlike earlier draft provisions, it envisages neither assistance to foreign arbitrations nor requests to foreign courts in

⁷⁷ Merely in those cases where the evidence is in the possession or under the control of a party, the arbitral tribunal may exert a certain influence by indicating its intention to use the "sanction" provided for in article 25 (c); see commentary to article 25, para. 5.

⁷⁸ As to the question of the territorial scope of application of the Model Law in general, see commentary to article 1, paras. 4-6.

arbitral proceedings held under the Model Law.¹⁰ This limitation is the result of a compromise between those in favour of international court assistance and those opposed to any provision on court assistance.¹⁰

Request for assistance, paragraph (1), and its execution, paragraph (2)

5. According to paragraph (1), assistance would be rendered by a "competent court" which is not necessarily the one designated pursuant to article 6 since its competence may be based, for example, on the residence of the witness to be heard or the location of the property to be inspected. A request for court assistance may be made by the arbitral tribunal or by a party with the approval of the arbitral tribunal. Although the obtaining of evidence may be regarded as being strictly a matter for the parties, the involvement of the arbitral tribunal would be conducive to preventing dilatory tactics of a party. Paragraph (1) lists the required contents of the request, without going into further details of form or procedure.

6. Paragraph (2) implements the earlier mentioned "expectation" of court assistance, without interfering with established national rules on court competence and organization (see above, para. 2). The court may, within its competence and according to its rules on taking evidence, execute the request in either of the following ways: It may take the evidence itself (e.g. hear the witness, obtain the document or access to property and, unless the arbitrators and parties are present, communicate the results to the arbitral tribunal), or it may order that the evidence be provided directly to the arbitral tribunal, in which case the involvement of the court is limited to exerting compulsion.

* * *

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.

¹⁰A/CN.9/233, para. 36; A/CN.9/245, paras. 37, 42-46; A/CN.9/246, paras. 90-91, 95-96.

¹¹It was stated in this context that court assistance to foreign arbitral tribunals or assistance by foreign courts in taking evidence could not appropriately be dealt with in a model law, and it was suggested as a possible future item of work to be discussed by the Commission that it might be desirable to elaborate rules on international judicial assistance either in a separate convention or by extending an existing convention (A/CN.9/233, para. 37; A/CN.9/246, paras. 43-44).

(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.

References

- A/CN.9/216, paras. 84-94
- A/CN.9/232, paras. 158-170
- A/CN.9/245, paras. 93-100
- A/CN.9/246, paras. 102-104

Commentary

1. Article 28 deals with the question of which law or rules the arbitral tribunal shall apply to the substance of the dispute. This question, which should be distinguished from the issue of the law applicable to the arbitral procedure or the arbitration agreement, is often dealt with in conventions and national laws devoted to private international law or conflict of laws. However, it is sometimes covered by national laws on arbitration and often by arbitration conventions and arbitration rules.

2. The Model Law follows this latter practice with a view to providing guidance on this important point and to meet the needs of international commercial arbitration. It adopts the same policy as in respect of procedural matters by granting the parties full autonomy to determine the issue (including the option of *amiable composition*) and, failing agreement, by entrusting the arbitral tribunal with that determination.

Parties' freedom to choose substantive "rules of law", paragraph (1)

3. The provision of paragraph (1) that the dispute shall be decided in accordance with such rules of law as are chosen by the parties is remarkable in two respects. The first one is the recognition or guarantee of the parties' autonomy as such, which is at present widely but not yet uniformly accepted. Article 28 (1) could enhance global acceptance and help to overcome existing restrictions such as substantial connection with the country of the chosen law.

4. The second one is the freedom to choose "rules of law" and not merely a "law", which could be understood as referring to the legal system of one particular State only. This provides the parties with a wider range of options and allows them, for example, to designate as applicable to their case rules of more than one legal system, including rules of law which have been elaborated on the international level.¹¹ Adoption of this formula, to date only found in the 1965 Washington Convention (art. 42) and the recent international arbitration laws of France (art. 1496 new CPC) and

¹¹As a further aid in interpreting the term "rules of law" and defining its limits, it may be reported that some representatives would have preferred an even wider interpretation or an even broader formula to include, for example, general legal principles or case law developed in arbitration awards but that this, in the view of the Working Group, was too far-reaching to be acceptable to many States, at least for the time being (A/CN.9/245, para. 94).

Djibouti (art. 12), constitutes a progressive step, designed to meet the needs and interests of parties to international commercial transactions. A useful rule of interpretation is added for those cases where the parties designate the law or legal system of a particular State.

Determination of substantive law by arbitral tribunal, paragraph (2)

5. Paragraph (2) reflects a more cautious approach in that it does not provide, as would be in line with paragraph (1), that the arbitral tribunal shall apply the rules of law it considers appropriate. Instead, it requires the arbitral tribunal to apply a conflict of laws rule, namely that which it considers applicable, in order to determine the law applicable to the substance of the dispute.

6. The resulting disparity may be regarded as acceptable in view of the fact that paragraph (1) is addressed to the parties who are free to take advantage of the wider scope, while paragraph (2) is addressed to the arbitral tribunal and applied only in the case where the parties have not made their choice. Incidentally, the parties could agree to widen the scope of the arbitral tribunal's determination, just as they are free to limit it, for example, by excluding one or more specified national laws. Above all, paragraph (2) deserves to be judged on its own. In this regard it seems worth noting that it is in full harmony with the 1961 Geneva Convention (art. VII (1)) and with widely used arbitration rules (art. 13 (3) ICC-Rules, art. 33 (1) UNCITRAL Arbitration Rules), which equally recognize the interests of the parties in having some degree of certainty as to which will be the law determined by the arbitral tribunal.

Express authorization of "amiable composition", paragraph (3)

7. Arbitration rules often provide that parties may authorize the arbitral tribunal to decide as *amiable compositeur* provided, however, that such arbitration is permitted by the law applicable to the arbitral procedure. Article 28 (3) grants this permission and, thus, gives effect to an express authorization by the parties that the arbitral tribunal shall decide *ex aequo et bono*, as this arbitration is labelled in some legal systems, or, as labelled in others, as *amiable compositeur*.

8. Although this type of arbitration is not known in all legal systems, its inclusion in the Model Law seems appropriate for the following reasons. It is sound policy to accommodate features and practices of arbitration even if familiar only to certain legal systems. This is reasonable not merely because it would be contrary to the purpose of the Model Law to disregard or even prevent established practices but because it is in harmony with the principle of reducing the importance of the place of arbitration by recognizing types of arbitration not normally used or known at that place. Finally, such recognition does not entail a risk for any unwary party unfamiliar with this type of arbitration since an express authorization by the parties is required.

9. No attempt is made in the Model Law to define this type of arbitration, which comes in various and often vague forms. It is submitted, however, that the parties may in their authorization provide some certainty, to the extent desired by them, either by referring to the kind of *amiable composition* developed in a particular legal system or by laying down the rules or guidelines and, for example, request a fair and equitable solution within the limits of the international public policy of their two States.

Relevance of terms of contract and trade usages

10. Article 28 does not expressly call upon the arbitral tribunal to decide in accordance with the terms of the contract and to take into account the trade usages applicable to the transaction. However, this does not mean that the Model Law would disregard or reduce the relevance of the contract and the trade usages.

11. This is clear from the various reasons advanced during the discussion of the Working Group against retaining such a provision.⁴² As regards the reference to the terms of the contract, it was stated, for example, that such reference did not belong in an article dealing with the law applicable to the substance of the dispute and was not needed in a law on arbitration, though appropriate in arbitration rules, or that such reference could be misleading where the terms of the contract were in conflict with mandatory provisions of law or did not express the true intent of the parties. As regards the reference to trade usages, the concerns related primarily to the fact that their legal effect and qualification were not uniform in all legal systems. For example, they may form part of the applicable law, in which case they were already covered by paragraph (1) or (2) of article 28. Finally, it was difficult to devise acceptable wording, in particular, to decide whether to adopt the formula of the UNCITRAL Arbitration Rules (art. 33 (3)) or of the 1980 Vienna Sales Convention (art. 9).

* * *

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.

References

- A/CN.9/216, paras. 76-77
- A/CN.9/232, paras. 136-140
- A/CN.9/245, paras. 101-104
- A/CN.9/246, paras. 105-108

Commentary

1. Article 29 deals with one important aspect of the decision-making process in those common cases where

⁴²A/CN.9/245, para. 99; A/CN.9/232, para. 164.

the arbitral tribunal consists of more than one arbitrator (in particular: three arbitrators). While leaving out other aspects relating to the mechanics of how a decision is arrived at, article 29 adopts the majority-principle for any award or other decision of the arbitral tribunal, with a possible exception for questions of procedure, which, for the sake of expediency and efficiency, the parties or the arbitral tribunal may authorize a presiding arbitrator to decide.

2. The majority-principle, as compared with requiring unanimity, is more conducive to reaching the necessary decisions and the final settlement of the dispute. This principle, which is also adopted for the signatures required on the award (article 31 (1)), does not mean, however, that not all arbitrators need take part in the deliberations or at least have the opportunity to do so.

3. Since article 29 is non-mandatory, the parties may lay down different requirements. For example, they may authorize a presiding arbitrator, if no majority can be reached, to cast the decisive vote, or to decide as if he were a sole arbitrator. The parties may also, for quantum decisions, provide a formula according to which the decisive amount would be calculated on the basis of the different votes of the arbitrators.

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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.

References

- A/CN.9/216, paras. 95-97
- A/CN.9/232, paras. 171-176
- A/CN.9/245, paras. 105-107
- A/CN.9/246, paras. 109-110

Commentary

1. Article 30 deals with the fortunately not infrequent case that the parties themselves settle the dispute during, and often induced by, the arbitral proceedings. In order to make the settlement agreement enforceable, it is necessary, under nearly all legal systems, to record it in the form of an arbitral award.

2. The arbitral tribunal shall issue such an award on agreed terms, if requested by the parties and not objected to by it. The first condition is based on the

view that there are fewer dangers of injustice by requiring the request of both parties instead of only one, who, however, may have a particular interest, since a settlement may be ambiguous or subject to conditions which might not be apparent to the arbitral tribunal. The second condition is based on the view that the arbitral tribunal, although it would normally accede to such a request, should not be compelled to do so in all circumstances (e.g. in case of suspected fraud, illicit or utterly unfair settlement terms).

3. According to paragraph (2), an award on agreed terms shall be treated like any other award on the merits of the case, not only as regards its form and contents (article 31) but also its status and effect.

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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.

References

- A/CN.9/216, paras. 78-80, 100-102, 105
- A/CN.9/232, paras. 141-145, 184-186
- A/CN.9/245, paras. 108-116
- A/CN.9/246, paras. 111-112

Commentary

Award in writing and signed, paragraph (1)

1. For the sake of certainty, the arbitral award shall be made in writing and signed by the arbitrator or arbitrators. However, corresponding with the provision on decision-making by a panel of arbitrators (article 29),¹¹ the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

¹¹The Commission may wish to consider the appropriateness of establishing full correspondence with article 29, by aligning the signature requirement to any agreed system other than decision by majority (see commentary to article 29, para. 3).

2. This proviso is certainly appropriate for those cases where, after the award has been finalized, an arbitrator dies or becomes physically unable to sign or cannot in fact be reached anymore. Where, however, an arbitrator refuses to sign, the proviso may be open to objection by those who are strictly against revealing whether an award was made unanimously or whether an arbitrator dissented. On the other hand, there are those who, based on their legal systems and practice, even want a provision in the Model Law entitling the dissenting arbitrator to state his opinion. The Commission might wish to consider whether the requirement of stating the reason for the omitted signature should be maintained in the proviso and whether the Model Law should take a stand on the separate issue of dissenting opinions, i.e. either generally allow or generally prohibit their issuance. At present, it is submitted, this question falls under article 19 (1) or (2) as a matter of the conduct of the proceedings.

Statement of reasons, paragraph (2)

3. The practice of stating the reasons upon which the award is based is more common in certain legal systems than in others and it varies from one type or system of arbitration to another. Paragraph (2) adopts a solution which accommodates such variety by requiring that the reasons be stated but allowing parties to waive that requirement. An agreement that no reasons are to be given would normally be made expressly, including reference to arbitration rules containing such waiver, but may also be implied, for example, in the submitting of a dispute to an established arbitration system which is known not to contemplate the giving of reasons. The same would apply to an intermediate solution, practised in certain systems, such as to state the reasons in a separate and confidential document.

Date and place of award, paragraph (3)

4. The date and the place at which the award is made are of considerable importance in various respects, in particular, as far as procedural consequences are concerned, in the context of recognition and enforcement and any possible recourse against the award. Paragraph (3), therefore, provides that the award shall state its date and the place of arbitration, which shall be deemed to be the place of the award.

5. This presumption, which should be regarded as irrebuttable,²⁴ is based on the principle that the award shall be made at the place of arbitration determined in accordance with article 20 (1). It also recognizes that the making of the award is a legal act which in practice is not necessarily one factual act but, for example, done in deliberations at various places, by telephone or correspondence.

Delivery of award, paragraph (4)

6. Paragraph (4) provides that a signed copy of the award be delivered to each party. Receipt of this copy is relevant, for example, as "receipt of the award" for the purposes of articles 33 (1), (3) and 34 (3) and as a

²⁴A/CN.9/245, para. 115.

necessary condition for obtaining recognition or enforcement under article 35 (2). The Model Law does not require any other administrative act such as filing, registration or deposit of the award.

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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).

References

A/CN.9/232, paras. 132-135

A/CN.9/245, paras. 47-53, 117-119

A/CN.9/246, paras. 113-116

Commentary

1. Article 32, which deals with the termination of the arbitral proceedings, serves three purposes. The first one is to provide guidance in this last, but not unimportant, phase of the proceedings. A good example is paragraph (2) (a), which makes it clear that withdrawal of the claim does not *ipso facto* lead to termination of the proceedings.

2. The second purpose is to regulate the consequential termination of the mandate of the arbitral tribunal and its exceptions (paragraph (3)). A good example is that the arbitrators would become *functus officio* by making an award only if that is "the final award", i.e. the one which constitutes or completes the disposition of all claims submitted to arbitration. The third purpose is to provide certainty as to the point of time of the termination of the proceedings. This may be relevant for matters unrelated to the arbitration itself, for example, the continuation of the running of a limitation period or the possibility of instituting court proceedings.

* * *

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 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. 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 or to an additional award.

References

A/CN.9/216, para. 98

A/CN.9/232, paras. 177-183

A/CN.9/245, paras. 120-123

A/CN.9/246, paras. 117-125

Commentary

1. Article 33 extends the mandate of the arbitral tribunal beyond the making of the award for certain measures of clarification and rectification, which may help to prevent continuing disputes or even setting aside proceedings. The first possible measure is to correct any error in computation or any clerical, typographical or similar error, either upon request by a party or on its own initiative. The second possible measure is to give an interpretation of a specific point or part of the award, as specified by a party, and to add this interpretation to the award. The third possible measure is to make an additional award as to any claim presented in the arbitral proceedings but omitted from the award (e.g. claimed interest was erroneously not awarded). If the arbitral tribunal considers the request, not necessarily the omitted claim, to be justified, it shall make an additional award, irrespective of whether any further hearing or taking of evidence is required for that purpose.

2. The period of time during which a party may request any such measure is thirty days of receipt of the award. The same period of time, calculated from the receipt of the request, is accorded to the arbitral tribunal for making the correction or giving the interpretation, while a time-limit of sixty days is set for the usually more difficult and time-consuming task of making an additional award. However, there are circumstances in which the arbitral tribunal would be unable, for good reasons, to comply with these time-limits. For example, the preparation of an interpretation may require consultations between the arbitrators, the making of an additional award may require hearings or taking of evidence, and in any case initially sufficient time must be given to the other party for replying to the request. The arbitral tribunal may, therefore, extend the time-limits, if necessary.

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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.

References

- A/CN.9/232, paras. 14-22
- A/CN.9/233, paras. 178-195
- A/CN.9/245, paras. 146-155
- A/CN.9/246, paras. 126-139

Commentary

Sole action for attacking award, paragraph (1)

1. Existing national laws provide a variety of actions or remedies available to a party for attacking the award. Often equating arbitral awards with local court decisions, they set varied and sometimes extremely long periods of time and set forth varied and sometimes long lists of grounds on which the award may be attacked. Article 34 is designed to ameliorate this situation by providing only one means of recourse (paragraph (1)), available during a fairly short period of time (paragraph (3)) and for a rather limited number of reasons (paragraph (2)). It does not, beyond that, regulate the procedure, neither the important question whether a decision by the Court of article 6 may be appealed before another court nor any question as to the conduct of the setting aside proceedings itself.

2. The application for setting aside constitutes the exclusive recourse to a court against the award in the sense that it is the only means for actively attacking the award, i.e. initiating proceedings for judicial review. A party retains, of course, the right to defend himself against the award by requesting refusal of recognition or enforcement in proceedings initiated by the other party (articles 35 and 36). Obviously, article 34 (1) does not exclude the right of a party to request any correction or interpretation of the award or the making of an additional award under article 33, since such request would be directed to the arbitral tribunal and not to a court; the situation is different in the case of a

remission to the arbitral tribunal under article 34 (4), which is envisaged as a possible response by a court to an application for setting aside the award. Finally, article 34 (1) would not exclude recourse to a second arbitral tribunal, where such appeal within the arbitration system is envisaged (as, e.g., in certain commodity trades).

3. Article 34 provides recourse against an "arbitral award" without specifying which kinds of decision would be subject to such recourse. The Working Group was agreed that it was desirable for the Model Law to define the term "award" and noted that such definition had important implications for a number of provisions of the Model Law, especially articles 34 and 16. After commencing consideration of a proposed definition, the Working Group decided, for lack of time, not to include a definition in the Model Law to be adopted by it and to invite the Commission to consider the matter.⁵³

4. Another matter to be considered by the Commission is the question of the territorial scope of application, the pending nature of which is clear from the alternative wordings placed between square brackets in paragraph (1). It is submitted that the territorial scope of article 34 should be the same as the one of the Model Law in general, whichever may be the criterion adopted by the Commission.⁵⁴

Reasons for setting aside the award, paragraph (2)

5. Paragraph (2) lists the various grounds on which an award may be set aside. This listing is exhaustive, as expressed by the word "only" and reinforced by the character of the Model Law as *lex specialis*.⁵⁵

6. Paragraph (2) sets forth essentially the same reasons as those on which recognition or enforcement may be refused under article 36 (1) (or article V of the 1958 New York Convention, on which it is closely modelled). It even uses, with few exceptions, the same wording, for the sake of harmony in the interpretation.

7. The list of reasons presented in paragraph (2) is based on two different policy considerations, which, however, converge in their result. First, after an extensive selection process, which included a considerable number of other grounds suggested for inclusion in the list, the reasons set forth in paragraph (2), and only these, were regarded as appropriate in the context of setting aside of awards in international commercial arbitration.

8. Second, conformity with article 36 (1) is regarded as desirable in view of the policy of the Model Law to reduce the impact of the place of arbitration. It recognizes the fact that both provisions with their different purposes (in one case reasons for setting aside and in the other case grounds for refusing recognition or enforcement) form part of the alternative defence system which provides a

⁵³A/CN.9/246, paras. 129, 192-194.

⁵⁴As to this general question of the territorial scope of application of the Model Law, see commentary to article 1, paras. 4-6.

⁵⁵See commentary to article 1, paras. 7-8.

party with the option of attacking the award or invoking the grounds when recognition or enforcement is sought. It also recognizes the fact that these provisions do not operate in isolation. The effect of traditional concepts and rules familiar and peculiar to the legal system ruling at the place of arbitration is not limited to the State where the arbitration takes place but extends to many other States by virtue of article 36 (1) (a) (v) (or article V (1) (e) of the 1958 New York Convention) in that an award which has been set aside for whatever reasons recognized by the competent court or applicable procedural law, would not be recognized and enforced abroad.

9. Drawing the consequences from this undesirable situation, article IX of the 1961 Geneva Convention cuts off this international effect in respect of all awards which have been set aside for reasons other than those listed in article V of the 1958 New York Convention. The Model Law merely takes this philosophy one step further by going beyond the angle of recognition and enforcement to the source and aligning the very reasons for setting aside with those for refusing recognition or enforcement. This step has the salutary effect of avoiding "split" or "relative" validity of international awards, i.e. awards which are void in the country of origin but valid and enforceable abroad.⁴²

10. Since the grounds listed in paragraph (2) are essentially those of article V of the 1958 New York Convention, they are familiar and require no detailed explanation; however, the fact that they are used for purposes of setting aside under the Model Law leads to some differences. For example, the application of subparagraphs (a) (i) and (iv), possibly also (iii), may be limited by virtue of an implied waiver or submission, as mentioned in the commentary to article 4 (para. 6) and to article 16 (paras. 8-9).

11. Subparagraph (a) (iv) expresses the priority of the mandatory provisions of the Model Law over any agreement of the parties, which is different from article 36 (1) (a) (iv), at least according to the predominant interpretation of the corresponding provision in the 1958 New York Convention (article V (1) (d)). The fact that the composition of the arbitral tribunal and the arbitral procedure are, thus, to be judged by the mandatory provisions of the Model Law entails, for example, that this subparagraph (a) (iv) covers to a large extent also the grounds of subparagraph (a) (ii), copied from the 1958 New York Convention, which comprise cases of violations of articles 19 (3) and 24 (3), (4).

12. Yet another difference is less obvious since it follows merely from the different effect of setting aside as compared to refusing recognition or enforcement. Under subparagraph (b) (i), an award would be set aside if the court finds that the subject-matter of the dispute is not capable of settlement by arbitration "under the law of this State". This reason is certainly appropriate for refusing recognition or enforcement in a given State, which often regards it as part of its public policy and

may reduce its impact by protecting only its *ordre public international*, i.e. its public policy concerning international cases. However, this same reason used for setting aside gains a different dimension by virtue of the global effect of setting aside (article 36 (1) (a) (v), or article V (1) (e) of the 1958 New York Convention). As was suggested in the Working Group, to quote now from the report of the seventh session (A/CN.9/246, paras. 136-137),

"... such global effect should obtain only from a finding that the subject-matter of the dispute was not capable of settlement by arbitration under the law applicable to that issue which was not necessarily the law of the State of the setting aside proceedings. It was, therefore, suggested to delete the provision of paragraph (2) (b) (i). The result of that deletion, which received considerable support, would be to limit the court control under article 34 to those cases where non-arbitrability of a certain subject-matter formed part of the public policy of that State (para. (2) (b) (iii)) or where the Court regarded arbitrability as an element of the validity of an arbitration agreement (para. (2) (a) (i)), although some proponents of that suggestion sought the more far-reaching result of excluding non-arbitrability as a reason for setting aside. Another suggestion was to delete, in paragraph (2) (b) (i), merely the reference to "the law of this State" and, thus, to leave open the question as to which was the law applicable to arbitrability. The Working Group, in discussing those suggestions, was agreed that the issues raised were of great practical importance and, in view of their complex nature, required further study. The Working Group, after deliberation, decided to retain, for the time being, the provision of paragraph (2) (b) (i) in its current form so as to invite the Commission to reconsider the matter and to decide, in the light of comments by Governments and organizations, on whether the present wording was appropriate or whether the provision should be modified or deleted."

"Remission" to arbitral tribunal, paragraph (4)

13. Paragraph (4) envisages a procedure which is similar to the "remission" known in most common law jurisdictions, though in various forms. Although the procedure is not known in all legal systems, it should prove useful in that it enables the arbitral tribunal to cure a certain defect and, thereby, save the award from being set aside by the Court.

14. Unlike in some common law jurisdictions, the procedure is not conceived as a separate remedy but placed in the framework of setting aside proceedings. The Court, where appropriate and so requested by a party, would invite the arbitral tribunal, whose continuing mandate is thereby confirmed, to take appropriate measures for eliminating a certain remediable defect which constitutes a ground for setting aside under paragraph (2). Only if such "remission" turns out to be futile at the end of the period of time determined by the Court, during which recognition and enforcement may be suspended under article 36 (2), would the Court

⁴²As to another effect, referred to as the potential risk of "double control" of domestic awards, see commentary to article 36, para. 3.

resume the setting aside proceedings and set aside the award.

* * *

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.

References

- A/CN.9/216, paras. 103-104, 109
- A/CN.9/232, paras. 19-21, 187-189
- A/CN.9/233, paras. 121-175
- A/CN.9/246, paras. 140-148

Commentary

Appropriateness of including provisions on recognition and enforcement of awards irrespective of their place of origin

1. The chapter on recognition and enforcement of awards presents the result of extensive deliberations on basic questions of policy, in particular, whether the Model Law should contain provisions on recognition and enforcement of domestic and foreign awards, and, if so, whether these two categories of awards should be treated in a uniform manner, and how closely any provisions on recognition and enforcement should follow the corresponding articles of the 1958 New York Convention. As evidenced by article 35 and its companion article 36, the prevailing answer to these basic policy questions was that the Model Law should contain uniform provisions on recognition and enforcement of all awards, irrespective of the place of origin, and in full harmony with the 1958 New York Convention.

*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.

2. The main reasons are, in short, the following: While foreign awards are appropriately dealt with in the 1958 New York Convention, which is widely adhered to, often with the restriction of reciprocity, and is open to any State prepared to accept its liberal provisions, the Model Law would be incomplete if it would not offer an equally liberal set of rules, in full harmony with the 1958 New York Convention, including its safeguards in article V, and without adversely affecting its effect and application, in order to establish a supplementary network of recognition and enforcement of awards not covered by any multilateral or bilateral treaty. While domestic awards are often treated by national laws under the same favourable conditions as local court decisions, the disparity of national laws is not conducive to facilitating international commercial arbitration and the Model Law should, therefore, aim at unifying the domestic treatment in all legal systems, without imposing restrictive conditions.

3. Above all, these provisions on recognition and enforcement would go a long way towards securing the uniform treatment of all awards in international commercial arbitration irrespective of where they happen to be made. To draw the line between such "international" awards and "non-international", i.e. truly domestic, awards (instead of distinguishing on territorial grounds between foreign and domestic awards), would further the policy of reducing the relevance of the place of arbitration and thereby widen the choice and enhance the vitality of international commercial arbitration. This idea of uniform treatment of all international awards was the major decisive reason which any State may wish to consider when assessing the acceptability of this chapter of the Model Law.

Recognition of award and application for its enforcement, paragraph (1)

4. Article 35 draws a useful distinction between recognition and enforcement in that it takes into account that recognition not only constitutes a necessary condition for enforcement but also may be standing alone, e.g. where an award is relied on in other proceedings. Under paragraph (1), an award shall be recognized as binding, which means, although this is not expressly stated, binding between the parties and from the date of the award.⁹⁹ An award shall be enforced upon application in writing to the "competent court".¹⁰⁰ Both recognition and enforcement are subject to the provisions of article 36 and the conditions laid down in paragraph (2) of article 35.

Conditions of recognition and enforcement, paragraph (2)

5. Paragraph (2), which is modelled on article IV of the 1958 New York Convention, does not lay down the

⁹⁹A/CN.9/246, para. 148. As a practical matter, the award may in fact be relied on by a party only from the date of receipt.

¹⁰⁰The reference is to the competent court, and not to the Court specified in article 6, because the Model Law does not aim at unifying national laws on the organization of the judicial system and, in particular, because the competence of courts for enforcement is normally linked to the residence of the debtor or location of property or assets.

procedure but merely the conditions for recognition and enforcement. The party relying on an award or applying for its enforcement shall supply, in an official language of the State, that award and its constituent document, i.e. the arbitration agreement.⁹¹ According to the footnote accompanying the text, these conditions are intended to set maximum standards; thus a State may retain even less onerous conditions.

No filing, registration or deposit required, paragraph (3)

6. The Model Law, which itself does not require filing, registration or deposit of awards made under its régime (article 31), also does not require such actions in respect of foreign awards whose recognition or enforcement is sought under its régime, following the policy of the 1958 New York Convention of doing away with the "double exequatur".

* * *

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

References

- A/CN.9/216, para. 109
- A/CN.9/232, paras. 19-20
- A/CN.9/233, paras. 133-177
- A/CN.9/245, paras. 137-145
- A/CN.9/246, paras. 149-155

Commentary

Grounds for refusing recognition or enforcement of "international" awards, paragraph (1)

1. Based on the prevailing policy considerations stated above,⁹² article 36 (1) adopts almost literally the well-known grounds set forth in article V of the 1958 New York Convention and declares them as applicable to refusal of recognition or enforcement of all awards, irrespective of where they were made. Thus, the provision, like article 35, covers foreign as well as domestic awards, provided they are rendered in "international commercial arbitration" as referred to in article 1 and, of course, subject to any multilateral or bilateral treaty to which the enforcement State is a party.

2. As regards foreign awards, full harmony with article V is obviously desirable. The reasons taken from there were even viewed as providing sufficient safeguards to the enforcement State which would make it unnecessary to restrict recognition and enforcement by requiring reciprocity. It was also thought that a model law on international commercial arbitration should not promote the use of such territorial restrictions and that, from a technical point of view, it was difficult, although not impossible, to devise a workable mechanism in a "unilateral" text such as the Model Law. Nevertheless, the Model Law does not preclude a State from adopting

⁹¹As regards this second condition, it is submitted that an exception be made for those cases where an original defect in form was cured by waiver or submission, for example, where arbitral proceedings were on the basis of an oral agreement initiated and not objected to by any party. In such case the supply of an award, which records the waiver or submission, should suffice.

⁹²Commentary to article 35, paras. 1-3.

a mechanism of reciprocity, in which case the basis or connecting factor and the technique used should be specified in the national enactment.

3. The list of reasons seems also appropriate for domestic awards, although its correspondence with the grounds for setting aside entails the potential of what has been referred to as undesirable "double control", i.e. two occasions for judicial review of the same grounds. This should be an acceptable consequence of the uniform treatment of all awards, based on the policy of reducing the relevance of the place of arbitration. In view of the different purposes and effects of setting aside and of invoking grounds for refusal of recognition or enforcement, a party should be free to avail himself of the alternative system of defences (as such recognized by the 1958 New York Convention) also in those cases where recognition or enforcement happens to be sought in the State where the arbitration took place. As regards the potential risk of double procedures on the same grounds, it is submitted that these concerns are essentially met by paragraph (2) (see below, para. 5).

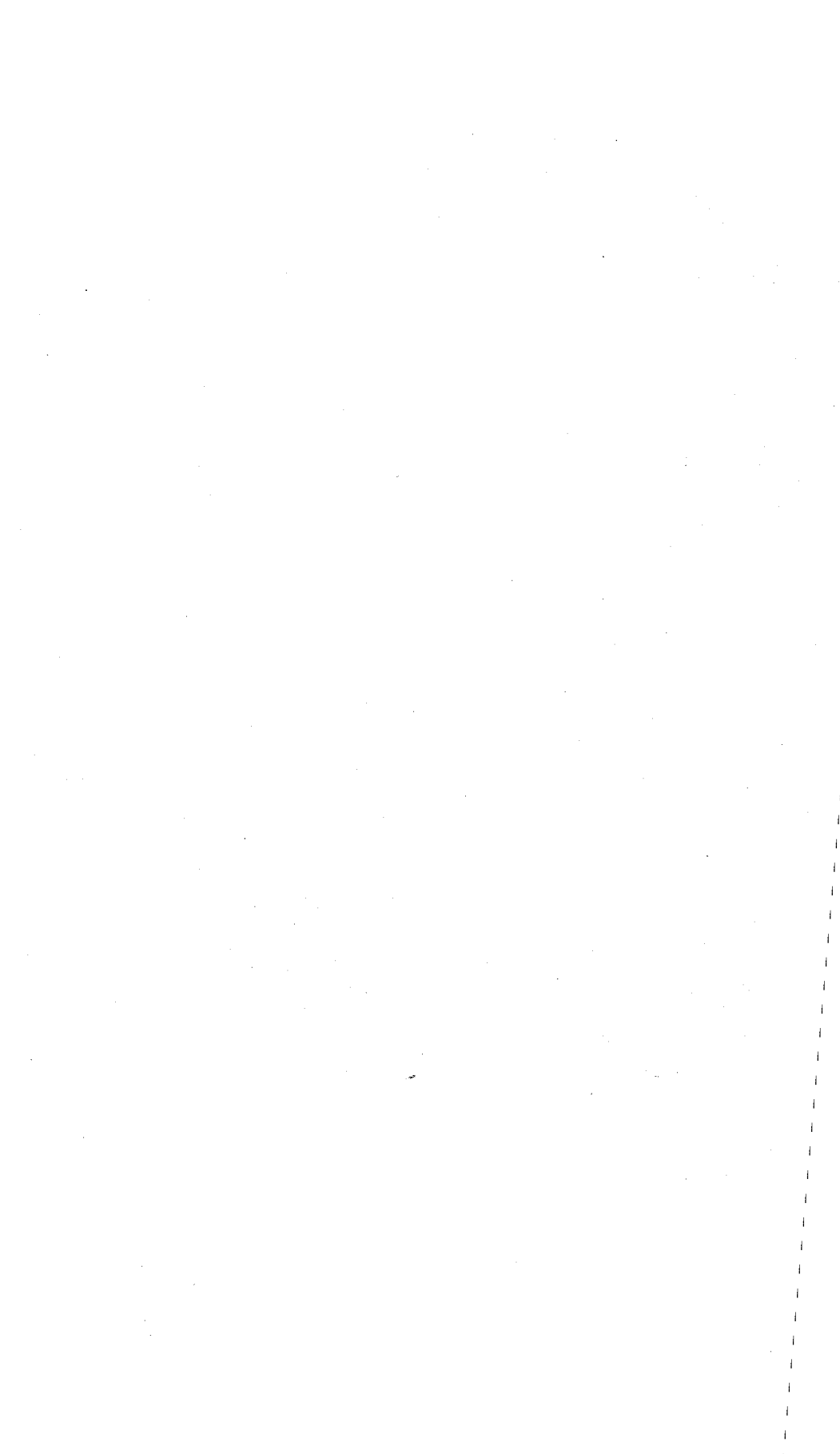
4. The fact that the grounds listed in paragraph (1) are applicable to foreign as well as domestic awards, must be taken into account when interpreting the text, which is in large measure copied from an article applicable

only to foreign awards (article V of the 1958 New York Convention). For example, the references to "the law of the country where the award was made" (subparagraph (a) (i)) or "the law of the country where the arbitration took place" (subparagraph (a) (iv)) or to "a court of the country in which, or under the law of which, that award was made" (subparagraph (a) (v)) may either lead to a foreign law, which may or may not have been modelled on the Model Law, or to the Model Law of "this State". In the latter case, i.e. a domestic setting, account should be taken of the kind of considerations mentioned in respect of the grounds for setting aside, for example, the limiting effect of an implied waiver or submission (articles 4 and 16 (2)) upon the reasons set forth in paragraph (1) (a) (i) and (iv).⁹¹

Suspension of recognition or enforcement, paragraph (2)

5. Paragraph (2) is modelled on article VI of the 1958 New York Convention. In line with the wider scope of the Model Law, it covers not only foreign but also domestic awards rendered in international commercial arbitration. Thus, it can be used to avoid concurrent judicial review of the same grounds and possibly conflicting decisions, where this risk is not already excluded by the fact that the same court is seized with the application for setting aside and the other party's application for enforcement.

⁹¹Commentary to article 34, paras. 10-11.



APPENDIX E

Provisions for Statutory Arbitration

This appendix lists statutes which provide that disputes which arise under them are to be resolved by arbitration. As the Report indicates (para 116), the provisions vary, in their subject matter, in the existence or not of the consent of the parties to arbitration, and in the way they refer to arbitration. On the last point the legislation might expressly invoke the Arbitration Act 1908 or it might refer only generally to arbitration. Some of the statutes set out an extensive regime which would leave no room for the implication of the Act's provisions.

The following list accordingly is divided as follows:

- (a) government and local government (especially valuation and compensation issues);
- (b) private corporations created by or under statute (where an element of consent might be seen);
- (c) licensing appeals;
- (d) labour relations;
- (e) transitional (again valuation matters);
- (f) statutes which appear to provide a separate regime (where the 1908 Act is not relevant).

When it is not clear to us whether the 1908 Act applies we have so indicated with an asterisk. The allocation of powers between the final group and the unclear category might be disputed.

Category	Further classification	Degree of choice	Other provisions
GOVERNMENT AND LOCAL GOVERNMENT			
Patents Act 1953 s53*	disputes over grant of compulsory licences	by agreement or order of Commissioner (in course of proceedings)	excludes s11 1938 Amendment Act provides for appeal
Auckland Metropolitan Drainage Act 1960 ss33(4), 35(6), 48(6), 49(6), 78(4), 95	disputes with AMD Board and local authorities, other public bodies	automatic once a dispute	provisions for appointment of tribunal
Animals Act 1967 s42	compensation for slaughtered animals	automatic once a dispute	provision for appointment and finality
Hutt Valley Drainage Act 1967 ss25(7), 25(8), 25(10), 27(2), 83	disputes with HVD Board (similar to AMD Act)	automatic once a dispute	provision for appointment
Poultry Act 1968 s10	compensation for destroyed birds (same as Animals Act)	automatic once a dispute	provision for appointment and finality

Tokoroa Agricultural and Pastoral Association Empowering Act 1968 s6(2)	compensation for change of venue	private Act (was based on agreement)	provision for appointment
Building Research Levy Act 1969 ss5(2), 6	valuing construction work for levy purposes	automatic once a dispute (where no permit)	provisions for appointment and costs
Apiaries Act 1969 s15(2)	compensation for destroyed bees (similar to Animals Act)	beekeeper may apply	provisions for appointment and finality
Public Bodies Leases Act 1969 ss7, 14(4), 22(2) and 1st and 2nd schedules	valuation of rent reviews compensation for improvements duties of umpire	schedules provide standard form leases	provisions for appointment and statements about
Marine Farming Act 1971 ss24, 39	valuation of improvements on expiry of lease	equivalent to standard form lease provision	provisions for appointment and costs
Mining Act 1971 s86(2),(3)	valuation of royalties	equivalent to standard license provision	provision for appointment
Tauranga City Council and Mount Maunganui Borough Council (Tauranga Harbour Bridge) Empowering Act 1972 s24, Schedule	disputes relating to Act	agreement recorded in Schedule	provision for appointment
Wanganui Harbour Board Empowering Act 1972 s3(2)	valuation of land	automatic once a dispute	provision for costs
Napier Harbour Board Empowering Act 1974 s3(2)	valuation of land	automatic once a dispute	provision for costs
Gas Act 1982 s29(3)	valuation of assets on cancellation of franchise (similar to Marine Farming Act)	equivalent to standard form franchise provision	
Fisheries Act 1983 s28OG(4) (enacted 1990)	compensation for reduction of individual transferable quotas	automatic once a dispute	
Survey Act 1986 s79(2)	contribution by Institute to Board	automatic once a dispute	

Port Companies Act 1988 s18	dispute between Harbour Board and port company over provision or condition of goods and services	automatic once a dispute	provision for appointment
Meat Act 1981 s43D* (enacted 1988)	recovery of inspection costs	by agreement or selection by the Director-General	
Maori Affairs Restructuring Act 1989 s66(4)	compensation for damage to land by waterworks	automatic once a dispute	
Education Act 1989 s4A(8)*	dispute over reduction in operational grant of schools with foreign students	at Board's request	provision for appointment and finality
Education Amendment Act 1989, s20(8)*	disputes over reduction in operational grant for tertiary institution with foreign students	at Council's request	provision for appointment and finality
University of Auckland Act 1961 s47B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality
University of Waikato Act 1963 s47B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality
Massey University Act 1963 s47B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality
Victoria University of Wellington Act 1961 s48B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality
University of Canterbury Act 1961 s48B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality
University of Otago Amendment Act 1961 s34B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality
Lincoln University Act 1961 s46B(7)* (enacted 1989)	dispute over reduction in grant paid to council	at Council's request	provision for appointment and finality

Maori Fisheries Act 1989 ss41, 42, 50	compensation for reduction in transferable quotas (similar to Fisheries Act)	automatic once a dispute	
Wheat Industry Research Levies Act 1989 s19*	amount of collection fees for levies	automatic once a dispute	provision for appointment
Education Act 1989 s228* (enacted 1990)	amount of grant reduction	at Council's request	provisions for appointment and finality
Conservation Act 1990 s24J (enacted 1990)	compensation for improvements to marginal strips	automatic once a dispute	provision for appointment
PRIVATE CORPORATIONS CREATED BY OR UNDER STATUTE			
Co-operative Companies Act 1956 s9(b)	value of shares	equivalent to standard form share contract	
Co-operative Freezing Companies Act 1960 s9(2)	value of shares (same as Co-C Act)	equivalent to standard form contract provision	
Building Societies Act 1965 s109	disputes between society and members	subject to rules of society	provisions for appointment and neutrality
Unit Titles Amendment Act 1979 s9(6)(b)	value of development		
Friendly Societies and Credit Unions Act 1982 ss78, 79, 80*	disputes between society, branch, officers, members	subject to rules of society or else by Registrar	modifies s11 1938 Amendment Act provision for discovery
LICENSING APPEALS			
Berryfruit Marketing Licensing Regulations 1983 reg29(3)*	appeals relating to licences	applicant may appeal	provisions re appointment and procedure
Game Industry Board Regulations 1985 reg33(3)*	appeals relating to licences (same as BML Regs)	applicant may appeal	provisions re appointment and procedure
New Zealand Horticultural Export Authority Act 1987 s43*	appeals relating to export licences	applicant may appeal	provisions re appointment procedure and appeal to court
Milk Act 1988 s15 and 2nd Schedule*	appeals re licence to process milk	applicant may appeal	detailed provisions re appointment and procedure
LABOUR RELATIONS			
Shop Trading Hours Act Repeal Act 1990 s7*	protective provisions	by agreement	

TRANSITIONAL PROVISIONS

Coal Mines Act 1979 s101D(4)	approval of Coal Corporation work programme	automatic once a dispute	
Port Companies Act 1988 s22(6)*	disputes over transfer of commercial undertakings	Minister may delegate	
Waterfront Industry Reform Act 1989 s18	value of buildings to be purchased	automatic once a dispute	provision for appointment
Local Government Act 1974 s594ZI (enacted 1989)	liability of local authorities in respect of undertakings	automatic once a dispute	provision for appointment
Waterfront Industry Restructuring Act 1989 s47(1)*	value of specified matters	Authority or local authority/ies may apply	provision for appointment
Local Government Act 1974 s594ZZA (enacted 1989)	regional Council divestment plan	Minister may delegate	

STATUTES WHICH PROVIDE A SEPARATE REGIME

Trees (Electric Lines) Regulations 1986 rr4-13	dispute with Electrical Supply Authorities	either party may apply	separate regime provided
State Sector Act 1988 ss69, 71, 75 and 3rd and 4th Schedules	disputes of interest	by agreement	separate regime provided
	final offer arbitration	by agreement in advance	separate regime provided
Area Health Board Act 1983 s39ZA (enacted 1988)	final offer arbitration (same as State Sector Act)	by agreement in advance	separate regime provided
Local Government Act 1974 s37H (enacted 1988)	payment on transfer of trading undertakings	by election of transferor or transferee	separate regime provided
Local Government Amendment Act (No 2) 1989 s45, 2nd Schedule s60	payment on transfer of trading undertakings	by election of transferor or transferee	separate regime provided
	apportionment of assets and liabilities among local authorities	transitional committee may refer	separate regime provided
Education Act 1989 s10	dispute over eligibility for special education	at request of a parent	separate regime provided
Police Act 1958, ss 83-96, 3, 4, and 5 Schedules (enacted 1989)	disputes of right and conditions of employment		separate regime provided

Defence Act 1990
ss71, 72, 73

final offer
arbitration (same
as State Sector
Act)

by agreement in
advance

separate regime
provided

* It is not clear whether the Arbitration Act 1908 applies.

APPENDIX F

Comparative Table: NZ Arbitration Legislation and Draft Arbitration Act

This comparative table indicates the provisions of the draft Act which deal with matters at present governed by the Arbitration Act 1908 and the Arbitration (Foreign Agreements and Awards) Act 1982. The substantive effect of the new provisions is not necessarily the same as those of the existing laws.

Arbitration Act 1908	Draft Arbitration Act
1 Short title	s15
2 Interpretation	s4
3 Submission to be irrevocable	No corresponding provision (NC)
4 Provisions implied in submissions	ss6 and 10
5 Power of court to stay proceedings where there is a submission	Sch1 art8
6 Appointment of arbitrator or umpire	Sch1 art11; Sch2 cl1
7 Power for parties to supply vacancy	Sch1 arts11, 14 and 15; Sch2 cl1
8 Powers of arbitrator	Oaths and Declarations Act 1957, ss 2 and 14; Sch1 arts17 and 33
9 Witnesses may be subpoenaed	Sch1 art27(2)
10 Power to enlarge time for making an award	Sch1 art19; Sch2 cl3(1)
11 Power to remit award	Sch2 cl5(4)
12 Power to remove arbitrator or set aside award	Sch1 arts12,13 and 34(2)
13 Enforcing award	Sch1 art35
14 Reference for report	} See Report paras 67 to 68A
15 Power to refer in certain cases	
16 Powers and remuneration of arbitrators	
17 Court to have powers as in references by consent	NC
18 Court of Appeal to have powers of Court	NC
19 Power to compel attendance of witness in any part of NZ	Sch1 art27(2); Sch4, Penal Institutions Act 1954, s26(5)
21 Costs	Sch1 arts 28; Sch2 cl6
22 Arbitrator or umpire entitled to remuneration	Sch1 arts 28; Sch2 cl6
23 Power to make rules	NC
24 Crown to be bound	s3
25 Application to Act to references under statutory powers	s7
FIRST SCHEDULE	NC
SECOND SCHEDULE	
1	Sch1 art10(2)
2	Sch1 art11(6)
4	Sch1 art29
6	Sch1 arts 19 and 27(3); Sch2 cl3
7	Sch1 arts 19 and 27(3); Sch2 cl3
8	Sch1 art34(1)
9	Sch1 arts28 and 31; Sch2 cl6
10	s10
10A	s10; Sch4, Contractual Mistakes Act 1977, s11

10B	s10; Sch4, Contractual Remedies Act 1979, s13A
10C	s10; Sch4, Contracts (Privity) Act 1982, s12
11	Sch1 art19; Sch2 cl3(1)
The Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933	
Preamble	s1(f)
1 Short title	NC
2 Interpretation	s4
4 Application of Part II	ss6 and 12
5 Effect of foreign awards	Sch1 art35(1)
6 Conditions for enforcement of foreign awards	Sch1 art36
7 Evidence	Sch1 art35(2)
8 Meaning of "final award"	Sch1 art 36(2)
9 Saving	NC
FIRST SCHEDULE Protocol on arbitration clauses	Sch3
SECOND SCHEDULE Convention on the execution of foreign arbitral awards	Sch3
Arbitration Amendment Act 1938	
1 Short title and commencement	NC
2 Interpretation	s4
3 Submission not to be discharged by death of party thereto	Sch1 art32(4) and (5)
4 Provisions in case of bankruptcy	NC
5 Power of court where arbitrator is removed or appointment of arbitrator is revoked	Sch1 arts11 and 15
6 Provisions on the appointment of 3 arbitrators	Sch1 art29
7 Provisions relating to umpires	NC
8 Arbitrators and umpires to use due dispatch	Sch1 arts14 and 19; Sch2 cl3(1)
10 Additional powers of court	Sch1 arts 8,9(3) and (4), 27(3) and 34(5)
11 Statement of case by arbitrator or umpire	Sch2 cl4
12 Entry of judgment in terms of award	Sch1 art35(1)
13 Interest on awards	Sch1 art31(2A)
14 Provision as to costs	s9; Sch1 art28; Sch2 cl6
15 Taxation of arbitrator's or umpire's fees	Sch2 cl6(4), (5) and (6)
16 Power of court to give relief where arbitrator is not impartial or dispute referred involves question of fraud	Sch1 arts 2(2), 8, 12, 13, 34(2) and (2) and 36(1) and (1)
18 Limitation of time for commencing arbitration proceedings	Sch1 arts 3 and 21; Sch4, Mercantile Law Act 1908
19 Saving for pending arbitrations	s15
20 Application to statutory arbitrations	s7
21 Amendments to principal Act	NC
FIRST SCHEDULE Matters in respect of which the court may make orders	
(1)	Sch1 art9(3); Sch2 cl3(3)
(2)	Sch1 art27(2); Sch2 cl3(3)
(3)	Sch2 cl3(3)
(4)	Sch1 art27(2); Sch2 cl3(3)

(5)	Schl arts9(3) and 27(2)
(6)	Schl art9(3)
(7)	Schl art27(2)
(8)	Schl art9(3)
SECOND SCHEDULE Provisions of Act which do not apply to statutory arbitration	s7
THIRD SCHEDULE Amendments of principal Act	NC
Arbitration (Foreign Agreements and Awards) Act 1982	
1 Short title and commencement	NC
2 Interpretation	s4
3 Act to bind the crown	s3
4 Power of court to stay court proceedings in respect of matters subject to an arbitration agreement	s6(3), Schl arts8 and 9(3)
5 Enforcement of foreign arbitral awards	Schl art35(1)
6 Evidence	Schl art35(2)
7 Refusal of enforcement	Schl art36
8 Enforcement of convention awards under other enactments	s7(1)
9 Reciprocal enforcement of Judgments Act 1934 not to affect enforcement under this Act	NC
10 Arbitration Clauses (Protocol) and the Arbitration (Foreign Awards) Act 1933 not to apply to Convention awards enforceable under this Act	NC
11 Application of Act	s15; Schl art1
12 Orders in Council and certificates declaring countries to be parties to Convention	s12
13 Convention awards to be unenforceable in New Zealand if no reciprocity	NC
14 Repeal	s13
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