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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT
PRACTICES ON THE WORK OF ITS SEVENTH SESSION

(New York, 6-17 February 1984)

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INTRODUCTION

1. At its fourteenth session, the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration. 1/
2. The Working Group commenced its work at its third session by discussing all but four of a series of questions prepared by the Secretariat designed to establish the basic features of a draft model law. 2/
3. At its fourth session, the Working Group completed its discussion on questions prepared by the Secretariat on possible features of a draft model law and some further issues of arbitral procedure possibly to be dealt with in a draft model law. At that session, the Working Group also considered draft articles 1 to 36 of a draft model law prepared by the Secretariat. 3/
4. At its fifth session, the Working Group considered further features and draft articles of a model law and revised draft articles I to XXVI of a model law on international commercial arbitration. At that session, the Working Group also considered draft articles 37 to 41 on recognition and enforcement of awards and on recourse against awards. 4/

1/ Report 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/ Report of the Working Group on International Contract Practices on the work of its third session (A/CN.9/216).

3/ Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN.9/232).

4/ Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN.9/233).

5. At its sixth session, the Working Group considered tentative draft articles A to G, revised draft articles XIII to XXIV and XXV to XXX and redrafted articles I to XII of a model law on international commercial arbitration. 5/

6. According to a decision by the Commission to expand the membership of the Working Group to all States members of the Commission, 6/ the Working Group consists of the following 36 States: Algeria, Australia, Austria, Brazil, Central African Republic, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Germany, Federal Republic of, Guatemala, Hungary, India, Iraq, Italy, Japan, Kenya, Mexico, Nigeria, Peru, Philippines, Senegal, Sierra Leone, Singapore, Spain, Sweden, Trinidad and Tobago, Uganda, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Yugoslavia.

7. The Working Group held its seventh session in New York from 6 to 17 February 1984. All the members were represented except the Central African Republic and Peru.

8. The session was attended by observers from the following States: Argentina, Barbados, Canada, Chile, Congo, Ecuador, El Salvador, Finland, Ghana, Greece, Guinea, Holy See, Honduras, Norway, Panama, Republic of Korea, Romania, Suriname, Switzerland, Thailand, Tunisia, Turkey and Venezuela.

9. The session was attended by observers from the following intergovernmental organizations: Asian-African Legal Consultative Committee, Commission of the European Communities and Hague Conference on Private International Law, and from the following international non-governmental organizations: Inter-American Commercial Arbitration Commission, International Bar Association, International Chamber of Commerce, International Council for Commercial Arbitration and International Law Association.

10. The Working Group elected the following officers:

Chairman: Mr. Ivan Szasz (Hungary)

Rapporteur: Mr. James C. Droushiotis (Cyprus)

5/ Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN.9/245).

6/ Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17 (A/38/17), para. 143.

11. The following documents were placed before the session:

- (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN.9/207);
- (b) Report of the Working Group on International Contract Practices on the work of its third session (New York, 16-26 February 1982) (A/CN.9/216);
- (c) Report of the Working Group on International Contract Practices on the work of its fourth session (Vienna, 4-15 October 1982) (A/CN.9/232);
- (d) Report of the Working Group on International Contract Practices on the work of its fifth session (New York, 22 February-4 March 1983) (A/CN.9/233);
- (e) Report of the Working Group on International Contract Practices on the work of its sixth session (Vienna, 29 August-9 September 1983) (A/CN.9/245);
- (f) Provisional agenda for the session (A/CN.9/WG.II/WP.47);
- (g) Composite draft text of a model law on international commercial arbitration (A/CN.9/WG.II/WP.48);
- (h) Territorial scope of application of the model law and related issues (A/CN.9/WG.II/WP.49);
- (i) Some notes on the composite draft text of a model law (A/CN.9/WG.II/WP.50).

12. The Working Group adopted the following agenda:

- (a) Election of officers;
- (b) Adoption of the agenda;
- (c) Consideration of composite draft text of a model law on international commercial arbitration;
- (d) Other business;
- (e) Adoption of the report.

DELIBERATIONS AND DECISIONS

13. The Working Group considered the composite draft text of a model law on international commercial arbitration (A/CN.9/WG.II/WP.48), as revised by the Drafting Group (A/CN.9/WG.2/7/CRP.1). In connection with pertinent articles of the draft text, the Working Group also considered issues of territorial scope of application of the model law and related issues raised in document A/CN.9/WG.II/WP.49 and some comments and suggestions by the Secretariat on the composite draft text which were contained in document A/CN.9/WG.II/WP.50.

14. The Working Group adopted the draft text of the model law on international commercial arbitration as contained in the annex to the present report. It was noted that, for lack of time, the Working Group was unable to review the articles as to their correlation and consistency.

15. The Working Group noted that the Secretariat had convened a drafting group in order to establish corresponding language versions of the text of the model law before it was sent to Governments and international organizations for comments. The Working Group expressed its appreciation to the Drafting Group which met before and during the session of the Working Group.

A. CONSIDERATION OF COMPOSITE DRAFT TEXT OF A MODEL LAW ON
INTERNATIONAL COMMERCIAL ARBITRATION

16. The Working Group decided to postpone its consideration of chapter I (General provisions) to a later stage of the session and to commence its deliberations with a consideration of chapter II (Arbitration agreement).

CHAPTER II. ARBITRATION AGREEMENT

Article 7

17. The text of article 7 as considered by the Working Group was as follows:

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.

18. The Working Group adopted that article.

19. The Working Group was agreed that the last part of the last sentence of paragraph (2) should not be understood as requiring an explicit reference to the arbitration clause contained in a document referred to.

Article 8

20. The text of article 8 as considered by the Working Group was as follows:

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 [unless the court orders a stay of the arbitral proceedings].

21. The Working Group adopted that article, including, in paragraph (2), the words "of its jurisdiction" but deleting the words "unless the court orders a stay of the arbitral proceedings", although there was some support for their retention.

22. The Working Group considered the question raised in the note prepared by the Secretariat (A/CN.9/WG.II/WP.50, para. 15) whether the model law should deal with the effect of a party's failure to invoke the arbitration agreement in accordance with paragraph (1) of that article. The Working Group was agreed that article 8 (1) certainly prevented a party from invoking the arbitration agreement later than the point of time indicated in paragraph (1), and that the court was not empowered without a request of a party, i.e. ex officio, to refer the parties to arbitration. While there was wide support for the view that the failure of the party should have a wider effect precluding that party from relying on the arbitration agreement also in other contexts or proceedings, the Working Group 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.

23. The Working Group did not accept a suggestion to add at the end of paragraph (1) the words "or that the dispute concerns a matter that is not capable of settlement by arbitration". While recognizing the importance of the requirement of arbitrability, the prevailing view was that there was no need for an express provision as the one suggested. It was noted that an arbitration agreement concerning a non-arbitrable subject-matter would normally be regarded as null and void. It was also pointed out by some representatives that the issue of non-arbitrability was adequately addressed in articles 34 and 36.

Article 9

24. The text of article 9 as considered by the Working Group was as follows:

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] [interim measure or a measure of conservation] and for a court to grant such measure.

25. The Working Group adopted that article, including the words "interim measure of protection" and deleting the words "interim measure or a measure of conservation". While there was some support for the latter wording which was taken from the 1961 Geneva Convention, the prevailing view was in favour of the term "interim measure of protection" which was taken from the UNCITRAL Arbitration Rules.

26. The Working Group was agreed that the range of measures covered by article 9 was a wide one and included, in particular, pre-award attachments. It was noted that that provision, as regards the range of measures covered, including their enforcement, was considerably wider than article 18 which empowered the arbitral tribunal to order certain interim measures of protection but did not deal with the enforcement of such orders.

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10

27. The text of article 10 as considered by the Working Group was as follows:

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.

28. The Working Group adopted that article.

Article 11

29. The text of article 11 as considered by the Working Group was as follows:

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) 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.

30. The Working Group adopted that article.

31. The Working Group noted that the words "or citizenship" following the word "nationality" in paragraphs (1) and (5) had been deleted by the Drafting Group. While there was some support for retaining the words "or citizenship", the prevailing view was to delete them since in many legal systems only the term "nationality" was used. However, the Working Group was agreed that, in view of the purpose of this provision to achieve non-discrimination, the term "nationality" should be given a wide interpretation so as to embrace citizenship, where such term was used.

32. As regards the function entrusted to the Court by paragraph (4) of that article, the Working Group was agreed that the words "to take the necessary measure" meant that the Court had to take the necessary measure itself (that is, to make the appointment) and not, for example, order an appointing authority, which had failed to do so, to perform the function entrusted to that authority by the parties.

Article 12

33. The text of article 12 as considered by the Working Group was as follows:

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall [without delay] 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 only challenge the arbitrator appointed by him for reasons of which he becomes aware after the appointment has been made.

(3) 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 [that provision] [paragraph (2) of this article or in article 14].

34. The Working Group adopted that article, subject to the deletion of the words "without delay" in the first sentence of paragraph (1) and subject to the addition, in the second sentence of paragraph (2), after the words "the arbitrator appointed by him" of the words "or in whose appointment he has participated". That addition was felt to be necessary since the policy considerations which applied to the case of the party-appointed arbitrator were of equal force in the case where the parties jointly appointed an arbitrator.

35. As regards paragraph (3), the Working Group noted that the Drafting Group had recommended to place that provision after article 14 as a new article 14 bis. The Working Group requested the Drafting Group to implement that idea and also to select the more appropriate wording of the two variants presented between square brackets at the end of that paragraph.

Article 13

36. The text of article 13 as considered by the Working Group was as follows:

Article 13. Challenge procedure

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

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of any circumstances 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) is not successful, the challenging party may request, within fifteen days [after having received 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.

37. The Working Group adopted that article, subject to the replacement, in paragraph (2), of the words "after becoming aware of any circumstances referred to in article 12 (2)" by the words "of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in article 12 (2), whichever is later".

38. The Working Group was agreed that the decision entrusted to the arbitral tribunal by paragraph (2) of that article was not to be considered as a decision on a question of procedure in the terms of article 29 and that the decision was entrusted to all members of the tribunal, including the challenged arbitrator. In an arbitration with more than one arbitrator, that decision may be made by a majority of all its members in accordance with article 29 (first sentence).

39. The Working Group did not accept a suggestion to include in article 13 an explicit statement to the effect that a successful challenge led to the termination of the mandate of the challenged arbitrator. The Working Group felt that that legal effect of a successful challenge was sufficiently clear by implication.

Article 14

40. The text of article 14 as considered by the Working Group was as follows:

Article 14. Failure or impossibility to act

If an arbitrator [fails to act or becomes de jure or de facto unable to perform his functions] [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.

41. The Working Group adopted that article, including the words "becomes de jure or de facto unable to perform his functions or for other reasons fails to act" and deleting the words "fails to act or becomes de jure or de facto unable to perform his functions".

42. It was noted that that article envisaged the termination of the mandate only for certain reasons specified in that provision and that neither article 14 nor article 15 indicated clearly in what other cases the mandate of an arbitrator would terminate. In particular, there was no provision on the termination of the mandate of an arbitrator by agreement of the parties and it was, therefore, not clear whether the parties by consent could remove an arbitrator only for certain reasons or whether their freedom in that respect was unlimited. Another important question in need of clarification was whether an arbitrator was free to resign only for certain reasons or whether he was free to resign without showing sufficient cause.

43. In discussing those questions it was understood that, as had been decided at earlier sessions, the model law would not deal with the legal responsibility of an arbitrator or other issues pertaining to the party-arbitrator relationship.

44. As regards the question of removal of an arbitrator by consent, there was wide support for the view that, because of the consensual nature of arbitration, the parties had unrestricted freedom to agree on the termination of the mandate of an arbitrator. As regards the question of resignation of an arbitrator, there was some support for the view that a person who had accepted to act as an arbitrator should not be allowed to resign for capricious reasons. The prevailing view, however, was that it was impractical to require just cause for the resignation, since an unwilling arbitrator could not, in fact, be forced to perform his functions.

45. While recognizing the complex nature of those questions the Working Group, after deliberation, decided that the model law should take a stand on those issues and express the views prevailing in the Group. It was thought that the appropriate place for doing so was article 15. That provision already envisaged resignation "for any other reason", so that only the case of removal by consent had to be added there.

Article 15

46. The text of article 15 as considered by the Working Group was as follows:

Article 15. Appointment of substitute arbitrator

[Where the mandate of an arbitrator terminates under article 13 or 14 or because of his resigning for any other reason,] 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.

47. The Working Group adopted that article, subject to the insertion after the words "resigning for any other reason" of the words "or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate".

48. The words "or because of the revocation of his mandate by agreement of the parties" were added in pursuance of the decision of the Working Group taken during its deliberations on article 14 (see para. 45, above). The words "or in any other case of termination of his mandate" were added in order to cover all possible cases in which the need for the appointment of a substitute arbitrator could arise. While there was some support for a detailed list of instances (e.g., death, illness, incapacity), the general formula was preferred for the sake of simplicity and since the detailed list was liable to being incomplete.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16

49. The text of article 16 as considered by the Working Group was as follows:

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 or, with respect to a counter-claim, in the reply to the counter-claim. 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 has exceeded the scope of its authority shall be raised promptly after the arbitral tribunal has indicated its intention to [deal with] [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) 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.]

50. The Working Group adopted that article, subject to the revision of the third sentence in paragraph (2) as follows: "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".

51. It was observed, with reference to the question raised in the note prepared by the Secretariat (A/CN.9/WG.II/WP.50, para. 16), 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 arbitrability.

52. As regards paragraph (3) of that article, the Working Group decided to retain that paragraph in the light of its decision to delete article 17 (see paras. 54-56, below).

Article 17

53. The text of article 17 as considered by the Working Group 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].

54. The Working Group decided to delete that article.

55. It was noted that the concurrent court control provided for in that article was to a large extent in conflict with the provision in the last sentence of paragraph (3) of article 16, which precluded a party from contesting an affirmative ruling by the arbitral tribunal on its jurisdiction until the final award on the merits was made. There was some support for retaining the provision on concurrent court control for the sake of a speedy and cost-saving settlement of any controversy about the arbitral tribunal's jurisdiction. However, the prevailing view was in favour of deleting article 17 since it might have adverse effects throughout the arbitral proceedings by opening the door to delaying tactics and obstruction and because it was not in harmony with the principle underlying article 16 that it was initially and primarily for the arbitral tribunal to decide on its competence, subject to ultimate court control.

56. As to the way of providing ultimate court control over the power of an arbitral tribunal to decide on its jurisdiction, there was some support for the view that the arbitral tribunal may make the ruling on its jurisdiction in the form of an award, which could then be reviewed by the court in setting aside proceedings under article 34. The proponents of that view were divided on whether this approach should be expressly regulated in the model law. The prevailing view, however, was to allow the ultimate court control only after the final award on the merits was made, as provided for in the last sentence of paragraph (3) of article 16.

Article 18

57. The text of article 18 as considered by the Working Group was as follows:

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 the taking of any interim measure [of protection it considers necessary in respect of the subject-matter of the dispute]. The arbitral tribunal may require of a party or the parties security for the costs of such measure.

58. The Working Group adopted that article, subject to the revision of the first sentence as follows: "Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order the other party or the parties to take any interim measure of protection which the arbitral tribunal considers necessary in respect of the subject-matter of the dispute".

59. The words "the other party or the parties" were inserted in order to make clear that the power of the arbitral tribunal, which was derived from the parties, was limited to the parties and that, therefore, such orders could not be addressed to third persons.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19

60. The text of article 19 as considered by the Working Group was as follows:

Article 19. Determination of rules of procedure

(1) Subject to the [mandatory] 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, provided that the parties are treated with equality and that each party is given a full opportunity of presenting his case. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

61. The Working Group adopted that article, subject to the deletion of the word "mandatory" in paragraph (1) and the addition, at the end of that paragraph, of the words "provided that the parties are treated with equality and that each party is given a full opportunity of presenting his case".

62. That addition to paragraph (1) was designed to emphasize the importance of the principles of equality and the right to be heard which should be observed not only by the arbitral tribunal but also by the parties when laying down any rules of procedure.

63. It was noted, with reference to the question raised in the note prepared by the Secretariat (A/CN.9/WG.II/WP.50, para. 14), that the freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceedings, as was provided in paragraph (1), and should not be limited, for example, to the time before the first arbitrator was appointed.

Article 20

64. The text of article 20 as considered by the Working Group was as follows:

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.

65. The Working Group adopted that article.

Article 21

66. The text of article 21 as considered by the Working Group was as follows:

Article 21. Commencement of arbitral proceedings

Unless otherwise agreed by the parties, the arbitral proceedings [shall be deemed to] commence on the date on which a request that a [particular] [specified] dispute be referred to arbitration is received by the respondent [provided that such a request identifies the claim].

67. The Working Group adopted that article in the following modified form:

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

Article 22

68. The text of article 22 as considered by the Working Group was as follows:

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 [of witnesses, experts or the parties], 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 [one of the] languages agreed upon by the parties or determined by the arbitral tribunal.

69. The Working Group adopted that article, subject to the deletion, in paragraph (1), of the words "of witnesses, experts or the parties" and, in paragraph (2), of the words "one of the".

70. While some concern was expressed that the provisions contained in the last sentence of paragraph (1) and in paragraph (2) were too detailed for a model law, the prevailing view was that those provisions were useful in view of the great practical importance of the question of language and in that they drew the attention of the parties to different instances in which the agreed or determined language could affect their position in the proceedings.

Article 23

71. The text of article 23 as considered by the Working Group was as follows:

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) [During the course of the arbitral proceedings] either party may amend or supplement his claim or defence 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.

72. The Working Group adopted that article, including, in paragraph (2), the words "During the course of the arbitral proceedings".

73. It was noted that the provision of paragraph (1) which referred to the "claim" should also apply to a counter-claim. As to whether this understanding should be expressed in that provision, it was agreed that the same question arose in respect of a number of articles of the draft of the model law and that it should therefore be considered at a later stage in a general manner. 7/

7/ See decision below, para. 196.

Article 24

74. The text of article 24 as considered by the Working Group was as follows:

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. However, if a party so requests, the arbitral tribunal shall, at the appropriate stage of the proceedings, hold hearings for the presentation of evidence by witnesses, including expert witnesses, or for oral argument.

(2) In order to enable the parties to be present at any hearing and at any meeting of the arbitral tribunal for inspection purposes, they shall be given sufficient notice in advance.

(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 other document, on which the arbitral tribunal may rely in making its decision, shall be communicated to the parties.

75. The Working Group adopted that article, subject to the modification of paragraphs (1) and (2) in the following form:

"(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.

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

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

76. The Working Group was agreed that the last sentence of paragraph (1) was ambiguous in that it allowed the following conflicting interpretations: (a) a party has a right to request a hearing only if the parties have not agreed that the proceedings be conducted on the basis of documents and other materials and, as a result, it was for the arbitral tribunal to decide on the mode of the proceedings; (b) a party has a right to request an oral hearing even if the parties have agreed on written proceedings.

77. Divergent views were expressed as to which was the appropriate rule in terms of policy. Under one view, full effect should be given to an agreement by the parties that the arbitral proceedings be conducted without hearings even if a party later requested a hearing. The prevailing view was that the right of a party to request a hearing was of such importance that the parties should not be allowed to exclude it by agreement.

78. The proponents of the prevailing view were divided on whether the arbitral tribunal had to follow such a request by a party and hold hearings or whether it should have discretion in that regard. Under one view, the right of a party to request a hearing was so fundamental that the arbitral tribunal should have to comply with it. Under another view, which the Working Group adopted after deliberation, a certain control by the arbitral tribunal was desirable and the proper wording for the provision was therefore that the arbitral tribunal "may hold" hearings, if a party so requested.

79. It was noted that paragraph (1) (second sentence) referred to "hearings for the presentation of evidence by witnesses, including expert witnesses" and that that reference was too limited because it did not cover other types of evidence, for example, cross-examination or testimony of a party. The Working Group was agreed that, instead of enumerating all possible types of evidence recognized in various legal systems, a general formula was preferable and that, therefore, the reference should merely read: "hearings for the presentation of evidence".

80. It was observed that paragraph (2), in addition to establishing the requirement of advance notice, could be understood as dealing with the procedural rights of the parties at a hearing or at a meeting for inspection purposes and that such a regulation was insufficient and too restrictive. In order to meet that concern, the Working Group decided to revise the provision so as to retain only the requirement of advance notice.

Article 25

81. The text of article 25 as considered by the Working Group was as follows:

Article 25. Default of a party

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

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

(b) the respondent fails to communicate his statement of defence in accordance with article 23 (1),

Variant A: the arbitral proceedings shall continue;

Variant B: the arbitral tribunal shall continue the proceedings without treating such failure as an admission of the claimant's allegations;

Variant C: the arbitral tribunal shall treat this as a denial of the claim and continue the proceedings;

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

82. The Working Group adopted that article, including, in subparagraph (b), the wording of variant B, and subparagraph (c) in the following modified form:

"(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."

83. As regards the three variants presented in subparagraph (b), the Working Group, after deliberation, adopted the wording of variant B. That wording, while according certain discretion to the arbitral tribunal, contained a limitation which was considered useful in view of the fact that under many national laws on civil procedure default of the defendant in court proceedings was treated as an admission of the claimant's allegations.

84. It was suggested that the provision should be more elaborate and provide some guidance concerning certain procedural issues (e.g., how to establish the default and in what manner to conduct the proceedings and make the award). The Working Group, after deliberation, was agreed that a model law need not contain detailed procedural rules in that respect.

Article 26

85. The text of article 26 as considered by the Working Group was as follows:

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties before the appointment of the first arbitrator, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the tribunal.

(2) The [expert may, within his terms of reference, require a party to give him] [arbitral tribunal 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.

(3) 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.

86. The Working Group adopted that article, subject to the deletion, in paragraph (1), of the words "before the appointment of the first arbitrator" and, in paragraph (2), the deletion of the words "expert may, within his terms of reference, require a party to give him" and, before the first word of paragraph (3), the addition of the words "If a party so requests or if the arbitral tribunal considers it necessary".

87. There was some support for retaining, in paragraph (1), the words "before the appointment of the first arbitrator" since that would ensure that an arbitrator, when accepting his mandate, would know about the restriction on his power to appoint an expert. However, the prevailing view was that the freedom of the parties to restrict that power of the arbitral tribunal was paramount and should not be subject to such a time-limit.

88. As regards paragraph (2), the Working Group was agreed that it was more appropriate that the arbitral tribunal itself, and not the expert, should require any relevant information or materials.

89. As regards paragraph (3), the purpose of the modification was to make clear that a hearing with the expert had not to be held in each and every case but only where a party so requested or where, without such a request, the arbitral tribunal considered it necessary.

Article 27

90. The text of article 27 as considered by the Working Group was as follows:

Article 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 assistance in taking evidence. The request shall [be in the language of the court, include a certified copy of the arbitration agreement and] 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 [necessary information on 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 [, including provisions on admissibility and on enforcement procedures], execute the request either by taking the evidence itself or by ordering that the evidence be provided directly to the arbitral tribunal. If so [suggested] [demanded] in the request, the court may transmit the request to a competent court of a foreign State [where assistance in obtaining evidence is required].

[(3) Where a foreign court transmits to a competent court of this State a request for assistance in taking evidence relating to arbitral proceedings in that foreign State, the court of this State shall treat such request as having been made by that foreign court itself.]

91. The Working Group adopted that article in the following modified form:

"(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."

92. The Working Group, in considering whether a provision along the lines of article 27 should be retained in the model law, discussed the intended purpose and possible effect of that article.

93. There was some support for the view that that article, since it formed part of a law on arbitration, could not and should not attempt to alter the existing law of a State concerning court assistance in taking evidence. For example, where that law contained rules for court assistance to other courts but not to arbitral tribunals, article 27 would not open the door to court assistance in aid of arbitration. Accordingly, the effect of the provision was limited to recognizing the right to request court assistance as a part of accepted arbitral procedure.

94. There was wide support for the view that the provision had effect beyond the realm of arbitral procedure and that the right to request court assistance under article 27 carried with it the expectation that there were circumstances under which the national law gave the possibility of obtaining assistance by courts. While article 27, thus, was designed to change, for example, a national law which envisaged court assistance only to other courts but not to arbitral tribunals, it did not attempt to interfere with national rules on civil procedure concerning the taking of evidence and the organization of the judicial system including court competence.

95. In the light of that understanding, divergent views were expressed as to whether article 27 should be retained. Under one view, the article should be deleted since the envisaged involvement of courts was contrary to the private nature of arbitration and was regulated in a way which interfered with the internal procedural law. Under another view, the article should be retained in its entirety, though with certain modifications. It was pointed out in

support of that view that the provision was useful in that it would provide the possibility of assistance in obtaining evidence which the arbitral tribunal itself could not obtain since it lacked means of compulsion. In the context of international commercial arbitration such assistance should be provided not only in arbitrations which were held in the State where the court was located but also in arbitrations held abroad (as envisaged in the second sentence of paragraph (2) and in paragraph (3)). Under yet another view, article 27 should be retained only in so far as it dealt with court assistance in arbitrations within the same State. It was stated in support of that view that, while court assistance as such was useful, its extension to foreign arbitral tribunals could not be appropriately dealt with by a model law.

96. That latter view was adopted by the Working Group as a compromise. Accordingly, it was decided to retain, with some modifications, paragraph (1) and the first sentence of paragraph (2).

97. The Working Group was agreed that it was desirable to express that limited scope of application of the article by adding, before the first word of paragraph (1), the words "In arbitral proceedings held in this State or under this Law". It was understood that that decision was subject to later review in the context of the general deliberation on the territorial scope of application of the model law. 8/

98. As regards, in paragraph (1), the words "or a party with the approval of the arbitral tribunal", it was agreed that that wording reflected a compromise between the two conflicting views that court assistance would be rendered only upon request by the parties or exclusively upon request by the arbitral tribunal.

99. As regards, in paragraph (1), the words "be in the language of the court", the Working Group decided to delete them because such a provision was either redundant or in possible conflict with national regulations on the use of languages in courts.

100. As regards, in paragraph (1), the words "include a certified copy of the arbitration agreement and", the Working Group decided to delete them since that requirement was unnecessarily burdensome in some circumstances, and in other circumstances, for which it seemed to be intended, not sufficient because it did not establish proof of the authority of the arbitrators.

101. The Working Group was agreed that, in paragraph (1) (c), the words "necessary information on the" and, in paragraph (2), the words "including provisions on admissibility and on enforcement procedures" were redundant and should be deleted.

8/ See discussion below, paras. 165-168.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28

102. The text of article 28 as considered by the Working Group was as follows:

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] [may be agreed] 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.

103. The Working Group adopted that article, subject to the retention, in paragraph (1), of the words "are chosen" and the deletion of the words "may be agreed".

104. An observation was made that, in paragraph (2), the expression "considers" might be construed as giving too wide a discretion to the arbitral tribunal in finding the conflict of laws rules and that it was, therefore, desirable to use another expression. However, the Working Group decided to retain the present wording in view of the fact that the same wording had been adopted in other legal texts on arbitration.

Article 29

105. The text of article 29 as considered by the Working Group was as follows:

Article 29. Decision-making by panel of arbitrators

In arbitral proceedings with more than one arbitrator, any award, including interim [, interlocutory] and partial award, and any other 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 [on his own].

106. The Working Group adopted that article in the following modified form:

"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."

107. The Working Group was of the view that that article should only deal with the majority principle in the making of decisions in arbitral proceedings and that it should not attempt to define the term "award". It was, therefore, decided to consider at a later stage whether a definition of "award" should be included in another appropriate article of the model law. 9/

108. There was some support for deleting the last sentence of that article because it might create controversies in cases where it was not certain whether a question was one of procedure or one of substance. However, the Working Group decided to retain the provision because the parties or the arbitrators may use it in order to make an arbitration more expedient and efficient.

Article 30

109. The text of article 30 as considered by the Working Group was as follows:

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 executory force as any other award on the merits of the case.

110. The Working Group adopted that article, subject to the replacement, in paragraph (2), of the words "executory force" by the word "effect".

Article 31

111. The text of article 31 as considered by the Working Group was as follows:

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.

9/ See discussion below, paras. 192-194.

(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.

112. The Working Group adopted that article.

Article 32

113. The text of article 32 as considered by the Working Group was as follows:

Article 32. Termination of proceedings

Variant A:

(1) The arbitral proceedings are terminated:

(a) by the making of the final award which disposes of all claims submitted to arbitration; or

(b) by an agreement of the parties that the arbitral proceedings are to be terminated at a specified date [or after expiry of a specified period of time]; or

(c) by an order of the arbitral tribunal in accordance with paragraph (2) of this article.

(2) After having given suitable notice to the parties, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings

(a) 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; or

(b) if for any other reason the continuation of the proceedings becomes unnecessary or inappropriate.

[Where the arbitral tribunal fails to issue an order of termination, any party may request from the Court specified in article 6 a ruling on the termination of the proceedings.]

(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).

Variant B:

(1) The arbitral proceedings are terminated either by the final award or by agreement of the parties or by an order of termination [by the arbitral tribunal] [which the arbitral tribunal may issue when the continuation of the proceedings appears unnecessary or inappropriate].

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

114. The Working Group adopted that article, based on variant B, in the following modified form:

"(1) The arbitral proceedings are terminated either 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 becomes for any other reason 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)."

115. While there was some support for the more elaborate draft provisions presented in variant A, the Working Group, after deliberation, decided in favour of variant B, for the sake of simplicity.

116. As regards termination of the proceedings by an order of the arbitral tribunal, the Working Group adopted the more explicit wording "which the arbitral tribunal may issue when the continuation of the proceedings appears unnecessary or inappropriate" as well as the provision contained in paragraph (2) (a) of variant A, in order to give some indication of the reasons for an order of termination.

Article 33

117. The text of article 33 as considered by the Working Group was as follows:

Article 33. Correction and interpretation of awards and additional awards

(1) Within thirty days of the 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; the arbitral tribunal may, within thirty days of the date of the award, make such corrections on its own initiative; and

(b) to give [, within thirty days,] an interpretation of a specific point or part of the award; such interpretation shall form part of the award.

(2) 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 such request to be justified and that the omission can be rectified without any further hearings or evidence, it shall make that additional award [within sixty days of receipt of the request].

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

118. The Working Group adopted that article in the following modified form:

"(1) Within thirty days of the 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, within thirty days, in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

"(b) to give, within thirty days, an interpretation of a specific point or part of the award; such interpretation shall form part of the award.

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

"(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal shall make the additional award within sixty days, if it considers the request to be justified.

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

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

119. Divergent views were expressed as to whether the article should prescribe a period of time during which the arbitral tribunal would have to dispose of a request by a party for a correction or interpretation or an additional award. Under one view, it was not appropriate to fix any period of time. It was pointed out in support of that view that there may be circumstances in which the arbitral tribunal would be unable, for good reasons, to comply with a fixed time-limit. Furthermore, rigid periods of time may create uncertainty as to the validity of actions taken after their expiration and would raise questions as to the sanctions for non-compliance.

120. Under another view, time-limits were necessary in order to ensure timely disposal of a party's request and to limit the duration of uncertainty about the definitive content of the award. It was also pointed out that time-limits were needed in view of the provision of article 34 (3) which set a time-limit for an application for setting aside of an award.

121. Under yet another view, a general formula was preferable which would, for example, require the arbitral tribunal to act "promptly" or "without delay".

122. The Working Group, after deliberation, adopted as a compromise the following solution. Article 33 would set fixed periods of time (of 30 days for a correction or interpretation and of 60 days for an additional award) and would empower the arbitral tribunal to extend these periods of time, if necessary under the circumstances.

123. The Working Group was agreed that these periods of time would commence to run when the arbitral tribunal received the request for a correction, interpretation or an additional award. While it was suggested to express that understanding in the text by adding, after the respective time-period, the words "of receipt of the request", the Working Group decided that there was no need for such an explicit statement since the correct answer obtained clearly from the current text.

124. It was noted that a party requesting a correction, interpretation or an additional award had to give notice to the other party in order to give that party the opportunity to express its views concerning that request. It was suggested that a reasonable period of time during which that party could reply should be taken into account for the calculation of the period of time during which the arbitral tribunal should dispose of the request. While the Working Group did not consider it necessary to lay down an elaborate time schedule in that respect, it was understood that the arbitral tribunal should allow sufficient time for a reply.

125. As regards paragraph (2), it was noted that that provision empowered the arbitral tribunal to make an additional award only in cases where the omission could be rectified without any further hearings and evidence. The Working Group, after deliberation, decided not to retain that requirement because it was unduly restrictive in that it excluded a considerable number of cases where at least a hearing, if not further evidence, was necessary before making the additional award.

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34

126. The text of article 34 as considered by the Working Group was as follows:

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 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, 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 [mandatory provisions of this Law and the] agreement of the parties 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 in accordance with article 31 (4) [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, instead of setting aside the award, [may order, where appropriate, that the arbitral proceedings be continued] [may authorize the continuation of arbitral proceedings where this would permit an omission or other procedural defect to be cured without having to set aside the award].

127. The Working Group adopted that article, subject to the addition, at the end of paragraph (1), of the words "or by a request to refuse recognition or enforcement in accordance with article 36", 10/ and subject to the replacement of the words "mandatory provisions of this Law and the", in paragraph (2) (a) (iv), by the words "provisions of this Law from which the parties cannot derogate and the", and subject to the deletion, in paragraph (3), of the words "in accordance with article 31 (4)", and subject to the revision of paragraph (4) as follows: "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".

128. While there was some support for the suggestion to place article 34 after the provisions on recognition and enforcement, the Working Group decided to retain the existing order of those articles.

129. It was noted that article 34 regulated the recourse against an arbitral award without defining the term "award" or specifying what types of awards would be covered. In order to achieve the necessary clarification, the Working Group decided to include in the model law a general definition of the term "award" or, at least, to specify what types of awards would be subject to setting aside under article 34. A suggestion for later consideration was to allow recourse against any award deciding on the substance of the dispute. 11/

130. It was observed that paragraph (1), by presenting the application for setting aside as exclusive recourse against awards, appeared to disregard the right of a party under article 36 to raise objections against the recognition or enforcement of an award. Although that right was exercised in reply to an initiative by the other party, the Working Group was agreed that, for the sake of clarity, paragraph (1) should make reference to that other type of recourse. 12/

10/ See, however, decision below, para. 197.

11/ See discussion below, paras. 192-194.

12/ See, however, decision below, para. 197.

131. As regards the words "[in the territory of this State] [under this Law]", the Working Group was agreed that it was premature to decide on the specific scope of application of article 34 before having discussed the territorial scope of application of the model law in general. 13/

132. As regards paragraph (2) (a) (i), there was considerable support for substituting the words "a party to the arbitration agreement referred to in article 7 lacked the capacity to conclude the agreement" for the words "the parties to the arbitration agreement referred to in article 7 were, under the law applicable to them, under some incapacity" since the latter wording was seen as containing an incomplete and inappropriate conflict of laws rule. The prevailing view, however, was to retain the current wording which was identical to the one in article V (1) (a) of the 1958 New York Convention.

133. There was some support for deleting the reference, in paragraph (2) (a) (i), to the law applicable to the validity of the arbitration agreement and, thus, to state as reason for refusal merely that "the arbitration agreement is not valid". It was pointed out, in support of that view, that the reference did not set forth a complete system of conflicts rules and had given rise to some difficulties. The prevailing view, however, was to retain the current wording as an acceptable and satisfactory provision which was identical to the one adopted in the 1958 New York Convention.

134. As regards paragraph (2) (a) (iii), the Working Group was agreed that the drafting of that provision, in particular its second part, could be improved. It was suggested, for example, to replace the words "only that part of the award which contains decisions on matters not submitted to arbitration may be set aside" by the words "that part of the award which contains decisions on matters submitted to arbitration need not be set aside".

135. As regards paragraph (2) (a) (iv), the Working Group adopted the policy underlying the words "mandatory provisions of this Law and the arbitration agreement" since a mandatory provision of this Law, by definition, would prevail over any procedural agreement by the parties which was in conflict with such provision. However, it was agreed to redraft that portion of the provision so as to avoid the expression "mandatory" which was not understood in all legal systems as meaning "from which the parties cannot derogate".

136. As regards paragraph (2) (b) (i), it was noted that that provision made the law of the forum determine the arbitrability of the subject-matter of the dispute. It was suggested that such a rule, while appropriate in the context of recognition and enforcement (art. 36 (1) (b) (i)), was not appropriate in setting aside proceedings since here the effect of a finding of non-arbitrability was not limited to the State of the forum but extended to all other States by virtue of article 36 (1) (a) (v). 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

13/ See discussion below, paras. 165-171.

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) (ii)) 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.

137. 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.

138. As regards paragraph (3), the Working Group reaffirmed its decision to delete the words "in accordance with article 31 (4)". As regards the words "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", there was considerable support for deleting those words since they might open the door for dilatory tactics by a party and because an unbreakable time-limit for applications for setting aside was desirable for the sake of certainty and expediency. The prevailing view, however, was to retain those words since they presented the reasonable consequence of article 33 which allowed a party to request a correction, interpretation or an additional award. It was also pointed out that the periods of time contained in article 33 enabled the arbitral tribunal to minimize the risk of dilatory tactics and provided a basis for calculating the possible extension of the time-limit prescribed in paragraph (3) of article 34.

139. As regards paragraph (4), the Working Group adopted the policy underlying that provision since remission, though not known in all legal systems, could be a useful device for curing procedural defects without having to set aside the award. It was noted that the wording "instead of setting aside the award" was not felicitous since it could be understood as upholding the validity of the award for the time during which the arbitral tribunal dealt with the case remitted to it. It was also noted that it was misleading to speak of a "continuation of the arbitral proceedings" since these were terminated by the final award and, apart from that, regard should be had to the fact that the arbitral tribunal may have to repeat an earlier phase of the proceedings. The Working Group was agreed that the wording set forth above (para. 127) would meet those concerns.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35

140. The text of article 35 as considered by the Working Group was as follows:

Article 35. Recognition and enforcement

- (1) An arbitral award [within the scope of article 1 (1)] [made within or outside the territory of this State] shall be recognized as binding, subject to the provisions of article 36.
- (2) To obtain enforcement, an application shall be made in writing to the competent court, accompanied by 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 applying for enforcement of the award shall supply a duly certified translation of these documents into such language.*

* 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 [for enforcement of awards made in that State or under the law of that State].

141. The Working Group adopted that article in the following modified form:

- "(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 is not a pre-condition for its recognition or enforcement in this State."

142. 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, it was not appropriate to retain in the model law provisions which would regulate recognition and enforcement of 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 pointed out 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 further 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 may create other difficulties in the application of this Convention. Yet another advantage of not covering foreign awards was that the remaining provisions could be better tailored to domestic awards without the need for harmony with the 1958 New York Convention.

143. The prevailing view, however, was to retain provisions covering both domestic and foreign awards. The main reason in support of that view was that in international commercial arbitration the place of arbitration (and of the award) should be of limited importance and that, therefore, such awards should be recognized and enforced in a uniform manner, irrespective of their place of origin. Provisions in the model law covering also foreign awards could prove useful to States which had not adopted the legal régime of the 1958 New York Convention. They could also be of supplementary assistance to States which adhered to the 1958 New York Convention or a similar convention, by providing a régime for non-convention awards. It was pointed out that any possible conflict between the two régimes would be avoided or settled by the proviso expressed in article 1 (1) according to which the model law yielded to treaty law.

144. The Working Group noted that article 35 would apply to awards from all countries without any restriction such as a requirement of reciprocity. A suggestion was made to meet the concerns of those States which were not prepared to adopt such an unrestricted provision by incorporating into the draft text some kind of reciprocity mechanism. The Working Group, after deliberation, decided not to adopt that suggestion for substantive and technical reasons. It was pointed out, for example, that a model law on international commercial arbitration should not promote the use of territorial links and that it was technically difficult, although not impossible, to provide in a model law a workable mechanism of reciprocity. The Working Group was agreed that a State which wanted to apply article 35 only on the basis of reciprocity should express this restriction in its legislation, specifying the basis or connecting factor and the technique used by it.

145. The Working Group was agreed that the words between square brackets in paragraph (1) were in line with its above policy decisions but that it sufficed to use the words "irrespective of the country in which it was made". The Working Group was also agreed to express the idea, implicit in paragraph (1), that arbitral awards should not only be recognized as binding but also enforced.

146. The Working Group was agreed that a distinction should be drawn between recognition standing alone and enforcement. While an award would be enforced only upon application by a party, recognition was an abstract legal effect which could obtain automatically without necessarily being requested by a party.

147. As regards paragraph (2), the Working Group was agreed that the documents referred to therein should also be supplied by a party which relied on an award. As to the footnote annexed to that paragraph, the Working Group decided to delete the words "for enforcement of awards made in that State or under the law of that State".

148. The Working Group considered the issues raised in the note prepared by the Secretariat (A/CN.9/WG.II/WP.50, paras. 27-29). As regards the suggestions to express the notion that an award should be recognized as binding "between the parties" and to express the starting point of such recognition, the Working Group was agreed that there was no need for express statements. The Working Group adopted the third suggestion which was to express in the model law that filing, registration or deposit of an award was not a pre-condition for its recognition or enforcement under article 35.

Article 36

149. The text of article 36 as considered by the Working Group was as follows:

Article 36. Grounds for refusing recognition or enforcement

(1) Recognition or enforcement of an arbitral award [made within or outside the territory of this State] 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) A party, against whom recognition or enforcement of an award made [in the territory of this State] [under this Law] is sought during the period of time referred to in article 34 (3), may raise any objection in accordance with paragraph (1) of this article only by an application for setting aside to the Court specified in article 6.

[(3) Where a party seeks recognition, but not enforcement, of an award before an authority other than a court, the other party may request the Court specified in article 6 to order refusal of recognition in accordance with paragraph (1) of this article.]

(4) If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1) (a) (v) or (2) 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 give appropriate security.

150. The Working Group adopted that article, subject to the replacement, in the opening phrase of paragraph (1), of the words "made within or outside the territory of this State" by the words "irrespective of the country in which it was made", and subject to the deletion of paragraphs (2) and (3) and, in paragraph (4), of the words "or (2)".

151. As regards the words placed between square brackets in the opening phrase in paragraph (1), the Working Group was agreed that the same words as used in article 35 (1) should be used here.

152. The Working Group noted that the idea underlying paragraph (2) was to avoid double control based on identical reasons during the period of time within which a party could apply for setting aside. There was considerable support for this policy which would prevent conflicting decisions of, on the one side, the court of enforcement and, on the other side, the Court requested to set aside the award. However, the Working Group, after deliberation, was agreed that the system envisaged under paragraph (2) was not an appropriate one. The Working Group therefore decided to delete paragraph (2), on the understanding that any suggestion for a more acceptable system could be considered by the Commission.

153. The Working Group considered a proposal to insert, after paragraph (2), a new paragraph (2 bis) as follows:

"(2 bis) If an application for setting aside the award has not been made within the time-limit prescribed in article 34 (3), the party against whom recognition or enforcement thereafter is sought may not raise any other objections than those referred to in this article, paragraph (1), subparagraphs (a) (i) or (v) or (b)".

Divergent views were expressed as to whether such a provision should be incorporated in the model law. Under one view, it was desirable to adopt a provision along these lines which would reduce the grounds for refusal of recognition and enforcement in those cases where a party had not made an application for setting aside during the time-limit prescribed therefor. It was pointed out that the provision was useful in that it induced a party to raise objections based on the procedural irregularities covered by article 34 (2) (a) (ii), (iii) and (iv) during the relatively short time-limit set forth in article 34 (3). While some proponents of that view thought that such a provision should apply to recognition and enforcement of only domestic awards, others were in favour of including also foreign awards, in which case the cut-off period was the period of time for requesting setting aside as prescribed in the law of the country where the award was made.

154. The prevailing view, however, was not to adopt such a provision. It was pointed out that the intended preclusion unduly restricted the freedom of a party to decide on how to raise its objections. 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 itself of the alternative system of defences which was recognized by the 1958 New York Convention and should be maintained in the model law. It was further pointed out that if the provision were limited to recognition and enforcement of domestic awards it would not be consistent with the policy of the model law to treat awards in a uniform manner irrespective of their place of origin.

155. As regards paragraph (3), the Working Group decided that there was no need for including such a provision which dealt with a rather infrequent occurrence and interfered with the internal system of a State concerning the relationship between the administrative branch and the judiciary.

CHAPTER I. GENERAL PROVISIONS

Article 1

156. The text of article 1 as considered by the Working Group was as follows:

Article 1. Scope of application

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

(2) [An] arbitration is international if:

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

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

(i) the place of arbitration as determined in the arbitration agreement;

(ii) any place where [a substantial] [the preponderant] part of the [characteristic] obligations of the [commercial relationship] [transaction] are to be performed or the place with which the subject-matter of the dispute is most closely connected.

(3) For the purposes of paragraph (2), 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.

* The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, irrespective of whether the parties are "commercial persons" (merchants) under any given national law. 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.

157. The Working Group adopted that article, subject to the deletion, in the first sentence of the footnote annexed to paragraph (1), of the words "irrespective of whether the parties are 'commercial persons' (merchants) under any given national law", and subject to the modification of paragraph (2) in the following form:

"(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."

158. As regards the content of the footnote annexed to paragraph (1), concern was expressed that the words "irrespective of whether the parties are 'commercial persons' (merchants) under any given national law" might be interpreted as dealing with the issue of State immunity. The Working Group noted that those words were not intended to touch upon that sensitive issue but were incorporated for the sole purpose of clarifying that the commercial nature was not dependent on the qualification of the parties as merchants since some national laws used that qualification for distinguishing between commercial and civil relationships. While there was support for maintaining those words for that very purpose, the Working Group, after deliberation, decided to delete them in order to meet the above expressed concern. It was understood that the deletion did not change the meaning of the first sentence of the footnote.

159. As regards the form of the footnote, the Working Group was agreed that the technique of a footnote was not an ideal one. It was nevertheless maintained as an intermediate solution between the approach of attempting to incorporate in the text of article 1 or 2 a definition of the term "commercial" and the mere inclusion in the report of the content of the footnote. It was observed that the footnote could provide guidance to the legislature of a State when adopting the model law but was unlikely to be reproduced in the national enactment of the model law.

160. As regards paragraph (2), divergent views were expressed concerning the test of internationality. Under one view, an arbitration was international only if the requirement set forth in subparagraph (a) was met, which was the test used in the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). Under another view, a text comprising the criteria referred to in subparagraphs (a) and (b) was appropriate, subject to minor modifications in the wording of subparagraphs (b) (i) and (ii). The prevailing view, however, was to further widen the scope of the term "international". To that effect, various suggestions were made.

161. One proposal was to use as a criterion significant foreign ownership or substantial control. The Working Group did not adopt that proposal in view of the controversial and sensitive nature of the issue and the practical difficulties in devising a workable test.

162. Another suggestion was to use a general formula such as "involving international commercial interests". The Working Group did not adopt that proposal on the ground that it was too vague for a model law. Another suggestion was to combine that general formula with the element of stipulation

of the parties, as follows: "if it involves international commercial interests and the parties so agree". While there was considerable support for that proposal, the Working Group did not accept it, for the time being, on the ground that it combined a flexible formula with the requirement of an agreement by the parties.

163. Yet another suggestion was to add a new subparagraph (c) to cover all other cases where the subject-matter of the arbitration agreement was related to more than one State. The Working Group, after deliberation, adopted that proposal since it presented a widely acceptable formula to achieve the desired widening of the test of internationality.

164. As regards paragraph (3), there was some support for replacing the criterion used therein by the "principal place of business", which was regarded as a clearer criterion. The prevailing view, however, was to retain paragraph (3) in its present form which was modelled on the 1980 Vienna Sales Convention.

Territorial scope of application of the model law

165. In the context of article 1, the Working Group discussed the question of territorial scope of application of the model law on the basis of a note by the Secretariat (A/CN.9/WG.II/WP.49), in particular the question whether the parties had a right to exclude the applicability of the procedural law of the place of arbitration by agreeing on a foreign procedural law. In discussing that question, it was understood that the working assumption in the preparation of the model law had been that the model law would govern arbitrations which took place in the State of the model law. However, that assumption did not exclude the possibility of including in the model law a provision which would give the parties an autonomy in choosing the procedural law governing the arbitration.

166. Some support was expressed for the view that the parties should have the autonomy to subject an arbitration to a procedural law other than the law of the place of arbitral proceedings. It was pointed out that arbitral proceedings should not be linked exclusively to the procedural law of the territory where such proceedings took place since the parties might have a legitimate interest to subject an arbitration to a particular procedural law while having equally legitimate interest in conducting arbitral proceedings in a State other than the State of the governing procedural law.

167. However, the view prevailed that the place of arbitration should be the exclusive determining factor for the applicability of the model law. It was stated in support of that view that the exclusive territorial criterion provided a clearer answer to the question as to which law governed an arbitration and which courts had the competence to intervene in the arbitral proceedings. It was further stated that, if the parties had the autonomy to choose a procedural law governing arbitration, a court of the place of arbitration might nevertheless consider itself competent to intervene in arbitral proceedings and that, if the intervening court would have to apply the chosen procedural law, this may lead to difficulties where the remedies prescribed in the applicable procedural law were essentially different from the remedies prescribed in the law of the place of arbitration.

168. The Working Group decided not to deal expressly in this article with a criterion for the delimitation of the scope of application of the model law. The Working Group decided not to review individual articles where this issue might be of particular relevance except for article 34.

169. The Working Group discussed the words placed between the two sets of square brackets in paragraph (1) of article 34. It was noted that the decision on those words had been deferred until the Working Group discussed the territorial scope of application of the model law in general (see para. 131, above).

170. Under one view, the words "in the territory of this State" should be retained and the words "under this Law" should be deleted, since this would be consistent with the prevailing view on the territorial scope of application of the model law. Under another view, the words "under this Law" should be retained and the words "in the territory of this State" should be deleted because that would be acceptable in a State which did not allow the autonomy in choosing a procedural law governing an arbitration as well as in a State which allowed such autonomy. Under yet another view, the two sets of words should be retained without square brackets. This would make it clear that the courts of the State of the model law would not be competent to set aside an award unless it was made in that State and under the law of that State. There was also a view that the words between both sets of square brackets should be deleted in order not to prejudge, in that article, the questions of competence of a court and of applicable law for setting aside an award.

171. However, in the light of the importance of the matter, the view prevailed that the draft text should retain both sets of the words within square brackets.

Article 2

172. The text of article 2 as considered by the Working Group was as follows:

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) 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 or residence. The communication shall be deemed to have been received on the day it is so delivered.

173. The Working Group adopted that article, subject to the replacement of the words "or residence", at the end of the first sentence of subparagraph (e), by the words "habitual residence or mailing address".

Article 3

174. The text of article 3 as considered by the Working Group was as follows:

Article 3. Mandatory provisions

The parties may not derogate from the following provisions of this Law: articles ...

175. The Working Group decided to delete that article and to insert, in articles 2 (e), 23 (2) and 26 (2) and (3), the words "unless otherwise agreed by the parties".

176. The Working Group was agreed that the model law should not contain a provision like article 3, wherein all mandatory provisions would be listed, for the reasons set forth in document A/CN.9/WG.II/WP.50, paragraph 9. As suggested in that note by the Secretariat, the Working Group was agreed that the non-mandatory character of articles 2 (e), 23 (2) and 26 (2) and (3) should be expressed in those provisions by words such as "unless otherwise agreed by the parties". It was noted that the non-mandatory character of a considerable number of other provisions was already expressed in the current text.

177. It was understood that that decision, i.e. to delete article 3 and to express, in articles 2 (e), 23 (2) and 26 (2) and (3), the non-mandatory character of these provisions, did not mean that all those provisions of the model law which did not express their non-mandatory character were necessarily of mandatory nature. It was noted that the Commission, when reviewing the draft model law in the light of comments by Governments and organizations, may wish to express also in other provisions their non-mandatory character. While there was some support for the view that it should be left to arbitrators and judges to determine the character of the provisions which did not express their non-mandatory character, the prevailing view, adopted by the Working Group, was that it was desirable to express the non-mandatory character in all provisions of the final text which were intended to be non-mandatory.

Article 4

178. The text of article 4 as considered by the Working Group was as follows:

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.

179. The Working Group adopted that article, including all the words which had been placed between square brackets.

180. Some support was expressed for deleting the article since it was too rigid and because the determination of a waiver or estoppel situation was better left to arbitrators and judges who, under the model law, were generally accorded discretion. The prevailing view, however, was to retain the provision.

181. Divergent views were expressed as to the scope of the effect of a waiver. Under one view, the rule in article 4 would have effect only for and during the arbitral proceedings. The prevailing view, however, was that its effect extended to the post-award stage, i.e. setting aside proceedings and recognition or enforcement (arts. 34 and 36).

182. As regards the wording of the article, divergent views were expressed on the limitation contained in the words "from which the parties may derogate". Under one view, the waiver rule should operate in respect of non-compliance of any provision of law, whether mandatory or not. Under another view, only fundamental procedural defects should be excluded from its operation (e.g., violation of public policy or non-arbitrability). The prevailing view, however, was to retain in article 4 the demarcation line between non-mandatory and mandatory provisions.

Article 5

183. The text of article 5 as considered by the Working Group was as follows:

[Article 5. Scope of court intervention

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] [, no court shall intervene except where] so provided in this Law.]

184. The Working Group adopted that article in the following modified form: "In matters governed by this Law, no court shall intervene except where so provided in this Law".

185. Divergent views were expressed as to whether that article should be retained. Under one view, the article should be deleted since it unduly limited the supervision and assistance by courts and infringed on the sovereign policy decision of a State as to the extent of control exercised by its courts. The prevailing view, however, was to retain that article since it was beneficial to international commercial arbitration by providing certainty to the parties and the arbitrators about the instances in which court supervision or assistance was to be expected.

186. The Working Group, after deliberation, adopted the latter view, but was agreed that that decision was a tentative one which the Commission was invited to reconsider in the light of the comments by Governments and international organizations.

187. It was noted that article 5 did not itself take a stand on the extent of court supervision but merely required that any instance of court involvement be expressed in the model law. It was, thus, possible to include, in addition to the various provisions already now envisaging court involvement, yet another provision for certain instances if the Commission saw a need therefor.

188. It was further understood that the introductory words of article 5, "In matters governed by this Law", had a meaning which was narrower than the term "international commercial arbitration" used in article 1 (1) in that it limited the scope of application of article 5 to those matters which were in fact governed by or regulated in the model law. Article 5 would, for example, not exclude court control or assistance in those matters which the Working Group had decided not to deal with in the law (e.g., capacity of parties to conclude arbitration agreement; impact of State immunity; competence of arbitral tribunal to adapt contracts; enforcement by courts of interim measures of protection ordered by arbitral tribunal; fixing of fees or request for deposit, including security for fees or costs; time-limit for enforcement of awards).

Article 6

189. The text of article 6 as considered by the Working Group was as follows:

Article 6. Special 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, 17 (1), [32 (2) Variant A] and 34 (3) shall be the ... (blanks to be filled by each State when enacting the model law).

190. The Working Group adopted that article, subject to the deletion of the word "Special" in the heading to that article and the replacement of the words "17(1), [32(2) Variant A] and 34(3)" by the words "and 34(2)".

B. OTHER ISSUES

1. Headings

191. The Working Group decided to retain the headings of chapters as forming part of the model law. As regards the headings of the individual articles, the Working Group decided to retain them for the mere purpose of easy reference. It was agreed to express that understanding, in a footnote or by other means, as follows: "Headings to individual articles are provided for easy reference but they are not to be relied on in interpreting the text of the article".

2. "Award"

192. The Working Group was agreed that it was desirable for the model law to define the term arbitral "award", in particular for purposes of determining which kinds of decisions would be subject to recourse under article 34. The Working Group considered the following proposal: "award" means a final award which disposes of all issues submitted to the arbitral tribunal and any other decision of the arbitral tribunal which finally determine any question of substance or the question of its competence or any other question of procedure but, in the latter case, only if the arbitral tribunal terms its decision an award.

193. While there was wide support for the first part of the proposed definition, i.e. up to the word "substance", serious concerns were expressed as regards the latter part, in particular the last portion referring to decisions on questions of procedure.

194. The Working Group noted that a definition of "award" had important implications to a number of provisions of the model law and was of special relevance to the issues dealt with in articles 34 and 16. Since there was not sufficient time for considering in depth those complex questions, the Working Group decided not to include a definition in the model law to be adopted by it and to invite the Commission to consider the matter.

3. Reference to conciliation

195. A suggestion was made to include in the model law a reference to conciliation along the following lines: "Conciliation can be used as an additional method of settling disputes where parties so wish". The Working Group was agreed that, if the Commission were to decide that the model law should be accompanied by a preamble, such preamble could include the above reference.

4. Counter-claim

196. The Working Group decided to delete, in article 16 (2), the words "or, with respect to a counter-claim, in the reply to the counter-claim", on the understanding that any provision of the model law referring to the claim would apply, mutatis mutandis, to a counter-claim.

5. Reference in article 34 to article 36

197. The Working Group noted that the term "recourse" in article 34 (1) had, in a number of languages, the connotation of an initiative or action by a party such as an "appeal". Since that meaning did not fully correspond with the raising of objections envisaged under article 36, the Working Group decided not to retain the reference to that article in article 34 (1).

6. Conflict of laws issues

198. With reference to the conflict of laws issues discussed in document A/CN.9/WG.II/WP.49, paragraphs 28 to 41, the Working Group considered whether any general conflict of laws rules should be prepared as part of the model law.

199. The Working Group was divided on whether such conflicts rules should be included in the model law. Under one view, it was desirable to include rules on the law applicable to the validity of the arbitration agreement in order to have a comprehensive law dealing with all important aspects of arbitration. Under another view, it was desirable to include in the model law rules on conflict of procedural laws since that issue was directly connected with the subject-matter dealt with in the model law.

200. Under yet another view, it was not appropriate to include in a model law on arbitration any conflicts rules. It was pointed out in support of that view that such rules were normally contained in other laws of a State and that there was less need for such rules in the model law in view of the decision of the Working Group not to include a provision on the territorial scope of its application. It was further noted that the Hague Conference on Private International Law was considering the preparation of a convention on the law applicable to the validity of arbitration clauses.

201. The Working Group was agreed that harmonization of conflicts rules relating to arbitration was desirable but that it was not appropriate to envisage inclusion of conflicts rules in the model law, which the Commission was expected to adopt in 1985. It was understood that the Commission may wish to consider the matter and decide on its possible future course of action, in particular, as regards the co-ordination of work between it and the Hague Conference on Private International Law.

C. OTHER BUSINESS

202. It was noted that the draft text of the model law would be sent to Governments and international organizations for comments so that the Commission could take those comments into account before adopting its final text.

ANNEX

DRAFT TEXT OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION
AS ADOPTED BY THE WORKING GROUP

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application*

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

(2) An arbitration is international if:

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

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

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

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

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

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

* Article 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.

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.

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.

Article 5. Scope of court intervention

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

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

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

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

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

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

Article 8. Arbitration agreement and substantive claim before court

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

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

Article 9. Arbitration agreement and interim measures by court

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

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

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

Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days after having been requested to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Court specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure; or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(c) an appointing authority fails to perform any function entrusted to it under such procedure,

any party may request the Court specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the Court specified in article 6 shall be final. The Court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

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

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

Article 13. Challenge procedure

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

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

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within fifteen days after having received notice of the decision rejecting the challenge, the Court specified in article 6 to decide on the challenge, which decision shall be final; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings.

Article 14. Failure or impossibility to act

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

Article 14 bis

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

Article 15. Appointment of substitute arbitrator

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

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence to rule on own jurisdiction

(1) The arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence 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.

Article 18. Power of arbitral tribunal to order interim measures

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

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19. Determination of rules of procedure

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

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

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

Article 20. Place of arbitration

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

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

Article 21. Commencement of arbitral proceedings

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

Article 22. Language

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

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

Article 23. Statements of claim and defence

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

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.

Article 24. Hearings and written proceedings

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

(2) Notwithstanding the provisions of paragraph (1) of this article, if a party so requests, the arbitral tribunal may, at any appropriate 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.

Article 25. Default of a party

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

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

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

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

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to interrogate him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

(1) In arbitral proceedings held in this State or under this Law, the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The request shall specify:

- (a) the names and addresses of the parties and the arbitrators;
- (b) the general nature of the claim and the relief sought;
- (c) the evidence to be obtained, in particular,

- (i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;

- (ii) the description of any document to be produced or property to be inspected.

(2) The court may, within its competence and according to its rules on taking evidence, execute the request either by taking the evidence itself or by ordering that the evidence be provided directly to the arbitral tribunal.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

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

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

Article 29. Decision making by panel of arbitrators

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

Article 30. Settlement

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

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

Article 31. Form and contents of award

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

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

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

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

Article 32. Termination of proceedings

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

(2) The arbitral tribunal

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

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

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

Article 33. Correction and interpretation of awards and additional awards

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

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

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

The arbitral tribunal shall make the 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.

CHAPTER VII. RECOURSE AGAINST AWARD

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

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

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

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

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

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

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

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

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

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

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

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

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

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

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

* 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.

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.

A/CN.9/246

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

ANNEX

DRAFT TEXT OF A MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION AS ADOPTED BY THE WORKING GROUP

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application*

- (1) This Law applies to international commercial** arbitration, subject to any multilateral or bilateral agreement which has effect in this State.
- (2) An arbitration is international if:
 - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the subject-matter of the arbitration agreement is otherwise related to more than one State.
- (3) For the purposes of paragraph (2) of this article, if a party has more than one place of business, the relevant place of business is that which has the closest relationship to the arbitration agreement. If a party does not have a place of business, reference is to be made to his habitual residence.

* Article 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.

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.

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.

Article 5. Scope of court intervention

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

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

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

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

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

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

Article 8. Arbitration agreement and substantive claim before court

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

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

Article 9. Arbitration agreement and interim measures by court

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

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

(1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

Article 11. Appointment of arbitrators

(1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

(3) Failing such agreement,

(a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days after having been requested to do so by the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the Court specified in article 6;

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the Court specified in article 6.

(4) Where, under an appointment procedure agreed upon by the parties,

(a) a party fails to act as required under such procedure; or

(b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure; or

(c) an appointing authority fails to perform any function entrusted to it under such procedure,

any party may request the Court specified in article 6 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the Court specified in article 6 shall be final. The Court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

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

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

Article 13. Challenge procedure

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

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

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within fifteen days after having received notice of the decision rejecting the challenge, the Court specified in article 6 to decide on the challenge, which decision shall be final; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings.

Article 14. Failure or impossibility to act

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

Article 14 bis

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

Article 15. Appointment of substitute arbitrator

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

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence to rule on own jurisdiction

(1) The arbitral tribunal has the power to rule on its own jurisdiction, including any objections with respect to the existence 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.

Article 18. Power of arbitral tribunal to order interim measures

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

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19. Determination of rules of procedure

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

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

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

Article 20. Place of arbitration

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

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

Article 21. Commencement of arbitral proceedings

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

Article 22. Language

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

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

Article 23. Statements of claim and defence

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

(2) Unless otherwise agreed by the parties, either party may amend or supplement his claim or defence during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances.

Article 24. Hearings and written proceedings

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

(2) Notwithstanding the provisions of paragraph (1) of this article, if a party so requests, the arbitral tribunal may, at any appropriate 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.

Article 25. Default of a party

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

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

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

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

Article 26. Expert appointed by arbitral tribunal

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to interrogate him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

(1) In arbitral proceedings held in this State or under this Law, the arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The request shall specify:

- (a) the names and addresses of the parties and the arbitrators;
- (b) the general nature of the claim and the relief sought;
- (c) the evidence to be obtained, in particular,
 - (i) the name and address of any person to be heard as witness or expert witness and a statement of the subject-matter of the testimony required;
 - (ii) the description of any document to be produced or property to be inspected.

(2) The court may, within its competence and according to its rules on taking evidence, execute the request either by taking the evidence itself or by ordering that the evidence be provided directly to the arbitral tribunal.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.

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

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

Article 29. Decision making by panel of arbitrators

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

Article 30. Settlement

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

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

Article 31. Form and contents of award

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

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

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20 (1). The award shall be deemed to have been made at that place.

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

Article 32. Termination of proceedings

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

(2) The arbitral tribunal

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

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

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

Article 33. Correction and interpretation of awards and additional awards

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

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

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

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

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

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. The arbitral tribunal shall make the additional award within sixty days, if it considers the request to be justified.

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

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

CHAPTER VII. RECOURSE AGAINST AWARD

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

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

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

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

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

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

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the Court finds that:

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

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

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

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

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

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

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

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

* 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.

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.