UNIFORM LAW CONFERENCE OF CANADA
WORKING GROUP ON ARBITRATION LEGISLATION

INTERNATIONAL COMMERCIAL ARBITRATION

Final Report and Commentary of the Working Group on New Uniform Arbitration Legislation

MARCH 2014

March 2014

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Dear Madam President:

RE: Working Group on Arbitration Legislation

The Working Group hereby submits its January 2014 Report and Commentary and a revised new uniform International Commercial Arbitration Act (**New Uniform ICAA**) for the Conference's consideration.

At the Conference's August 2013 meeting, the Working Group presented drafts of the proposed New Uniform ICAA and a Report and Commentary. At that time, certain provisions of the draft New Uniform ICAA had not yet been reviewed by legislative counsel assisting the Working Group. As well, although a French-language translation of the draft New Uniform ICAA was available, the Working Group's Report and Commentary had not been translated into French in time for the Conference's August 2013 meeting. At that meeting, the Working Group received comments from representatives, including suggestions for improvements to the draft materials. The New Uniform ICAA and the draft Report and Commentary received the Conference's conditional approval at the August 2013 meeting.

After the August 2013 meeting, the Working Group revised the New Uniform ICAA to address issues discussed at that meeting and further drafting improvements recommended by legislative counsel assisting the Working Group. The Working Group then reviewed and approved the final text of the New Uniform ICAA. The Working Group revised its Final Report and Commentary to address the revisions made following the Conference's August 2013 meeting. The revised New Uniform ICAA and Report and Commentary were then translated into French. The Working Group wishes to acknowledge the very substantial contribution of Borden Ladner Gervais LLP, which performed the translation of the Final Report and Commentary at no cost to the ULCC.

The Working Group now asks the Conference to approve the French and English texts of the final draft of the New Uniform ICAA and the Report and Commentary.

Gerald W. Ghikas QC
Working Group Chair

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PART I REPORT

A. Introduction

[1] At the Conference's meeting in August 2012 the Working Group tendered a Report (**2012 Report**) describing why it is important and timely to renew Canada's legislative infrastructure for international commercial arbitration. The 2012 Report set out policies that the Working Group recommended should guide the preparation of a new Uniform International Commercial Arbitration Act (**New Uniform ICAA**). The Conference accepted the Working Group's policy recommendations and made comments to provide general guidance concerning the implementation of those policies. The Conference resolved that the Working Group should continue its work and that it:

(a) prepare draft uniform legislation respecting international commercial arbitration and commentaries in accordance with the recommendations contained in the 2012 Report and report back to the Conference at the 2013 meeting (**Project Phase 1**); and

(b) submit a project proposal to the Advisory Committee on Program Development and Management respecting uniform, updated domestic commercial arbitration legislation for the Committee's consideration and, if appropriate, the establishment of a working group (**Project Phase 2**).

[2] With this Report and Commentary the Working Group tenders for the Conference's consideration a draft of the New Uniform ICAA (see Appendix 1). Upon completion of Phase 1 of its mandate the Working Group proposes to move to Phase 2, with the intent that a proposal for a new Uniform Arbitration Act to govern non-international arbitrations in Canada would be tendered to the Conference at its 2015 meeting.

[3] The 2012 Report described the history of and rationale for this initiative, the key aspects of which are as follows:

(a) the present initiative builds on work undertaken by the Conference in 1986, when it developed the existing Uniform International Arbitration Act (**Current Uniform ICAA**) to implement two pillars of international arbitration:

(i) the UNCITRAL Model Law on Arbitration (**Model Law**); and

(ii) the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (**Convention**);

(b) Canada has been perceived as a leader in the area of international commercial arbitration law, jurisprudence, and practice, largely due to the solid legislative foundation established under the Conference's leadership, which has stimulated arbitration-related activity in Canada, facilitated cross-border business by Canadian enterprises, and generally enhanced Canada's reputation;

(c) private sector members of the Canadian arbitration community (businesses, arbitration lawyers, arbitrators, academics, and arbitral institutions) have identified a need for Canada to renew its legislative infrastructure for commercial arbitration in the light of changes made to the Model Law in 2006, potentially problematic differences that have developed over the last 25 years among legislation in various Canadian jurisdictions, and a general evolution in the level of sophistication of arbitration legislation in other countries that compete with Canada for international arbitration business; and

(d) it is important to Canada's continued success in presenting itself to foreign users that as far as possible the provinces and territories implement international arbitration legislation that is uniform in both form and substance, as a diversity of approaches among jurisdictions within Canada may deter foreign users.

B. Policy recommendations accepted by the Conference

[4] A consolidated expression of the policy recommendations accepted by the Conference at its 2012 meeting is as follows:

1. Continue to base the New Uniform ICAA on the Model Law and Convention;

2. Prepare a single statute that schedules the Model Law and Convention as appendices;

3. Depart from the Model Law's text only for good reason;

4. Continue to have separate uniform statutes for international and non-international arbitration; and

5. Promote uniformity within Canada to avoid undue complexity for foreign users.

C. Working Group

[5] The Working Group is comprised of a "Core Group" to steer the process and a larger "Advisory Board" to serve as a consultative body and resource for the Core Group. The members of the Core Group are:

Chair	Gerald W. Ghikas QC, FCIArb, CArb Independent Arbitrator Vancouver Arbitration Chambers
Administrative Secretary	Angus M. Gunn QC, FCIArb Borden Ladner Gervais LLP
British Columbia	Darin Thompson, Legal Counsel, Ministry of Justice (British Columbia)
	Debbie Asirvatham, Borden Ladner Gervais LLP

Alberta	Clark W. Dalton QC, Projects Coordinator of Commercial Law Projects, Uniform Law Conference of Canada
	James E. Redmond QC, FCIArb, Independent Arbitrator
	Peter J. M. Lown QC, Director, Alberta Law Reform Institute
Ontario	Anthony Daimsis, Professor, Faculty of Law, University of Ottawa
	John A. M. Judge, Independent Resident Arbitrator, Arbitration Place
	John D. Gregory, General Counsel, Justice Policy Development Branch, Ministry of the Attorney General (Ontario)
Québec	Jean-François Lord, Legal Counsel, Ministère des Relations Internationales
	Martin J. Valasek, Norton Rose Fulbright Canada LLP
Canada	Dominique D'Allaire, Legal Counsel, Private International Law Section, Justice Canada

[6] The Advisory Board (whose composition is detailed in Appendix 2) includes many leading Canadian international commercial arbitration practitioners throughout this country and around the world.

D. Process since the 2012 Report

[7] The Core Group performed an analysis of existing Canadian international commercial arbitration legislation and relevant jurisprudence and examined updated arbitration legislation from other jurisdictions to identify issues worthy of consideration as part of the legislative renewal process. This process was augmented by input from the Advisory Board. Over the past year, the Core Group has held over 40 teleconference calls, has made extensive use of e-mail, and has discussed in plenary session the research undertaken by individual members of the Core Group.

[8] In January 2013 the Core Group circulated a discussion paper titled "Towards a New Uniform *International Commercial Arbitration Act*" (**Discussion Paper**). It identified the approved policy recommendations and solicited comments concerning 23 specific issues. The Discussion Paper was sent to the members of the Advisory Board and to specific arbitral organizations and academic institutions and was made available to other potentially interested parties. The arbitral organizations included ICC Canada, Toronto Commercial Arbitration Society (TCAS), Western Canada Commercial Arbitration Society (WCCAS), Judicial Arbitration and Mediation Services (JAMS), and Young Canadian Arbitration Practitioners (YCAP). The academic institutions included faculty at McGill University, Université Laval, University of Montréal, University of Ottawa, Osgoode Hall, University of Alberta, and University of British Columbia.

[9] The issues raised by the Discussion Paper were canvassed at conferences in Montréal, Toronto, and Calgary. Various arbitration and legal publications in Canada, the United Kingdom, and the United States of America wrote articles describing the project and the issues outlined by the Discussion Paper.

[10] The Core Group received excellent feedback in response to the Discussion Paper, including a comprehensive response from ICC Canada, which is the leading international commercial arbitration organization in Canada. Helpful comments also were received from TCAS, WCCAS, Osgoode Hall, and McGill, as well as number of individuals.

[11] With the benefit of the comments received in response to the Discussion Paper the Core Group proceeded to review each of the 23 issues it had identified and to formulate specific recommendations. The recommendations were then communicated to Christina Wasyliw and Glenn Joynt of the Manitoba Department of Justice, who gave invaluable support to the Project by drafting language to reflect the Core Group's directions and arranging for required translations. Through several teleconference calls and numerous e-mails, representatives of the Core Group interacted extensively with Ms. Wasyliw and Mr. Joynt during the drafting phase.

E. August 2013 Conference meeting

[12] With its 2013 Report and Commentary the Working Group submitted a draft of the proposed New Uniform ICAA to the Conference for approval. As described in the Working Group's January 2014 letter of transmittal, at the August 2013 Conference the drafts of the New Uniform ICAA and of this Report and Commentary received conditional approval.

[13] In summary, the approval of the draft New Uniform ICAA and 2013 Report and Commentary was conditional on:

(a) the Working Group revising those provisions of the draft New Uniform ICAA dealing with limitation periods and chain recognition;

(b) the legislative drafters assisting the Working Group reviewing and commenting on several provisions of the draft New Uniform ICAA that they had not yet reviewed;

(c) the Working Group preparing a revised Report and Commentary to address any changes resulting from the foregoing;

(d) a French-language translation of the revised New Uniform ICAA and Report and Commentary being prepared; and

(e) the revised materials being circulated and approved by a date to be fixed by the Conference.

[14] As the final version of this Report and Commentary was being prepared, the ULCC reconsidered a provision in the proposed New Uniform ICAA that would have facilitated the "chain recognition" of foreign arbitral awards, dispensing with the need for multiple *de novo* applications for recognition and

enforcement of awards across Canadian jurisdictions. The ULCC noted that the proposal for chain recognition of foreign arbitral awards was inconsistent with the ULCC's treatment of foreign court judgments, notably under the Uniform Enforcement of Foreign Judgments Act (UEFJA). The ULCC concluded that from an enforcement perspective, foreign arbitral awards and foreign court judgments should be treated identically as matter of policy and that the proposed chain recognition provision should not be included in the New Uniform ICAA. This Report and Commentary, and the accompanying New Uniform ICAA, incorporate that direction, and satisfy the conditions set out in subparagraphs [13](a) to (d) above. They are tendered for approval in accordance with subparagraph [13](e).

F. The Working Group recommends adoption

[15] In accordance with the policy direction given in 2012, the New Uniform ICAA is structured in the same manner as the Current Uniform ICAA, so that it is comprised of a short statute that schedules the original text of the Convention and the Model Law. Part II of this Report and Commentary provides additional commentary with respect to each provision of the proposed New Uniform ICAA. Where the Core Group has identified potential tensions between particular provisions and any of the approved policy recommendations those matters are identified and discussed.

[16] Despite strong support for the changes proposed, the Commentary also discusses reservations or concerns that have been identified as a result of the consultation process and several issues that we feel should be brought to the attention of the Conference or legislators.

[17] As reflected in its 2012 Report, the Working Group recognizes that unique considerations may arise with respect to the implementation of the proposed new legislation in Québec. First, because Québec implements its laws with respect to this subject through the provisions of its *Civil Code of Québec* and *Code of Civil Procedure* there will necessarily be differences in the form of any enactment in Québec. The Working Group has not attempted to formulate specific text for implementation in Québec. Second, there are certain matters on which the civilian and common law approaches may diverge. As a result of the very helpful interventions of its members from Québec, in respect of such matters the Working Group has sought to make philosophic or policy choices that are compatible with the manner in which Québec legislation and legislators may approach those matters. Indeed, in many instances the Québec legislation is less restrictive than what is being proposed in the New Uniform ICAA. The Working Group is hopeful that its recommended approach will contribute to maintaining Canada's harmonized arbitration legislation. Independently of the work undertaken by the Working Group Québec has undertaken its own review and revision of its arbitration laws.

[18] Except insofar as differences of approach may be preferred by members from Québec, the New Uniform ICAA reflects the unanimous recommendation of the Core Group, taking into account the views expressed by the Advisory Board and comments resulting from the extensive consultation process described earlier. Subject to reservations concerning some matters relating to implementation by the government of Québec, the members of the Core Group are confident that the adoption of the New Uniform ICAA in the form proposed is strongly endorsed by users and other members of the Canadian arbitration community.

PART II COMMENTARY CONCERNING THE PROPOSED NEW UNIFORM ICAA

A. General Considerations

[19] In accordance with approved policy recommendations numbers 1 and 2, the New Uniform ICAA appends the Convention as Schedule I and the Model Law as Schedule II.

[20] The New Uniform ICAA has been divided into four Parts:

Part I "Interpretation" provides several key definitions and provides guidance to the interpretation of the Act itself.

Part II "The Convention" implements the Convention in its entirety and makes certain designations and elections required to be made by the Convention. It also includes provisions to adapt the application of the Convention (the drafting of which generally assumes a unitary state) to reflect the division of legislative authority in Canada.

Part III "The Model Law" implements the Model Law in its entirety except for option II of article 7 and makes certain designations required to be made by the Model Law. It also includes provisions to adapt the application of the Model Law (the drafting of which generally assumes a unitary state) to reflect the division of legislative authority in Canada. In addition, it supplements certain specific Model Law provisions.

Part IV "General" contains a number of supplementary provisions of general application to address subjects not addressed in the Convention or the Model Law.

[21] The Current Uniform ICAA was divided into three parts that were preceded by an interpretation section. The Core Group recommends a four-part structure for clarity and ease of reference. Parts I and II of the Current Uniform ICAA were titled "Foreign Arbitral Awards" and "International Commercial Arbitration." The Core Group considered that these headings did not suitably reflect the contents of those Parts; in fact, both the Convention and the Model Law contain provisions concerning foreign arbitral awards and both instruments deal with international commercial arbitration. The proposed new titles are more descriptive of the content of the several Parts.

B. Part I Interpretation

(a) Subsection 1(1) – Definitions

[22] Section 1(1) of the Current Uniform ICAA contained definitions of "Convention" and "International Law" by cross reference to the instruments appended, respectively, as Schedules A and B.

[23] The New Uniform ICAA defines "Convention" in the same manner with a change in form, not substance.

[24] The Core Group considered (and the Advisory Board agreed) that the term "Model Law" should replace the term "International Law" throughout, as "Model Law" is the name by which the instrument in question is commonly known. Also, as the Model Law was amended by UNCITRAL on 7 July 2006 and as the New Uniform ICAA is intended to implement the Model Law as amended, the definition of Model Law was revised to make it clear that "Model Law" includes the 2006 amendments. The instrument appended as Schedule II to the New Uniform ICAA is the Model Law as amended by UNCITRAL in 2006.

[25] The definition of Model Law does not include any amendments UNCITRAL may make to the Model Law in the future. If such amendments are made, their suitability for adoption in Canada will have to be considered separately and specific amendments to Canadian legislation would have to be made to implement any further changes.

(b) Scope of Application of the New Uniform ICAA

[26] Article I(3) of the Convention states:

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

Article 1(1) of the Model Law states:

> This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.

The footnote to which article 1(1) of the Model Law refers is included in the official text of the Model Law, and states:

> 2. The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road.

[27] The Current Uniform ICAA contained an optional provision (section 2(2)(*a*)) that enacting jurisdictions could use to make the reciprocity reservation contemplated by the first sentence of article I(3) of the Convention. Section 5 of the Current Uniform ICAA allowed enacting jurisdictions to make a similar reciprocity reservation with respect to the recognition and enforcement provisions of the Model Law. None of the enacting jurisdictions made the reciprocity reservations. The Core Group could

not identify any cogent policy reason to carry sections 2(2)(*a*) and 5 of the Current Uniform ICAA into the New Uniform ICAA.

[28] All enacting jurisdictions, other than Québec, have made the "commercial reservation" authorized by the second sentence of article I(3) of the Convention. The enacting jurisdictions, other than Québec, also have made no attempt to enlarge the scope of Model Law application beyond international commercial arbitration. Québec has taken a different approach, specifying only that its legislation does not apply to arbitrations concerning certain specific categories of relationship.

[29] The Working Group debated at length questions relating to the proper scope of application of the New Uniform ICAA and whether it should extend the scope of its application beyond the bounds of the current regime. There was also discussion about whether the Current Uniform ICAA, including the Convention and the Model Law it implements, give sufficient guidance as to what constitutes and what does not constitute a "commercial arbitration" or a "commercial legal relationship."

[30] There was some support among commentators to include definitions of "commercial" and "commercial relationship." It was noted that the current British Columbia ICAA sets out when an arbitration is to be considered to be "commercial," based largely on the footnote in the Model Law. In the end, the Core Group concluded that the New Uniform ICAA should not contain such separate definitions, because:

(a) there is no indication that the current approach has created any particular mischief;

(b) it is very difficult, and perhaps impossible, to anticipate the kinds of "borderline" cases and relationships that might arise so as to be confident that a suitable comprehensive definition can be developed; and

(c) the footnote in the Model Law likely provides sufficient guidance while leaving appropriate flexibility to serve the interests of justice in individual cases.

[31] The Working Group discussed the implications of the phrase "subject to any agreement in force between this State and any other State or States." Subsection 5(1) of the New Uniform ICAA makes it clear that the applicability of the Model Law is subject to "an agreement that is in force in [*enacting jurisdiction*] between Canada and any other country or countries."

(c) Subsection 1(2) – Same meaning

[32] Some words and phrases are used in both the Convention and the Model Law, but they do not necessarily have the same meaning in the context of the two instruments. When those terms are used in the Uniform ICAA, theoretically a question could arise as to which meaning is intended.
The Current Uniform ICAA (subsection 1(2)) recognized this. The New Uniform ICAA addresses this issue more expansively, for the purposes of clarity. There is no change in substance.

C. Part II The Convention

(a) Subsection 2(1) – Application of Convention

[33] This section makes the Convention (to which Canada is a party) applicable in each enacting jurisdiction, thereby fulfilling Canada's treaty obligation. There is no change in language or substance from the Current Uniform ICAA (subsection 2(1)).

[34] At present the various enacting jurisdictions have taken a variety of approaches to this issue. In some jurisdictions the Convention has been implemented by way of a standalone statute that appends the Convention as a schedule.[1] In other jurisdictions, the Convention has been implemented by adopting the Current Uniform ICAA (or substantially similar legislation) and appending the Convention as a schedule.[2] In Ontario, the enacting legislation was repealed as it was considered to be unnecessary in the light of specific amendments made to Ontario's ICAA[3] (although the Working Group has concluded that all jurisdictions in Canada should be urged to implement the Convention expressly). In Québec the Convention is implemented through Article 948 *et seq.* of the *Code of Civil Procedure* (948-951.2 C.C.P.).

[35] In the interests of uniformity the Core Group and Advisory Board recommend that continued implementation of the Convention should occur through enactment of the New Uniform ICAA, with any existing legislation being repealed and replaced.

(b) Subsection 2(2) – Application to certain arbitral awards

[36] Article I(1) of the Convention states:

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

[1] See British Columbia's *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154, Canada's *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.), Saskatchewan's *Enforcement of Foreign Arbitral Awards Act*, S.S. 1996, c. E-9.12, and the Yukon's *Foreign Arbitral Awards Act*, R.S.Y. 2002, c. 93.

[2] See Alberta's *International Commercial Arbitration Act*, R.S.A. 2000, c. I-5, Manitoba's *International Commercial Arbitration Act*, C.C.S.M., c. C151, New Brunswick's *International Commercial Arbitration Act*, R.S.N.B. 2011, c. 176, Prince Edward Island's *International Commercial Arbitration Act*, R.S.P.E.I. 1988, c. I-5, Newfoundland and Labrador's *International Commercial Arbitration Act*, R.S.N.L. 1990, c. I-15, the Northwest Territories' *International Commercial Arbitration Act*, R.S.N.W.T. 1988, c. I-6, Nova Scotia's *International Commercial Arbitration Act*, R.S.N.S. 1989, c. 234, and Nunavut's *International Commercial Arbitration Act*, R.S.N.W.T. (Nu) 1988, c. I-6.

[3] See Ontario's *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9.

(i) *International Arbitration Awards Made Elsewhere in Canada*

[37] Many international arbitrations seated in Canada involve a Canadian party, but most involve foreign parties; indeed, if Canada is successful in continuing its reputation as a suitable neutral seat, a growing number of cases will not involve any Canadian parties. The Working Group concluded that awards made in international arbitrations seated in Canada, but outside the enacting jurisdiction, should be enforceable in each enacting jurisdiction in the same manner as awards made in international arbitrations seated outside Canada. There is no justification in principle or policy for having different rules for recognition and enforcement of international arbitration awards, merely because they were made in Canada rather than elsewhere. The international character of the arbitration and the award should determine the Convention's applicability.

[38] The first sentence of article I(1) of the Convention states that it applies to awards made in another "State." As used in article I, "State" refers to "Canada," the State Party to the Convention itself. Without a statutory authorization in the enacting jurisdiction, international arbitration awards made in Canada outside the enacting jurisdiction likely are not enforceable under the first sentence of article I(1).

[39] The second sentence of article I(1) says that the Convention applies to awards "not considered as domestic awards in the State where their recognition and enforcement is sought." International arbitration awards made in arbitrations seated in Canada outside the enacting jurisdiction likely would be caught by the second sentence of article I(1) on the basis that the enforcing jurisdiction would not consider them to be domestic. However, to create a clearer foundation for the application of the Convention to international arbitration awards made in Canada, the New Uniform ICAA includes section 2(3)(a) to make it clear that for the purposes of the Convention international arbitration awards made in Canada are "not considered domestic."

(ii) *Non-International Awards Made in Canada*

[40] The Working Group considered whether the recognition and enforcement provisions of the Convention do or should apply to awards made outside the enacting jurisdiction that are considered to be "domestic" awards. The Working Group considered that enforcement of and recourse against domestic awards made in Canada should be addressed in provincial or territorial legislation regulating domestic arbitration. Provincial or territorial legislation of the seat of arbitration determines grounds of appeal from domestic awards. There are now and may continue to be differences in the scope of recourse from domestic awards compared to international awards. For example, typically (although not in Québec) the grounds for appeal from non-international awards include "error of law." Under the Convention and the Model Law, error of law does not provide a defence to enforcement of international awards. There is no logical basis for the grounds for setting aside a domestic award at the seat to be different from the grounds for resisting enforcement in another province or territory. The Working Group considered that the appropriate enforcement mechanism for domestic awards is to have the award converted into a court judgment at the seat, and then to enforce the judgment elsewhere in Canada relying on inter-jurisdictional enforcement legislation.

[41] On its face, the first sentence of article I(1) does not apply to awards made in Canada. Similarly, awards made in domestic arbitrations in Canada should not fall within the ambit of the second sentence. However, to make it clear that domestic awards made in Canada are not to be enforceable in the enacting jurisdiction in the same manner as international arbitration awards, the New Uniform ICAA includes section 2(3)(b).

(iii) *Non-International Awards Made Outside Canada*

[42] The first sentence of article I(1) of the Convention applies to foreign domestic awards as well as to foreign international awards. The Working Group and other commentators concluded that there is no need to clarify or supplement that provision.

(c) Section 3 – Designation of Court

[43] The Convention requires the designation of the court to which applications for recognition and enforcement may be made. This section reproduces section 3 of the Current Uniform ICAA.

D. Part III The Model Law

(a) Section 4 – Application of Model Law

[44] This section makes the Model Law, including all of the 2006 amendments to it other than option II of article 7, applicable in the enacting jurisdiction. To the extent that the pre-existing provisions of the Model Law are implemented this section replicates subsection 4(1) of the Current Uniform ICAA.

[45] To the extent, though, that this section also implements the 2006 Model Law amendments, it is entirely new. The implementation of the 2006 amendments, to the extent found appropriate, was the primary impetus for the present legislative reform initiative. Before proposing that all 2006 amendments be implemented the Working Group and commentators examined each of them carefully.

[46] For the most part, the benefits of the 2006 Model Law amendments were widely recognized and the proposal for their implementation in Canada was not controversial. Any policy proposal entails an element of compromise, and with the 2006 Model Law amendments it arose principally in respect of articles 17B and 17C. Those provisions authorize arbitrators to make *ex parte* preliminary orders, a prospect that is understandably controversial in a consensual dispute-resolution context. The Core Group consulted extensively with the Advisory Board regarding these provisions, and considered a number of options in respect of them. On balance, the Working Group concluded that articles 17B and 17C should be adopted without modification. The reservations surrounding articles 17B and 17C were overcome by (a) the parties' ability to contract out of them; (b) the perceived weakness they remedy in the Current Uniform ICAA; and (c) the clarity they provide to the unsettled law on arbitrators' ability to issue *ex parte* orders.

[47] For the benefit of the Conference, this commentary will first summarize the less controversial provisions of the 2006 amendments to the Model Law, before describing the debate concerning

articles 17B and 17C and the rationale for the Working Group's recommendation concerning those articles.

(i) *Article 2A International origin and general principles*

[48] This provision was added by UNCITRAL to encourage national courts to have regard to the international character of the Model Law when called upon to interpret its provisions. It does not go so far as to require consistency or to give legal effect to decisions of foreign courts. It endorses the practice that is already followed in Canada, as evident in many recent decisions of the Supreme Court of Canada.

[49] There was some concern about the meaning and application of the requirement that "regard is to be had … to the need to promote … the observance of good faith." In the common law provinces of Canada there is no general duty of good faith. A good faith obligation of narrow scope may be implied into a contract only in very limited circumstances. Some commentators asked whether article 2A might impact parties' substantive contractual rights by adding a good faith obligation of indeterminate scope. The large majority of commentators did not share that concern, however, and found that article 2A merely directs a court to be mindful that arbitration proceedings are expected to be conducted in good faith.

[50] Approved policy recommendation number 3 was that departures from the text of the Model Law should be made only for good reason. The Working Group concluded that the concerns raised did not provide a sufficient basis to justify departing from the Model Law text in this instance.

(ii) *Article 7 Definition and Form of Arbitration Agreement*

[51] The 2006 Model Law amendments set out two options for article 7, dealing with the requirement for a written arbitration agreement. The Working Group recommends that the New Uniform ICAA adopt option I of article 7 of the Model Law.

[52] The Model Law as presently in force in Canada imposes a strict writing requirement, demanding signatures or an exchange of documents in order to establish that parties have consented to arbitration. UNCITRAL wished to ensure that electronic communications could effectively give rise to a binding arbitration agreement. The desire was to create a provision flexible enough to grow with different technologies and evolve over time. Article II(2) of the Convention may lack this flexibility.

[53] Building on the language of article 7 as it existed under the 1985 Model Law, option I still requires that arbitration agreements be in writing, although the technical requirements have been relaxed to capture any arbitration agreement, so long as the *content* of the agreement is recorded in written form, regardless of whether the arbitration agreement or contract *itself* was concluded orally, by conduct, or by other means.

[54] Option II, on the other hand, removes the writing requirement from the Model Law and leaves it to applicable contract laws to govern the validity of the form of the arbitration agreement.

[55] The Working Group recommends the adoption of option I of article 7 of the 2006 Model Law amendments. While sophisticated commercial parties typically reduce their arbitration agreements to

writing, formal writing requirements can become an issue with less sophisticated parties, whose arbitration agreements may arise by course of conduct. The Working Group considers it desirable for those parties' expectations to be recognized and enforced.

[56] The Working Group considered whether it was necessary for the New Uniform ICAA to state expressly that electronic functional equivalents to writing as recognized and enforced under Canadian legislation will also be sufficient under the Convention and the Model Law. The Working Group concluded that such a statement was unnecessary.

(iii) *Articles 17, 17A, 17D-17J Interim Measures*

[57] These new articles were added to the Model Law to replace article 17 as now in force in Canada. Existing Article 17 authorizes arbitrators to grant interim measures of protection, but gives almost no guidance as to what constitutes an interim measure, the tests that should apply when interim measures are sought from an arbitral tribunal, the conditions that may be attached to such orders, or the vexing question of whether orders or awards granting interim measures of protection can be enforced by courts in the same manner as final awards under the Convention or the Model Law.

[58] With the benefit of input from numerous state delegations and experienced arbitration practitioners, UNCITRAL developed the more detailed provisions now included in the 2006 amendments to the Model Law. With the sole exception of articles 17B and 17C (discussed below) and some reservations among Québec members of the Core Group concerning their ultimate enactment in Québec, the implementation of all other articles on this subject was enthusiastically endorsed by members of the Working Group and all commentators. The policy rationale for making these amendments is outlined in the UNCITRAL commentary on the 2006 amendments. In brief:

- Article 17 re-states the authority of arbitrators to award interim measures and then adds a description of the categories of permissible interim measures.
- Article 17A sets out the tests that applicants for interim measures must meet.
- Article 17D authorizes arbitrators to modify, suspend or terminate interim measures.
- Article 17E authorizes arbitrators to require applicants for interim measures to provide security.
- Article 17F requires prompt disclosure of all material circumstances and of any changes in circumstances that might have a bearing on the interim measure.
- Article 17G creates a statutory cause of action for damages and costs against parties who obtain interim measure that the tribunal later concludes should not have been granted.
- Article 17H makes orders or awards for interim measures enforceable in a similar manner to other awards.
- Article 17I sets out the grounds on which a court may refuse recognition and enforcement of interim measures.

(iv) *Articles 17B and 17C – Preliminary Orders*

[59] One of the most controversial issues considered by the Working Group was the question of whether the New Uniform ICAA should implement articles 17B and 17C, which were added to the Model Law as part of the 2006 amendments. There are cogent arguments both for and against their inclusion.

[60] These provisions expressly empower international arbitral tribunals seated in the enacting jurisdiction to make *ex parte* "preliminary orders" if an application is intended to be brought for an interim measure and the arbitral tribunal is satisfied that the purpose of the interim measure would be frustrated if notice of the requested interim measure were given to the responding party. The arbitral tribunal is given the discretionary power to order the intended respondent not to take any steps that would frustrate the interim measure of protection intended to be sought, until the application for the interim measure can be heard and decided on its merits. The temporary preliminary order is said to be binding between the parties, but expressly is not enforceable by a court.

[61] These provisions, as with many others in the Model Law, are not mandatory. The parties can agree to exclude the power to make preliminary orders.

[62] Even with the inclusion of these sections, parties remain at liberty to seek an interim measure from a court rather than from the arbitral tribunal. Whether or not a court would entertain an *ex parte* application would depend upon its local court practice.

[63] On balance the Working Group has recommended that articles 17B and 17C be included in the New Uniform ICAA, for the following reasons:

(a) One approved policy recommendation is that the New Uniform ICAA should depart from the text of the Model Law only for "good reason."

(b) The preponderant view of the Advisory Board and other commentators was that articles 17B and 17C should be included.

(c) Parties who do not wish to give an arbitral tribunal the power to make preliminary orders can agree to exclude articles 17B and 17C.

(d) There is a division of opinion as to whether arbitral tribunals seated in Canada already have the power to make *ex parte* orders, so it is useful to clarify the matter.

(e) Generally, the authority of arbitral tribunals to grant relief of any kind should be co-extensive with the authority of courts, lest the utility and attractiveness of arbitration as an alternative to litigation be called into question. Courts, as with arbitral tribunals, have a duty to give parties an opportunity to be heard, but that obligation does not preclude a court from making *ex parte* orders. To suggest that courts are somehow better placed than arbitral tribunals to assess the propriety of *ex parte* relief sends a counter-productive message.

(f) Articles 17B and 17C are balanced, in the sense that they impose desirable limitations on the circumstances in which the power can be exercised and provide other procedural protections. The parties also are free to exclude or further limit the power to grant *ex parte* relief by agreement.

(g) It is important for the statute to contain a clear direction to the courts that *ex parte* preliminary orders of arbitral tribunals are not enforceable by courts in the same manner as other orders or awards granting interim measures.

(h) Circumstances do arise from time to time in which it is important that the arbitral tribunal have the power to make *ex parte* orders to preserve the subject matter of the dispute and maintain the integrity of the process.

(i) The mere existence of the power to make *ex parte* preliminary orders will deter parties from taking steps that might justify its exercise.

(j) Experienced international arbitrators will exercise the power to make *ex parte* preliminary orders sparingly, when the circumstances clearly justify doing so.

(k) Even though *ex parte* orders are not enforceable by courts in the same manner as awards, parties will be very hesitant to refuse to comply with them and thereby win the disapproval of the arbitral tribunal. There is broad acceptance of the fact that arbitral tribunals often make procedural orders that are not enforceable as awards.

[64] Because of the importance of this issue, the Conference should be aware of the arguments raised by those who strongly oppose or who are concerned about including articles 17B and 17C:

(a) Arbitration is a consensual process in which the procedural rules and the authority of arbitrators are and should be derived primarily from the agreement of the parties, including any procedural rules agreed by the parties. The question of whether *ex parte* orders can be made should be left to the agreement of the parties. It is not necessary or appropriate to intrude upon party autonomy by granting this specific power by statute.

(b) A fundamental principle of arbitral law and practice is that both parties must be heard and must be given a fair opportunity to present their cases. *Ex parte* communications between arbitrators and parties (for example at the time of arbitrator appointment) are strictly limited by widely accepted protocols to exclude communications concerning the merits of the dispute, lest such communications give rise to doubts as to independence or impartiality. It is antithetical to give statutory authority for *ex parte* communications on matters of substance.

(c) Parties who can demonstrate good grounds for requiring *ex parte* interim measures may seek such measures from a court of competent jurisdiction. Articles 17B and 17C are unnecessary.

(d) Articles 17B and 17C expressly state that, although other arbitrator orders or awards granting interim measures are enforceable by a court, *ex parte* preliminary orders of an arbitral tribunal are not. The proper purview of arbitration legislation is to give power and

direction to courts, not to regulate the conduct of those aspects of the arbitral process in which the courts are to have no involvement.

[65] While recognizing that there is merit to both points of view, the Working Group recommends that articles 17B and 17C of the Model Law as amended be included for the reasons set out above. This approach is consistent with approved policy recommendation number 3.

(b) Section 5 – Meaning of certain terms used in Model Law

[66] The word "State" and phrases including that word appear throughout the Model Law, which is drafted in contemplation of a unitary "State." In the Canadian context it is necessary to distinguish between those instances when "State" refers to Canada and those when it refers to an enacting jurisdiction within Canada. These sections of the New Uniform ICAA make these distinctions and are based on provisions already included in the Ontario ICAA.

(c) Section 6 – Use of extrinsic material in applying article 2A(1) of Model Law

[67] The Model Law is a work product of UNCITRAL and one of its working groups. UNCITRAL maintains publicly available on its website and elsewhere official reports and commentaries concerning the initial Model Law text and the 2006 amendments.

[68] Subsection 14(2) of the Current Uniform ICAA states that in interpreting the Model Law, recourse may be had to two official UNCITRAL texts. The proposed new section expands the scope of documents that may be considered to include documents of the same kind relating to the 2006 amendments.

[69] The Current Uniform ICAA required that the text of UNCITRAL documents be published in the Canada Gazette before recourse could be had to them as an aid to interpretation. Publication in the Canada Gazette is expensive. The Working Group doubts that the Canada Gazette versions are used in practice as a reference point, as all UNCITRAL texts are available from UNCITRAL, and are easily accessed from its website. For sake of certainty, section 6 provides the United Nations publication numbers for each of the texts to which it refers. The proposed New Uniform ICAA therefore deletes the Canada Gazette requirement.

(d) Section 7 – Designation of court and reference to court

[70] Several articles of the Model Law require the enacting jurisdiction to identify the court to which applications may be made. These sections of the New Uniform ICAA, counterparts of which appeared in the Current Uniform ICAA, allow the enacting jurisdiction to designate the appropriate court.

(e) Section 8 – Rules applicable to substance of dispute

[71] Article 28(1) of the Model Law requires arbitrators to apply any law or rules of law designated by the parties that are to be applicable to the substance of the dispute. Although there is a strongly held view

that the terms "rules of law" and "law" both refer to substantive state laws, literature on the subject suggests that the term "rules of law" is sometimes interpreted to include regimes that are not part of a state law. This approach is reflected in the UNCITRAL commentary on article 28.

[72] Article 28(2) of the Model Law deals with what should be done if a party fails to designate either a law or rules of law. It requires the arbitral tribunal to choose an applicable "law" determined by the conflict of laws principles that it considers applicable.

[73] Section 8 of the Current Uniform ICAA provides as follows:

> Notwithstanding article 28(2) of the [Model Law], if the parties fail to make a designation pursuant to article 28(1) of the [Model Law], the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

The Working Group believes that this provision was likely included to clarify that when identifying the applicable law under article 28(2) the arbitral tribunal need not necessarily apply any conflicts of law rules. The Working Group saw no need to change that approach under the New Uniform ICAA.

[74] The Working Group considered whether the discretion of the arbitral tribunal should be further expanded to authorize expressly a choice of "rules of law" as an alternative to (or in conjunction with) a choice of state law, but concluded that in light of differing views as to the proper interpretation of "rules of law" it would be unwise to do so.

[75] Section 8 of the Current Uniform ICAA has caused no mischief. The Working Group concluded that it should be carried forward unchanged into the New Uniform ICAA.

E. Part IV General

(a) Section 9 – Enforcement of consolidation agreements

[76] Section 9 of the Current Uniform ICAA allows a court in the enacting jurisdiction to order that two or more arbitration proceedings be consolidated. This avoids a multiplicity of proceedings and can enhance the cost-effectiveness of the arbitral process. The intent of the existing provision appears to be that it would apply only where all parties to the proceedings proposed to be consolidated (i) agreed to consolidation; and (ii) jointly applied to the court for relief.

[77] One recognized disadvantage of arbitration relative to court litigation is that whereas courts have a broad discretion to allow third-party claims, addition of parties, and consolidation of related proceedings, the jurisdiction of arbitral tribunals to do the same is more limited. Some arbitral institutions, led by the International Chamber of Commerce (ICC), have amended their rules to facilitate consolidation and joinder of parties. There was considerable support in principle for expanding the power of Canadian courts to order consolidation of arbitrations, perhaps even to the extent of allowing such orders to be made without the consent of all parties. It was observed by some commentators that the

current provision allowing consolidation only upon joint application of all parties was not particularly useful.

[78] The Working Group concluded that it is not feasible or advisable to add to the New Uniform ICAA a court power to order consolidation of arbitrations in cases where all parties to the proceedings proposed to be consolidated have not agreed. The Working Group concluded, however, that where such an agreement exists (either in the arbitration agreement or in rules that the parties have incorporated by reference) but one or more of the parties refuses to honour that agreement, other parties should be able to apply to the court to enforce the consolidation agreement.

[79] In addition, there are instances where parties have agreed to consolidation but have not agreed (or cannot agree) on the procedural steps that should be taken to give effect to that agreement – most notably, how the new tribunal should be constituted. The Working Group concluded that courts in the enacting jurisdiction should be empowered to assist the parties in the constitution of the tribunal for the consolidated proceeding.

[80] The Working Group also concluded that where the parties have agreed that an arbitral institution should supervise the consolidation process, the courts should not intervene.

[81] Section 9 of the New Uniform ICAA is intended to give effect to the objectives identified by the Working Group.

(b) Section 10 – Stay of proceedings

[82] This section replicates section 11 of the Current Uniform ICAA. Both the Convention and the Model Law require a court in the enacting jurisdiction to "refer the parties to arbitration" at the request of one party to an arbitration agreement where court proceedings are brought in respect of a matter apparently covered by the arbitration agreement. This section makes it clear that as part of the referral the court proceedings in respect of that matter are to be stayed.

[83] The Working Group noted a potential tension between the Convention and the Model Law as to the significance of when the referral to arbitration is requested. Article 8(1) of the Model Law indicates that a party must request the referral before that party submits its first statement on the substance of the dispute. By contrast, article II(3) of the Convention does not appear to condition the referral to arbitration on when it is requested. To date, this potential tension does not appear to have created practical difficulties in Canada. As a consequence, the Working Group did not regard a legislative response to that tension as necessary at this time.

(c) Section 11 – Limitation period for recognition or enforcement of arbitral awards

[84] In its Discussion Paper, the Working Group invited comment on whether it was desirable and feasible to harmonize limitation periods across Canada for the recognition and enforcement of international arbitration awards. The Advisory Board and commentators on the Discussion Paper generally regarded such a harmonized limitation period as desirable.

[85] The policy rationale for such harmonization, however, differs from that relevant for the balance of the New Uniform ICAA. Uniformity in Canada's international commercial arbitration statutes is normally advocated on the basis of policy recommendation number 5 accepted by the Conference – namely, the need to avoid undue complexity for foreign users when deciding whether to seat their arbitrations in a Canadian jurisdiction. Yet questions of recognition and enforcement arise only post-award, and the choice of jurisdiction turns on the location of exigible assets rather than the presence of "arbitration friendly" legislation. What policy considerations favour a harmonized limitation period for recognition and enforcement?

[86] The Working Group concluded that despite the differing policy rationale, several considerations favoured adoption of a uniform limitation period for seeking recognition and enforcement of foreign commercial arbitral awards:

- Policy recommendation number 5 aimed, in part, to enable foreign users to treat Canada as if it were a unitary state for purposes of commercial arbitration. The Working Group considered that Canada's reputation as an arbitration-friendly jurisdiction could be jeopardized not solely by uneven legislation dealing with arbitral procedure but also by uneven legislation dealing with enforcement of foreign arbitral awards in Canada.

- Ease of enforcement of international arbitration awards in Canada, in accordance with the Convention and as provided by the Model Law, is a consideration of primary importance to foreign parties proposing to do business with Canadian businesses or international enterprises with assets in Canada. Since a uniform limitation period for simplifies the enforcement of foreign arbitral awards in Canada, it will also strengthen the attractiveness to foreign businesses of Canadian businesses or international enterprises with assets in Canada.

- Limitation periods are a matter of provincial and territorial legislative competence, and thus *could* differ across Canada. Ultimately, each province and territory is free to choose the appropriate time period for limitation purposes taking into account a range of policy considerations such as the limitation period applicable to judgments or the appropriate balance between the state's duties with respect to enforcement of private rights and the stability of business relations. The Working Group could not, however, discern a principled reason why the time periods *should* differ across Canada for the recognition and enforcement of foreign arbitral awards.

- A uniform limitation period is more coherent than variable ones with the Working Group's support for the concept of "chain recognition and enforcement" (see section 12, below).

[87] Four practical questions arose as a consequence of the Working Group's decision to advocate a uniform limitation period for the recognition and enforcement of foreign arbitral awards. First, should the limitation be situated in each province's or territory's limitations statute or should it be situated in the New Uniform ICAA? The Working Group was mindful of the ULCC's important uniform Limitation Act project, and the policy preference that all limitation provisions be consolidated into a single statute.

Despite those considerations, the Working Group considered it crucial that any limitation period governing the recognition and enforcement of foreign arbitral awards be situated in the New Uniform ICAA. In accordance with policy recommendation number 5, foreign users should not have to consult multiple statutes within a given jurisdiction to discern the arbitration-related law. Furthermore, to the extent that any provinces or territories decline to enact (or choose to depart from) the uniform Limitation Act, the objective of having uniform laws across Canada in respect of international arbitration will be undermined.

[88] The second practical question was what length of limitation period would be appropriate. The Working Group regarded as overly Draconian the two-year limitation period that in 2010 the Supreme Court of Canada held to be applicable in Alberta.[4] The Working Group considered that a more generous limitation period could be adopted for foreign arbitral awards than (for example) court judgments. The Working Group also considered that the limitation period ought to be commensurate with the counterpart limitation periods of Canada's major trading partners. An ICC International Court of Arbitration Bulletin issued in 2012 identified the following limitation periods applicable to recognition and enforcement of foreign arbitral awards in ten of Canada's largest trading partners:

COUNTRY OR TERRITORY	IS THERE A LIMITATION PERIOD?	IF SO, HOW LONG IS IT?
Brazil	• Recognition: yes (arguably) • Enforcement: yes	• Recognition: 10 years • Enforcement: same as limitation period for underlying claim
China	Yes	2 years
France	Yes (arguably)	For awards rendered: • Before 17 June 1983: 30 years • After 17 June 1983: 5 years
Germany	No	N/A
Italy	Yes	10 years
Japan	No	N/A
Korea (Republic of)	Yes	10 years
Mexico	Yes (arguably)	10 years
United Kingdom (England, Wales, and Northern Ireland)	Yes	• General: 6 years • Arbitration agreement under seal: 12 years • If consideration given to a foreign law upon enforcement, the *Foreign Limitation Periods Act 1984* provides that the foreign law relating to limitation shall apply

[4] *Yugraneft Corp. v. Rexx Management Corp.*, [2010] 1 S.C.R. 649 (Alta.).

United Kingdom (Scotland)	Yes	20 years
United States of America	Yes	• General: 3 years • Third Circuit: some authority in New Jersey (albeit not in an international case) suggests that when a party fails to bring an action to enforce an arbitral award within the time period specified for summary proceedings, the party may still file a lawsuit to enforce the award within the 6-year limitation period for bringing breach-of-contract claims.

[89] The Working Group noted that two of these jurisdictions regarded a limitation period as unnecessary, but concluded that eliminating any limitation period would expose Canadian and multinational businesses to an excessive burden of uncertainty and would overexpose international enterprises with assets in Canada. The Working Group considered that a limitation period should be adopted, and that a uniform limitation period of ten years for recognition and enforcement of foreign arbitral awards would be appropriate. Such a limitation period would compare favourably with the counterpart limitation periods of Canada's major trading partners, and it would also recognize that international commercial arbitration awards are akin to foreign judgments (which are normally subject to a ten-year limitation period in Canada).

[90] The Working Group's views on the appropriate length of limitation period were linked to the third practical question arising – namely, whether the uniform limitation period should be subject to extension. As the Supreme Court of Canada has noted,[5] modern limitations statutes seek to balance conventional rationales oriented towards protection of defendants — certainty, evidentiary, and diligence — with the need to treat plaintiffs fairly, having regard to their specific circumstances. This balance is typically struck through "discoverability" rules that stop the limitation period from running until the party entitled to claim first acquired (or ought to have acquired) sufficient knowledge of the claim.
The Working Group concluded, though, that a ten-year limitation period was sufficiently generous as to obviate the need for its extension. The Working Group also considered that a power to stop the limitation period from running could create practical difficulties in connection with the chain recognition and enforcement provision that the Working Group is also recommending (see paragraphs 94 to 96 below).

[91] A final practical question concerned the relationship between the proposed limitation period and article III of the Convention. The latter provision states that "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." There is room for debate as to whether a provision that creates a limitation period for applications seeking recognition or enforcement of international commercial arbitration awards imposes a condition on recognition or enforcement within the meaning of article III. Out of an abundance of caution,

[5] *Yugraneft Corp.*, *supra*, note 4 at 675-676 (para. 59).

though, enacting jurisdictions are advised to ensure that the limitation periods for applications seeking recognition and enforcement of domestic awards are not more generous than those contemplated by section 11 of the New Uniform ICAA.

(d) Section 12 – Appeals from negative jurisdictional rulings

[92] Article 16(1) of the Model Law gives effect to the widely recognized "*competence competence*" principle, which provides that arbitral tribunals have the power to rule on their own jurisdiction. Article 16(2) requires that jurisdictional objections be raised at an early stage. Article 16(3) allows the arbitral tribunal to rule on jurisdictional objections either as a preliminary question or as part of a final award on the merits of the dispute.

[93] Article 16(3) authorizes an appeal to the court of the enacting jurisdiction only if the arbitral tribunal rules that it has jurisdiction (a positive ruling). The article is silent on whether an appeal lies from a ruling by an arbitral tribunal that it lacks jurisdiction (negative rulings). Without the ability to appeal a negative ruling, even if that ruling is incorrect a party may be forced to pursue its claims in a national court. UNCITRAL documents indicate that appeals from negative rulings were not expressly authorized, because it was considered inappropriate to compel a tribunal to decide matters that it concluded it lacked jurisdiction to decide.

[94] A growing number of states have reformed their international arbitration laws to include express authorization for appeals from negative rulings. Those jurisdictions include Belgium, England, France, India, Italy, New Zealand, Singapore, Sweden, Switzerland, and the United States of America. The rationales expressed for these reforms include:

- the international consensus favours allowing appeals from negative rulings;
- it is unfair and inconsistent to allow appeals from positive rulings without also allowing appeals from negative rulings;
- denying the opportunity to correct erroneous negative rulings can lead to injustice and frustrate the parties' intention of avoiding litigation in national courts; and
- parties may prefer to seat their arbitrations in states that allow appeals from negative rulings.

[95] The Working Group agrees with these rationales, and has included a provision in the New Uniform ICAA to allow appeals from negative rulings. The text of the section tracks the language of article 16(3) of the Model Law, to ensure that both negative and positive rulings are addressed in precisely the same way. This approach emulates that taken by New Zealand in its legislation. Some other jurisdictions have taken a more expansive approach. The proposed text has not as yet been reviewed by the professional legislative drafters assisting the Working Group. The Working Group wishes to solicit comments from the drafters to confirm that the proposed language is appropriate.

(e) Section 13 – Crown bound

[96] This section of the New Uniform ICAA replicates section 12 of the Current Uniform ICAA.

(f) Section 14 – Forms of proof

[97] This section of the New Uniform ICAA replicates section 13 of the Current Uniform ICAA.

(g) Section 15 – Coming into force

[98] Section 16 of the Current Uniform ICAA dealt with commencement simply by indicating "*(Proclamation section)*". The Working Group considered it appropriate for the New Uniform ICAA to provide a default for commencement, and concluded that it made sense for the statute to come into force on a day to be fixed by proclamation.

PART III ADDITIONAL CONSIDERATIONS FOR LEGISLATORS

A. Introduction

[99] This part of the Report briefly describes four other issues considered by the Working Group that are not reflected in the proposed New Uniform ICAA. In several cases, particular issues are flagged for the attention of legislators.

B. Appeals from court orders, judgments, and decrees under the Convention and the Model Law

[100] The decision by commercial parties to refer their disputes to arbitration is generally regarded as an election to forego traditional court-based dispute resolution. The Convention and the Model Law seek to vindicate that election by restricting the occasions for court intervention during and after the arbitral process. Examples of those restrictions include:

- The prohibition on court intervention other than as provided in the Model Law (Model Law article 5);
- The need for courts, when seized of an action in a matter in respect of which the parties have agreed to arbitrate, to refer the parties to arbitration upon request (Convention article II(3) and Model Law article 8(1));
- The prohibition on appeals from court decisions appointing arbitrators, resolving arbitrator challenges, terminating arbitrator mandates, and deciding positive jurisdictional pleas (Model Law articles 11(5), 13(3), and 14(1));
- The restriction of the grounds upon which a court may refuse recognition or enforcement of an interim arbitral measure (Model Law article 17I);
- The restriction on the modes of recourse to a court against an arbitral award (Model Law article 34); and
- The obligation of courts to recognize arbitral awards as binding and enforce them subject to articles 35 and 36 of the Model Law.

[101] The Working Group noted that although the Model Law addressed appeal rights in respect of certain types of court decisions under the Convention and the Model Law, it was silent on other types of decisions. In particular, there was no indication as to whether appeals lay from decisions that referred parties to arbitration, decisions in respect of recognition and enforcement of interim arbitral measures, and decisions in respect of recognition and enforcement of arbitral awards. The Working Group considered that the policy stance visible in the Convention and the Model Law against court intervention in the arbitral process should extend with at least equal vigour to appeal proceedings from such intervention.

[102] Although the Working Group did not favour eliminating all opportunity for appellate review from such decisions, it did conclude that no appeal should be available without a grant of leave.
The Working Group also concluded that a short time limit should apply to any such application for leave.

The Working Group considered that these objectives could be achieved through a legislative provision along the following lines:

> **Appeals respecting court orders, judgments, or decrees under the Convention or the Model Law**
>
> **(1)** Subject to this Act, an appeal from an order, judgment, or decree of [*enacting jurisdiction to designate appropriate court*] under the Convention or the Model Law lies to [*the highest court of final resort in or for the enacting jurisdiction*] only with leave of a justice of [*the highest court of final resort in or for the enacting jurisdiction*].
>
> **(2)** The time limit for bringing an application for leave to appeal under subsection (1) is 10 days, commencing on the day after the order, judgment, or decree appealed from is pronounced.
>
> **(3)** In an appeal to which leave is granted under subsection (1), a judge of [*the highest court of final resort in or for the enacting jurisdiction*] may require that the appeal be prosecuted on such terms, and may require the appellant to provide such deposit or security, as is just and proper in the circumstances.
>
> **(4)** A grant of leave to appeal under subsection (1) does not operate as a stay or suspend the operation of the order, judgment, or decree under appeal, unless a judge of [*the highest court of final resort in or for the enacting jurisdiction*] orders otherwise.

[103] Despite the strong policy rationale for these provisions, a possible concern arises in respect of the directive in article III of the Convention that "[t]here shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards." To the extent that these provisions could be said to impose "substantially more onerous conditions" on the recognition or enforcement of international commercial arbitration awards than domestic arbitral awards, they could be said to offend article III. A survey conducted between 2005 and 2008 of the States parties to the Convention revealed that appeals had been similarly restricted (or eliminated) in the implementing statutes of many other jurisdictions – causing UNCITRAL to remark that article III "had not been closely adhered to in some cases."[6]

[104] There is, however, a plausible argument that an order, judgment, or decree in respect of the recognition or enforcement (or both) of an international commercial arbitral award is *sui generis* and cannot reasonably be analogized to the enforcement of a domestic arbitral awards. If that is so, then no article III problem arises. If the problem cannot be surmounted at this stage, then rather than abandon this topic the Working Group would instead defer and return to it in tandem with the Working Group's review of the ULCC's uniform domestic arbitration statute.

[6] United Nations. Commission on International Trade Law. *Report on the survey relating to the legislative implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)*, 41st Sess., U.N. Doc. A/CN.9/656/Add.1 (2008) at paras. 25-32.

[105] In the end, there was not sufficient support among the members of the Working Group to justify a recommendation that these issues be addressed at this time.

C. Contracting out of the New Uniform ICAA

[106] The Working Group considered the extent to which parties to international arbitration agreements should be permitted to contract out of or in to the application of the New Uniform ICAA or the Model Law, and whether a specific provision should be included in the New Uniform ICAA on this subject. The Working Group concluded that no such provision was required. However, legislators are advised to ensure that legislation applicable to non-international commercial arbitrations makes it clear that parties who erroneously invoke that legislation are to be referred back to the ICAA.

[107] As the Convention is a state obligation, parties cannot derogate from its application by agreement. The Working Group noted that many provisions of the Model Law are expressly subject to any agreement of the parties to the contrary. The Working Group concluded that the provisions of the Model Law which are not expressly subject to contrary agreement deal with subjects that should not be subject to variation by party agreement.

[108] Important rights may vary depending on whether the international arbitration or non-international arbitration statute applies to any particular arbitration. For example, there will likely be differences in rights of appeal and other differences in the level of permissible court intervention. A number of commentators noted that it is not uncommon for parties to arbitration agreements that are clearly international in character to nonetheless expressly provide that any arbitration is to be conducted under a statute that is intended to be applicable only to non-international arbitrations. This is often perceived to be the unintended result of a drafting error.

[109] Legislators should consider whether, as a matter of policy, they wish the parties, rather than the Legislature, to determine which statute of the enacting jurisdiction is to apply. The predominant view of members of the Working Group is that the Legislature should make that determination, and that the legislation should contain a mechanism to ensure that, regardless of an intended or unintended invocation of a non-international statute, all international arbitrations will be governed by the ICAA. The Working Group recommends that the best mechanism is to include a provision in the non-international statute, making it clear that when the arbitration is international any reference to the non-international act shall be interpreted as a reference to the ICAA.

D. Confidentiality

[110] The Working Group considered whether the New Uniform ICAA should include provisions expanding the scope of confidentiality applicable to arbitral proceedings. Commentators have noted that, contrary to common belief, there is no general principle of law that makes arbitral proceedings confidential. Such proceedings generally are conducted privately, but the issue of whether the existence of the proceedings, the claims and defences, the pleadings, the documentary and oral evidence, the fact of an award, the text of the award, and the outcome of the case are confidential depends primarily on the parties' agreement.

[111] Most institutional arbitration rules, which parties are free to adopt by agreement, contain confidentiality provisions. Parties also sometimes incorporate express confidentiality provisions into their arbitration agreements. Despite this, several jurisdictions have recently amended their arbitral statutes to provide for confidentiality of arbitral proceedings, in some cases on an "opt-in" basis and in some cases on an "opt-out" basis.

[112] The views of those providing comments to the Working Group were somewhat divided on the question of whether the New Uniform ICAA should include a confidentiality provision. If such a provision were to be included, the predominant view was that it should be on an "opt-in" basis, with the result that the applicability of any such confidentiality provision would still be dependent on the parties specifically addressing the issue by agreement.

[113] The Working Group concluded that as the predominant view was that the scope of confidentiality should depend on party agreement, and as the issue is addressed by institutional procedural rules, the New Uniform ICAA need not address the issue.

E. Nationality, independence, and impartiality of court-appointed arbitrators

[114] Article 12 of the Model Law requires all arbitrators to disclose "any circumstances likely to give rise to justifiable doubts as to his impartiality or independence" and allows an arbitrator to be challenged only if such circumstances exist. This language reflects an international standard.

[115] The Working Group considered whether it was necessary to state expressly that in all cases where a court is to appoint an arbitrator the test to apply is whether any circumstances exist that are "likely to give rise to justifiable doubts as to [the arbitrator's] impartiality or independence" but concluded that it was unnecessary to do so.

[116] Article 11(1) of the Model Law states that no person shall be precluded by reason of nationality from acting as an arbitrator, unless the parties otherwise agree. The Model Law text therefore permits the parties to agree on nationality restrictions, but absent agreement imposes no restriction. The current Ontario ICAA overrides article 11, with the intent that it would no longer authorize parties to agree on nationality restrictions. The Working Group concluded that it would not recommend the current Ontario approach, as there are not sufficient grounds to justify a departure from the Model Law on this subject. This is consistent with approved policy recommendation number 2.

APPENDIX 1 DRAFT NEW UNIFORM *INTERNATIONAL COMMERCIAL ARBITRATION ACT*

PART I
INTERPRETATION

Definitions

1. **(1)** In this Act,

(a) "**Convention**" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, adopted by the United Nations Conference on International Commercial Arbitration in New York on 10 June 1958 as set out in Schedule I; and

(b) "**Model Law**" means the Model Law on International Commercial Arbitration, adopted by the United Nations Commission on International Trade Law on 21 June 1985, as amended by the United Nations Commission on International Trade Law on 7 July 2006 as set out in Schedule II.

COMMENT: *The definition of Model Law makes it clear that the 2006 amendments to the UNCITRAL Model Law are included.*

(2) Except as otherwise provided in this Act,

(a) words and expressions used in Part II have the same meaning as the corresponding words and expressions in the Convention; and

(b) words and expressions used in Part III have the same meaning as the corresponding words and expressions used in the Model Law.

COMMENT: *Some words are used in slightly different senses in the Convention and the Model Law. This section clarifies the meaning to be given to those words when used in the Act.*

PART II
THE CONVENTION

Application of Convention

2. **(1)** Subject to this Act, the Convention applies in [*enacting jurisdiction*] to arbitral awards or arbitration agreements, whether made before or after the coming into force of this Part, in respect of differences arising out of commercial legal relationships.

(2) In determining whether the Convention applies to certain types of arbitral awards,

(a) an arbitral award made in a jurisdiction within Canada that is considered to be international in that jurisdiction is not considered to be a domestic award for the purpose of article I(1) of the Convention; and

(b) an arbitral award made in a jurisdiction within Canada that is not considered to be international in that jurisdiction is considered to be a domestic award for the purpose of article I(1) of the Convention.

***COMMENT**: Article I(3) of the Convention permits state parties to make both a "reciprocity reservation" and "commercial reservation." This section makes the commercial reservation but does not make the reciprocity reservation. Enacting Jurisdictions that do not wish to make the commercial reservation should delete the phrase "*in respect of differences arising out of commercial relationships*."*

Designation of court

3. For the purpose of seeking recognition and enforcement of an arbitral award pursuant to the Convention, application shall be made to [*enacting jurisdiction to designate appropriate court*].

PART III
THE MODEL LAW

Application of Model Law

4. (1) Subject to this Act, the Model Law applies in [*enacting jurisdiction*].

(2) With respect to article 7 of the Model Law, option I applies in [*enacting jurisdiction*]; option II does not.

(3) The Model Law applies to international commercial arbitration agreements and awards made in international commercial arbitrations, whether made before or after the coming into force of this Part.

***COMMENT**: Article 7 of the Model Law contains two options for the requirement that arbitration agreements be in writing. Subsection 4(2) makes it clear that option I applies but option II does not apply.*

Meaning of certain terms used in Model Law

5. (1) In article 1(1) of the Model Law, an "agreement in force between this State and any other State or States" means an agreement that is in force in [*enacting jurisdiction*] between Canada and any other country or countries.

(2) In articles 1(2), 17 J, 27, 34(2)(a)(i), 34(2)(b)(ii), and 36(1)(b)(ii) of the Model Law, "this State" means [*enacting jurisdiction*].

(3) In article 1(3) of the Model Law, "different States" means different countries, and "the State" means the country.

(4) In articles 1(5), 34(2)(b)(i), and 36(1)(b)(i) of the Model Law, "law of this State" means the law of [*enacting jurisdiction*] and any laws of Canada that are in force in [*enacting jurisdiction*].

(5) In article 35(2) of the Model Law, "this State" means Canada.

***COMMENT**: The language of the Model Law assumes that the enacting jurisdiction is a unitary state. In the Canadian context it is necessary to identify those instances in which phrases in the Model Law containing the word "state" should be interpreted as referring to Canada or to the enacting jurisdiction. This section achieves that objective.*

Use of extrinsic material in applying article 2 A(1) of Model Law

6. In applying article 2A(1) of the Model Law, recourse may be had to:

(a) the Reports of the United Nations Commission on International Trade Law on the work of its 18th (3-21 June 1985) and 39th (19 June – 7 July 2006) sessions (U.N. Docs. A/40/17 and A/61/17);

(b) the International Commercial Arbitration Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration (U.N. Doc A/CN.9/264); and

(c) the Commentary of the United Nations Commission on International Trade Law concerning the UNCITRAL Model Law on International Commercial Arbitration 1985 with Amendments as Adopted in 2006 (U.N. Sales No. E.08.V.4).

***COMMENT**: This section authorizes courts in the enacting jurisdiction to have regard to official UNCITRAL texts relating to both the original Model Law and the 2006 amendments to it.*

Designation of court

7. (1) The functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3), 17 H, and 34(2) of the Model Law shall be performed by [*enacting jurisdiction to designate appropriate court*].

(2) For the purposes of the Model Law, a reference to "court" or "competent court", where in the context it means a court of [*enacting jurisdiction*], means the [*enacting jurisdiction to designate appropriate court*] except where the context otherwise requires.

Rules applicable to substance of dispute

8. Notwithstanding article 28(2) of the Model Law, if the parties fail to make a designation pursuant to article 28(1) of the Model Law, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances respecting the dispute.

***COMMENT**: Under article 28(1) of the Model Law parties may designate an applicable "law" or "rules of law". The term "law" is sometimes considered to refer only to the laws, or only to the codified laws, of a state, while "rules of law" is considered to also include uncodified laws and other regimes that parties may agree should apply. Where the parties to an arbitration agreement have failed to designate either applicable laws or rules of law, article 28(2) of the Model Law requires the arbitral tribunal to apply the "law" determined by the conflicts of laws rule it considers applicable. This section requires the arbitral tribunal to identify "rules of law" it considers appropriate, and does not require it to apply conflicts of law rules when doing so.*

PART IV
GENERAL

Enforcement of consolidation agreements

9. (1) If all parties to two or more arbitral proceedings have agreed to consolidate those proceedings, a party, with notice to the others, may apply to the [*enacting jurisdiction to designate appropriate court*] for an order that the proceedings be consolidated as agreed to by the parties.

(2) Subsection (1) does not prohibit parties from consolidating arbitral proceedings without a court order.

(3) On an application under subsection (1), if all parties to the arbitral proceedings have agreed to consolidate the proceedings but have not agreed, through the adopting of procedural rules or otherwise,

(a) to the designation of parties as claimants or respondents or a method for making those designations; or

(b) to the method for determining the composition of the arbitral tribunal

the court may, subject to subsection (4), make an order deciding either or both of those matters.

(4) If the arbitral proceedings are under different arbitration agreements, no order shall be made under subsection (1) unless, by their arbitration agreements or otherwise, the parties have agreed

(a) to the same place of arbitration or a method for determining a single place of arbitration for the consolidated proceeding within [*enacting jurisdiction*];

(b) to the same procedural rules or a method for determining a single set of procedural rules for the conduct of the consolidated proceedings; and

(c) either to have the consolidated proceedings administered by the same arbitral institution or to have the consolidated proceedings not be administered by any arbitral institution.

(5) In making an order under this section, the [*enacting jurisdiction to designate appropriate court*] may have regard to any circumstances that it considers relevant, including

(a) whether one or more arbitrators have been appointed in one or more of the arbitral proceedings;

(b) whether the applicant delayed applying for the order; and

(c) whether any material prejudice to any of the parties or any injustice may result from making an order.

***COMMENT**: This section authorizes a court in the enacting jurisdiction to enforce unanimous agreements to consolidate multiple arbitrations and to assist the parties to such agreements in constituting an arbitral tribunal for the consolidated proceeding. The court is prohibited from ordering consolidation of arbitrations arising under incompatible arbitration agreements.*

Stay of proceedings

10. Where, pursuant to article II(3) of the Convention or article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

COMMENT: *Under the Convention or the Model Law if court proceedings are commenced about a matter falling under an arbitration agreement, a court is required to "refer the parties to arbitration". This section makes it clear that the relevant court proceedings are to be stayed.*

Limitation period for recognition or enforcement of arbitral awards

11. (1) No application under the Convention or the Model Law for recognition or enforcement, or both, of an arbitral award shall be made after the tenth anniversary of

(a) the date on which the time limit expired for the commencement of proceedings at the place of arbitration to set aside the award, if no such proceedings were commenced; or

(b) the date on which proceedings at the place of arbitration to set aside the award concluded, if such proceedings were commenced.

(2) Despite subsection (1), if an arbitral award was made before the coming into force of this Act but an application under the Convention or Model Law for the recognition or enforcement of that award was not made before that day, no application shall be made after the earlier of the following

(a) the date determined under subsection (1); or

(b) the date on which the limitation period that applied in respect of the recognition or enforcement of the arbitral award before the coming into force of this Act expired or would have expired.

(3) Where there is a conflict between this Act and any other Act on the limitation period for recognition or enforcement of arbitral awards, this Act prevails.

COMMENT: *This section creates a ten-year limitation period that applies to applications for recognition or enforcement of international commercial arbitration awards under either the Convention or the Model Law. Enacting jurisdictions should note that article III of the Convention prohibits an enacting jurisdiction form imposing "substantially more onerous conditions … on the recognition or enforcement of" international commercial arbitration awards than are imposed for recognition or enforcement of domestic arbitral awards. Although there is room for debate as to whether this prohibition implicates limitation periods, enacting jurisdictions are advised to ensure that the limitation periods for recognition and enforcement of domestic awards are not more generous than those contemplated by this Act.*

Appeals from negative jurisdictional rulings

12. (1) If, pursuant to article 16(2) of the Model Law, an arbitral tribunal rules on a plea that it does not have jurisdiction, any party may apply to the [*enacting jurisdiction to designate appropriate court*] to decide the matter.

(2) The decision of the [*enacting jurisdiction to designate appropriate court*] shall not be subject to an appeal.

(3) If the arbitral tribunal rules on the plea as a preliminary question, the proceedings of the arbitral tribunal are not stayed with respect to any other matters to which the arbitration relates and are within its jurisdiction.

Crown bound

13. (1) This Act binds the Crown.

(2) An award recognized pursuant to this Act is enforceable against the Crown in the same manner and to the same extent as a judgment is enforceable against the Crown.

NOTE: *Jurisdictions should consider whether subsections (1) and (2) are required in their jurisdiction.*

Forms of proof

14. (1) In any proceeding, a certificate issued by or under the authority of the Minister of Foreign Affairs containing a statement that a foreign state is a Contracting State is, in the absence of evidence to the contrary, proof of the truth of the statement without proof of the signature or official character of the person who issued or certified it.

(2) Nothing in this section precludes the taking of judicial notice pursuant to the *Evidence Act* or any other enactment.

Coming into force

15. This Act comes into force on a day to be fixed by proclamation.

SCHEDULE I

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

Article I

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

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

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

Article II

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

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

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

Article III

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

Article IV

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

(a) The duly authenticated original award or a duly certified copy thereof;

(b) The original agreement referred to in article II or a duly certified copy thereof.

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

Article V

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

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

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

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

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

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

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

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

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

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

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

Article VIII

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

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

Article IX

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

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

Article X

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

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

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

Article XI

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

(a) With respect to those articles in this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the federal Government shall to this extent be the same as those of Contracting States which are not federal States;

(b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;

(c) A federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of the law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

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

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

Article XIII

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

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

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

Article XIV

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

Article XV

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

(a) Signatures and ratifications in accordance with article VIII;

(b) Accessions in accordance with article IX;

(c) Declarations and notifications under articles I, X and XI;

(d) The date upon which this Convention enters into force in accordance with article XII;

(e) Denunciations and notifications in accordance with article XIII.

Article XVI

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

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

SCHEDULE II

UNCITRAL Model Law on International Commercial Arbitration

(United Nations documents A/40/17,
annex I and A/61/17, annex I)

(As adopted by the United Nations Commission on International Trade Law on 21 June 1985, and as amended by the United Nations Commission on International Trade Law on 7 July 2006)

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between this State and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 17 H, 17 I, 17 J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

(Article 1(2) has been amended by the Commission at its thirty-ninth session, in 2006)

(3) An arbitration is international if:

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

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

[1] Article headings are for reference purposes only and are not to be used for purposes of interpretation.

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

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

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

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

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

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

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

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

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

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

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

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

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

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

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

Article 2 A. International origin and general principles

(As adopted by the Commission at its thirty-ninth session, in 2006)

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

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

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

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

Article 4. Waiver of right to object

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

Article 5. Extent of court intervention

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

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

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

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7. Definition and form of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

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

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.

(5) Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

(As adopted by the Commission at its thirty-ninth session, in 2006)

"Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

Article 8. Arbitration agreement and substantive claim before court

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

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

Article 9. Arbitration agreement and interim measures by court

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

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

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

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

Article 11. Appointment of arbitrators

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

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

(3) Failing such agreement,

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

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

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

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

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

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

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

(5) A decision on a matter entrusted by paragraph (3) or (4) of this article to the court or other authority specified in article 6 shall be subject to no appeal. The court or other authority, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 12. Grounds for challenge

(1) When a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable 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, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

Article 13. Challenge procedure

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

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

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

Article 14. Failure or impossibility to act

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any

party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

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

Article 15. Appointment of substitute arbitrator

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

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

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

(1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

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

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

(As adopted by the Commission at its thirty-ninth session, in 2006)

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

(1) The party requesting an interim measure under article 17(2)*(a)*, *(b)* and *(c)* shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under article 17(2)*(d)*, the requirements in paragraphs (1)*(a)* and *(b)* of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary orders

Article 17 B. Applications for preliminary orders and conditions for granting preliminary orders

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)*(a)*, is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

Article 17 E. Provision of security

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this article shall apply.

Article 17 G. Costs and damages

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

(1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.

(3) The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

Article 17 I. Grounds for refusing recognition or enforcement[3]

(1) Recognition or enforcement of an interim measure may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in article 36(1)*(b)*(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this State, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

[3] The conditions set forth in article 17 I are intended to limit the number of circumstances in which the court may refuse to enforce an interim measure. It would not be contrary to the level of harmonization sought to be achieved by these model provisions if a State were to adopt fewer circumstances in which enforcement may be refused.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

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

Article 19. Determination of rules of procedure

(1) Subject to the 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.

Article 20. Place of arbitration

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

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

Article 21. Commencement of arbitral proceedings

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

Article 22. Language

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

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

Article 23. Statements of claim and defence

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

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

Article 24. Hearings and written proceedings

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

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

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

Article 25. Default of a party

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

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

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

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

Article 26. Expert appointed by arbitral tribunal

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

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

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for 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 put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

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

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

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

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

Article 29. Decision-making by panel of arbitrators

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

Article 30. Settlement

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

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

Article 31. Form and contents of award

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

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

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

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

Article 32. Termination of proceedings

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

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

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

Article 33. Correction and interpretation of award; additional award

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

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

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

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

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

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

CHAPTER VII. RECOURSE AGAINST AWARD

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

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

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

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

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

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

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

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

(b) the court finds that:

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

(ii) the award is in conflict with the public policy of this State.

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

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

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

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

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in an official language of this State, the court may request the party to supply a translation thereof into such language.[4]

(Article 35(2) has been amended by the Commission at its thirty-ninth session, in 2006)

Article 36. Grounds for refusing recognition or enforcement

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

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

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

[4] 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.

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

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such 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.

APPENDIX 2 ADVISORY BOARD MEMBERS

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