THE EIGHTEENTH SESSION (1985)

A. Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (Vienna, 3-21 June 1985) (A/40/17)[a]

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[a] *Official Records of the General Assembly, Fortieth Session, Supplement No. 17* (A/40/17) (hereinafter referred to as *Report*).

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Introduction

1. The present report of the United Nations Commission on International Trade Law covers the Commission's eighteenth session, held at Vienna from 3 to 21 June 1985.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

Chapter I. Organization of the session

A. *Opening*

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its eighteenth session on 3 June 1985. The session was opened on behalf of the Secretary-General by Mr. Carl-August Fleischhauer, Under-Secretary-General, the Legal Counsel.

B. *Membership and attendance*

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 9 November 1979 and 15 November 1982, are the following States:[1] Algeria,** Australia,** Austria,** Brazil,** Central African Republic,** China,** Cuba,* Cyprus,* Czechoslovakia,* Egypt,** France,** German Democratic Republic,** Germany, Federal Republic of,* Guatemala,* Hungary,* India,* Iraq,* Italy,* Japan,** Kenya,* Mexico,** Nigeria,** Peru,* Philippines,* Senegal,* Sierra Leone,* Singapore,** Spain,* Sweden,** Trinidad and Tobago,* Uganda,* Union of Soviet Socialist Republics,** United Kingdom of Great Britain and Northern Ireland,** United Republic of Tanzania,** United States of America* and Yugoslavia.*

5. With the exception of the Central African Republic, Senegal, Trinidad and Tobago and Uganda, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States: Argentina, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Colombia, Côte d'Ivoire, Democratic People's Republic of Korea, Dominican Republic, Finland, Greece, Guinea, Holy See, Indonesia, Iran (Islamic Republic of), Kuwait, Lebanon, Netherlands, Norway, Oman, Panama, Poland, Portugal, Republic of Korea, Romania, Switzerland, Thailand, Ukrainian Soviet Socialist Republic, Venezuela and Zaire.

7. The following international organizations were represented by observers:

(a) *United Nations Secretariat*

Economic Commission for Europe (ECE)
United Nations Conference on Trade and Development (UNCTAD)
United Nations Industrial Development Organization (UNIDO)

* * *

International Trade Centre (UNCTAD/GATT)

(b) *Intergovernmental organizations*

Asian-African Legal Consultative Committee
Bank for International Settlements
Commission of the European Communities
Council of Europe
Hague Conference on Private International Law
International Institute for the Unification of Private Law

(c) *Other international organizations*

Chartered Institute of Arbitrators
Inter-American Bar Association

*Term of office expires on the day before the opening of the regular session of the Commission in 1986.

**Term of office expires on the day before the opening of the regular session of the Commission in 1989.

[1]Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its thirty-fourth session on 9 November 1979 (decision 34/308) and 17 were elected by the Assembly at its thirty-seventh session on 15 November 1982 (decision 37/308). Pursuant to resolution 31/99 of 15 December 1976, the term of those members elected by the Assembly at its thirty-fourth session will expire on the last day prior to the opening of the nineteenth regular annual session of the Commission in 1986, while the term of those members elected by the Assembly at its thirty-seventh session will expire on the last day prior to the opening of the twenty-second regular annual session of the Commission in 1989.

Inter-American Commercial Arbitration Commission
International Bar Association
International Chamber of Commerce
International Council for Commercial Arbitration
International Federation of Consulting Engineers
Regional Centre for Commercial Arbitration, Cairo

C. *Election of officers*

8. The Commission elected the following officers:[2]

Chairman:	R. Loewe (Austria)
Vice-Chairmen:	L. G. Paes de Barros Leaes (Brazil) I. Sźasz (Hungary) H. Z. Tang (China)
Rapporteur:	E. E. E. Mtango (United Republic of Tanzania)

D. *Agenda*

9. The agenda of the session, as adopted by the Commission at its 305th meeting on 3 June 1985, was as follows:

1. Opening of the session.
2. Election of officers.
3. Adoption of the agenda.
4. International commercial arbitration.
5. International payments.
6. New international economic order: industrial contracts.
7. Operators of transport terminals.
8. Co-ordination of work.
9. Status of conventions.
10. Dissemination of decisions concerning UNCITRAL legal texts and uniform interpretation of such texts.
11. Training and assistance.
12. General Assembly resolution on the work of the Commission.
13. Future work.
14. Other business.
15. Adoption of the report of the Commission.

E. *Adoption of the report*

10. The Commission adopted the present report at its 333rd and 334th meetings, on 21 June 1985, by consensus.

[2]The elections took place at the 305th and 308th meetings, on 3 and 4 June 1985. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see report of the United Nations Commission on International Trade Law on the work of its first session, *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (*Yearbook 1968-1970*, part two, I, A, para. 14)).

Chapter II. International commercial arbitration: draft model law on international commercial arbitration[3]

A. *Introduction*

11. The Commission, at its fourteenth session, decided to entrust the Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration.[4] The Working Group carried out its task at its third, fourth, fifth, sixth and seventh sessions.[5] The Working Group completed its work by adopting the draft text of a model law on international commercial arbitration at the close of the seventh session,[6] after a drafting group had established corresponding language versions in the six languages of the Commission.

12. The Commission, at its seventeenth session, requested the Secretary-General to transmit the draft text to all Governments and interested international organizations for their comments and requested the secretariat to prepare an analytical compilation of the comments received. The Commission also requested the secretariat to submit to the eighteenth session of the Commission a commentary on the draft text.[7]

13. At its current session, the Commission had before it a report of the Secretary-General containing an analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration (A/CN.9/263 and Add. 1 and 2) and a report of the Secretary-General containing an analytical commentary on the draft text (A/CN.9/264).

B. *General observations on the draft text of a model law on international commercial arbitration*

14. The Commission reaffirmed its appreciation to the Working Group on International Contract Practices for having elaborated the draft text of a model law on international commercial arbitration, which was in general favourably received and regarded as an excellent basis for the deliberations of the Commission.

15. It was stated that the paramount consideration in reviewing and revising the draft text should be the efficient functioning of international commercial arbi-

[3]The Commission considered this subject at its 305th to 333rd meetings, on 3 to 21 June 1985. Summary records of those meetings are contained in A/CN.9/SR.305-333.

[4]Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 70.

[5]Reports on the work of those sessions are contained in A/CN.9/216, A/CN.9/232, A/CN.9/233, A/CN.9/245 and A/CN.9/246.

[6]The draft text of a model law on international commercial arbitration is contained in the annex to A/CN.9/246.

[7]Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth session, Supplement No. 17* (A/39/17), para. 101.

tration. To that end, due account must be taken of the needs of those who in day-to-day practice would use the text and whom it was ultimately intended to serve.

16. As regards the future form of the text to be adopted, the Commission decided to maintain the working assumption of the Working Group, according to which the text would be adopted and recommended in the form of a model law and not in that of a convention, subject to possible review of that decision at the end of its deliberations on the substance of the draft text.

C. *Discussion on individual articles of the draft text*

CHAPTER I. GENERAL PROVISIONS

*Article 1. Scope of application**

17. The text of article 1 as considered by the Commission was as follows:

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

"(2) An arbitration is international if:

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

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

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

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

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

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

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

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

Substantive scope of application: international commercial arbitration

18. While some concern was expressed about restricting the substantive scope of application to international commercial matters, the Commission was agreed that the draft text should be geared to and cover only international commercial arbitration.

The term "commercial"

19. Divergent views were expressed as to the appropriateness of the footnote accompanying paragraph (1) as regards its form as well as its content, although it was generally agreed that the term "commercial" should be given a wide interpretation. Under one view, the footnote should be deleted since in many legal systems, in particular those which did not use the technique of a footnote, it would be without legal value. Instead, an attempt should be made to define the term "commercial" in the body of the law itself. Such a definition might, for example, be based on a shortened version of the text contained in the footnote or by a reference in article 1 (1) to disputes arising from trade or commerce. An alternative suggestion was to present the guideline for interpretation, contained in the footnote, in a commentary or in the report on the proceedings.

20. The prevailing view was that the footnote should be retained, though possibly with certain modifications. It was realized that no generally acceptable definition had been found to date and that any definition would entail certain risks. It was felt that the footnote, despite its uncertain legal effect, could provide useful guidance in interpretation, at least to the drafters of any national enactment of the model law.

21. A number of modifications were proposed to the text of the footnote, whether the text would be retained in a footnote or incorporated into the body of the law itself. One proposal was to clarify that, in line with article 7 (1), non-contractual relationships were included, since the term "transaction" might lead to the opposite result. Other proposals were to add to the list of examples such commercial activities as services and processing as well as agreements on international economic co-operation.

22. In view of the fact that certain national laws of civil law tradition drew the line between commercial and civil transactions according to whether or not the parties involved were commercial persons (merchants), there was support for the proposal to state in the opening sentence that the qualification of a relationship as commercial did not depend on the nature or character of the parties. That proposal was objected to on the ground that such wording might be construed as touching upon the sensitive issue of State immunity. The Commission was agreed that there was no intention to deal with that issue in the Model Law and that, if the proposal were to be accepted, it would have to be made clear that rules on State immunity were not affected. Another concern was that the illustrative list of commercial relationships could be construed as

meaning in positive terms that any dispute arising therefrom would be capable of settlement by arbitration. As to a decision relating to that concern, see below, para. 29.

23. The Commission established an *ad hoc* working party composed of the representatives of China, Hungary and the United States and requested it to prepare, in the light of the above discussion and proposals, a revised version of paragraph (1) and the accompanying footnote for consideration by the Commission.

24. The *ad hoc* working party suggested replacing, in article 1 (1), the words "international commercial** arbitration" by the words "international arbitration in commercial** matters, including services and other economic relations". It also suggested revising the opening part of the footnote as follows: "**The term 'commercial' should be given a wide interpretation so as to include, but not be limited to, the following: any trade transaction for the supply or exchange of goods or services; distribution agreement; . . .".

25. It was noted that the proposed text did not use the term "international commercial arbitration", which had come to be a well-known term in the field. After discussion, the Commission decided that, in spite of the acknowledged difficulties, it would be better to retain the original text of article 1 (1) and to revise the footnote as follows: "**The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply of goods or services; distribution agreement; . . .".

26. The Commission was of the view that with the revision of the footnote it was sufficiently clear that the qualification of a relationship as commercial did not depend on the nature of the parties. Therefore, it was felt that it was not necessary to express it explicitly in the text either of article 1 (1) or of the footnote. The Commission was also of the view that the provision as drafted did not touch on any rule on sovereign immunity.

Paragraph (2): "international"

27. The Commission adopted subparagraph (*a*) and was agreed that the provision would cover the bulk of cases encountered in international commercial arbitration.

28. Divergent views were expressed as to the appropriateness of retaining subparagraph (*b*) (i). Under one view, the provision should be deleted for essentially two reasons. One reason was that there was no justification to qualify a purely domestic relationship as international simply because a foreign place of arbitration was chosen. Party autonomy was unacceptable here since it would enable parties to evade mandatory provisions of law, including those providing for exclusive court jurisdiction, except where recognition or enforcement of the "foreign" award was later sought in that State. The other reason was that the provision covered not only the case where the place of arbitration was determined in the arbitration agreement but also the case where it was determined only later, pursuant to the agreement, for example by an arbitral institution or the arbitral tribunal. It was felt that the latter case created uncertainty as to what was the applicable law and as to the availability of court services before the place of arbitration was determined. Under another view, only the latter reason was convincing and, therefore, subparagraph (*b*) (i) should be maintained without the words "or pursuant to".

29. The prevailing view was to retain the entire provision of subparagraph (*b*) (i). It was noted that the provision only addressed the question of internationality, i.e. whether the (Model) Law for international cases or the same State's law for domestic cases applied. It was thought that the principle of party autonomy should extend to that question. The Commission, in adopting that view, was agreed, however, that the concern relating to non-arbitrability, which had also been raised in a more general sense and in particular in the discussion on paragraph (1) and the accompanying footnote (above, para. 22), should be met by a clarifying statement in a separate paragraph of article 1 along the following lines: "This Law does not affect any other law of this State which provides that a certain dispute or subject-matter is not capable of settlement by arbitration."

30. As regards subparagraphs (*b*) (ii) and (*c*), the Commission was agreed that their respective scope was not easily determined in a clear manner. In particular, subparagraph (*c*) was regarded as unworkable due to its vague ambit. While there was some support for maintaining the provision, though possibly in some modified form, the Commission, after deliberation, decided to delete subparagraph (*c*).

31. However, in order to balance the reduction in scope due to that deletion, it was proposed to add an opting-in provision, either only to subparagraph (*b*) (ii) or as a replacement for subparagraph (*c*). It was thought that such a provision provided a more precise test than the one set forth in subparagraph (*c*). In response to that proposal, a concern was expressed that such a subjective criterion would enable parties freely to label as international a purely domestic case. Others, however, considered that any such concern was outweighed by the advantages of a system that provided certainty to the parties that their transaction would be recognized as international, a characterization that should properly fall within the scope of party autonomy. In response to that consideration the view was expressed that it was inconceivable that any State which deemed it necessary to retain a special law for domestic cases would want to allow parties to evade that system.

32. The Commission requested an *ad hoc* working party, composed of the representatives of Australia, Finland, India, the Union of Soviet Socialist Republics and the United States, to prepare a draft of an opting-in

provision and of a provision to implement the proposal on non-arbitrability. The working party was also requested to prepare, for consideration by the Commission, a draft provision which would express the character of the Model Law as a *lex specialis* with regard to all matters governed by the Law.

33. As to the opting-in provision, the *ad hoc* working party suggested replacing the wording in subparagraph (*c*) by the following new provision: "(*c*) The parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country." While the concern previously expressed above in paragraph 31 was restated, it was pointed out that courts were unlikely to give effect to such an agreement in a purely domestic case. After discussion, the Commission adopted the suggested provision.

34. As to the provision on non-arbitrability, the *ad hoc* working party suggested adding the following new paragraph to article 1: "This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law." The Commission adopted the suggested paragraph.

35. As to the provision expressing the *lex specialis* character of the Model Law, the *ad hoc* working party suggested adding the following new paragraph to article 1: "This Law prevails over other provisions of law of this State as to matters governed by this Law." The Commission decided not to include the suggested formulation in article 1 because of a concern that the proposed provision linked a somewhat imprecise delimitation of "matters governed by this Law" with a categorical rule. However, it was understood that, since the Model Law was designed to establish a special legal régime, in case of conflict, its provisions, rather than those applicable to arbitrations in general, would apply to international commercial arbitrations.

Paragraph (3)

36. The Commission adopted the provision, subject to the deletion of the word "relevant" and to clarifying that the second sentence did not relate to the first sentence but to paragraph (2).

* * *

Article 2.
Definitions and rules of interpretation

37. The text of article 2 as considered by the Commission was as follows:

"For the purposes of this Law:

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

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

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

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

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

Subparagraphs (a), (b) and (d)

38. The Commission adopted subparagraphs (*a*), (*b*) and (*d*) of the article.

Subparagraph (c)

39. During the discussion on subparagraph (*c*), a suggestion was made to express by an appropriate reservation that the freedom of the parties to authorize a third person to make a certain determination did not extend to the determination of the rules of law applicable to the substance of the dispute, as referred to in article 28 (1). The Commission postponed consideration of the suggestion until the discussion of article 28.

40. In accordance with the view of the Commission expressed during the subsequent discussion on article 28 that the Model Law should not deal with the possibility that parties might authorize a third person to determine rules of law applicable to the substance of the dispute (see below, para. 242), the Commission decided to modify subparagraph (*c*) along the following lines: "(*c*) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination".

Subparagraph (e)

41. In respect of subparagraph (*e*), several suggestions were made for adding certain procedural rules, in particular as regards the case where the addressee's place of business, habitual residence or mailing address was not to be found. One suggestion, which the Commission adopted, was to clarify that in such case the mailing by registered letter sufficed. The Commission did not accept a suggestion to lay down certain criteria for determining what constituted a reasonable inquiry. Another submission, with which the Commission agreed, was that the expression "last-known" referred to the knowledge of the sender.

42. In order to reduce the risk that the provision might operate to the detriment of a party who was unaware of any proceedings against him, it was suggested that some sort of advertising should be required, a certain period of time should be established for the fictitious receipt to become effective or that some possibility for the respondent to resort to a court should be envisaged. Another suggestion was not to retain the provision and to rely solely on the requirements and safeguards of the applicable procedural law. Yet another suggestion was that the provision, since it went clearly beyond a mere definition or rule of interpretation, should be placed in a separate article of the Model Law.

43. The Commission, after deliberation, was agreed that the provision should not set forth excessively detailed procedural requirements which could prove to be an obstacle to incorporating the Model Law in national legal systems. The Commission entrusted an *ad hoc* working party, composed of the representatives of Czechoslovakia, Iraq and Mexico, to prepare a modified version of the provision in the light of the above discussion.

44. The *ad hoc* working party suggested placing the provision in a new article 3 in the following modified form:

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

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

45. The Commission adopted the suggested provision as new article 3. It was noted that the reason for placing the provision in a separate article was that it contained a rule of procedure and neither a definition nor a rule of interpretation. It was also noted that the reason for placing the last sentence in a separate paragraph was to make clear that the sentence referred to the entire provision. As to the understanding of the Commission that new article 3 on receipt of communications did not apply to court proceedings or measures but only to the arbitral proceedings proper, see below, para. 106.

Suggestions for additional definitions

46. The Commission adopted the proposal to express in article 2, possibly before the definition of "arbitral tribunal" in subparagraph (*a*), that the term "arbitration" meant any arbitration whether or not administered by a permanent arbitral institution.

47. The Commission did not accept a proposal to move the definition of "arbitration agreement", set forth in article 7 (1), to article 2.

48. It was suggested that the term "award" should be defined in the Model Law. Such a definition, which would be useful for all provisions where the term was used, could also clarify the various possible types of awards, such as final, partial, interim or interlocutory awards.

49. The Commission was agreed that, while a definition was desirable, a more modest approach should be taken in view of the considerable difficulty of finding an acceptable definition and in view of the fact that other legal texts on arbitration, e.g. the 1958 New York Convention and many national laws, did not define the term. It was agreed to determine in the context of article 34 and any other provision where such determination was needed (e.g. articles 31 and 33) which types of decisions were covered by those articles.

50. As to a decision to add a new subparagraph (*f*) in respect of counter-claims, see below, para. 327.

* * *

Article 4.
Waiver of right to object

51. The text of article 4 as considered by the Commission was as follows:

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

52. Divergent views were expressed as to whether article 4 should be retained. Under one view, the provision was too vague and possibly in conflict with relevant provisions of national law and, as regards its effect, too rigid in that it might operate unfairly against a party. For those reasons, the question of waiver or estoppel should either be left entirely to the applicable national law or, if it was deemed absolutely necessary to have a waiver rule in regard to certain provisions, the question should be addressed only in the individual articles of the Model Law concerning those provisions.

53. The prevailing view, which the Commission adopted, was that a general waiver rule along the lines of article 4 should be maintained, since such a rule would help the arbitral process function efficiently and in good faith and would help achieve greater uniformity in the matter.

54. As regards the contents of article 4, various suggestions were made. It was suggested that, as to the imputed knowledge of a party, the wording "or ought to have known" should either be deleted or be made more precise and less rigid by requiring ordinary care or reasonable diligence. Noting that those words were not contained in the corresponding provision in the

UNCITRAL Arbitration Rules (article 30), the Commission decided to delete them since they might create more problems than they solved.

55. A suggestion was made to delete the reference to the non-mandatory provisions of law and the arbitration agreement. The Commission did not adopt the proposal since the remaining provision would be too vague and, since it would also cover non-compliance with mandatory provisions of law, it would be too rigid.

56. The view was expressed that the words "without delay" were too vague and too rigid. It was, therefore, proposed to establish instead a period of time or to soften the requirement by using wording such as "within reasonable time". It was noted, in that context, that the time element was important in view of the fact that a period of time as referred to in article 4 was not contained in any provision of the Model Law and was rarely contained in arbitration agreements. The Commission, after deliberation, decided to use the wording "without undue delay" instead of fixing a period of time, since no period of time could be appropriate in all cases.

57. As regards the effect of a waiver under article 4, the Commission was agreed that it was not limited to the arbitral proceedings but extended to subsequent court proceedings in the context of articles 34 and 36. It was noted, however, that where an arbitral tribunal had ruled that a party was deemed to have waived his right to object, the court could come to a different conclusion in its review of the arbitral procedure under article 34 or, provided the proceedings were conducted under the Model Law, article 36.

* * *

Article 5.
Scope of court intervention

58. The text of article 5 as considered by the Commission was as follows:

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

59. Divergent views were expressed as to the appropriateness of the provision. The discussion focused on two objections. The first objection was that the provision, which addressed an issue of fundamental practical importance, did not give a clear answer to the question whether in a given situation court intervention was available or excluded. The second objection was that the provision, read together with the few provisions of the Model Law which provided for court intervention, presented an unacceptably restrictive scope of judicial control and assistance.

60. In advancing the first objection, it was pointed out that in many cases it was not possible to know whether a matter was governed by the Law. If a particular matter was not expressly mentioned in the Law, it was possible that the drafters had considered the matter and decided that the Law should not cover it, that the drafters had considered the matter and decided not to give the court authority to intervene or that the drafters had failed to consider the matter at all. Especially since the parties, arbitral tribunals and courts who would be called upon to apply the Law in the future would not have easy access to the drafting history, they would often not know into which category a particular matter fell.

61. In response to that objection, it was pointed out that the problem was common to any *lex specialis* and, in fact, all texts for the unification of law. Since no such text was complete in every respect, what was not governed by it must be governed by the other rules of domestic law. Therefore, it was necessary, though admittedly often difficult, to determine the scope of coverage of the particular text. Yet, in the great majority of cases in which the question of court intervention became relevant, the answer could be found by using the normal rules of statutory interpretation, taking into account the principles underlying the text of the Model Law.

62. In advancing the second objection, it was emphasized that article 5 expressed an excessively restrictive view as to the desirability and appropriateness of court intervention during an arbitration. It was to the advantage of businessmen who engaged in international commercial arbitration to have access to the courts while the arbitration was still in process in order to stop an abuse of the arbitral procedure. Furthermore, a limitation of the authority of the courts to intervene in arbitral proceedings might constitute an unwarranted interference in the prerogatives of the judicial power, and might even be contrary to the constitution in some States. Finally, even if the authority of the court to intervene in supervision of an arbitration might have to be limited, the court should have a broader power to act in aid of the arbitration. It was suggested, as a possible means of softening the extremely rigid character of article 5, to give the parties to an arbitration the authority to agree on a more extensive degree of court supervision and assistance in their arbitration than was furnished by the Model Law.

63. In response to that second objection, it was pointed out that resort to intervention by a court during the arbitral proceedings was often used only as a delaying tactic and was more often a source of abuse of the arbitral proceedings than it was a protection against abuse. The purpose of article 5 was to achieve certainty as to the maximum extent of judicial intervention, including assistance, in international commercial arbitrations, by compelling the drafters to list in the (Model) Law on international commercial arbitration all instances of court intervention. Thus, if a need was felt for adding another such situation, it should be expressed in the Model Law. It was also recognized that, although the Commission might hope that States would adopt the Law as it was drafted, since it was a model law and not a convention, any State which might have constitutional problems could extend the scope of judicial intervention when it adopted the Law without violating any international obligation.

64. As regards the suggestion to enable parties to agree on a wider scope of court intervention, the question was raised as to whether the parties could be expected to draft an agreement on the point that would adequately deal with the problems. Moreover, the concern was expressed that institutional arbitration rules might include a provision extending the right of court intervention and that some parties who had agreed to the use of those rules might be subject to court intervention they had not expected.

65. The Commission, after deliberation, adopted the article in its current form.

* * *

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

66. The text of article 6 as considered by the Commission was as follows:

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

67. The Commission was agreed that article 6, by calling upon each State to designate a court for performing the functions of arbitration assistance and supervision referred to in the article, was useful and beneficial to international commercial arbitration. As a result of a subsequent decision to provide for instant court control over an arbitral tribunal's ruling that it had jurisdiction (see below, para. 161), a reference to article 16 (3) was included in article 6.

68. It was understood that a State was not compelled to designate merely one single court but was free to entrust a number of its courts or a certain category of its courts with performing those functions. That point could be made clear by adding to the words "the Court" the words "or the Courts".

69. It was also agreed that a State should not be compelled to designate a court in the terms of article (2) (*b*) for all the functions referred to in article 6 but should be free to entrust the functions envisaged in articles 11, 13 and 14 to an organ or authority outside its judicial system such as a chamber of commerce or an arbitral institution.

70. A suggestion was made to recognize party autonomy as regards the choice of the forum in those cases where more than one court was competent to perform the functions of arbitration assistance and supervision. Another suggestion was to resolve any possible positive conflict of court competence by according priority to the court first seized with the matter. The Commission did not accept those suggestions since, in so far as the choice of forum within a given State was concerned, the issue fell in the national domain of regulating the organization of and access to its courts and, in so far as the issue and possible conflict of the competence of courts in different States was concerned, it could not effectively be settled by a model law.

71. The Commission was agreed, however, that it was desirable to determine the instances in which the court or courts of a particular State which had adopted the Model Law would be competent to perform the functions referred to in article 6. It was noted that the question was directly related to the general matter of the territorial scope of application of the Model Law. The Commission, therefore, embarked on a discussion of that general matter.

Discussion on territorial scope of application

72. Divergent views were expressed as to whether the Model Law should expressly state its territorial scope of application and, if so, which connecting factor should be the determining criterion. Under one view, it was inappropriate to determine that issue in the Model Law since the territorial scope of application of the Law as adopted in a given State was either self-evident from the fact of its enactment or was to be determined by the particular State in accordance with its general policies in that regard, including its stance on conflict of laws and on court competence. The prevailing view, however, was that it was desirable to determine that issue in the Model Law in order to achieve a greater degree of harmony, thereby helping to reduce the conflict of laws as well as of court competence.

73. As regards the connecting factor which should determine the applicability of the (Model) Law in a given State, there was wide support for the so-called strict territorial criterion, according to which the Law would apply where the place of arbitration was in that State. In support of that view, it was pointed out that that criterion was used by the great majority of national laws and that, where national laws allowed parties to choose the procedural law of a State other than that where the arbitration took place, experience showed that parties in practice rarely made use of that faculty. The Model Law, by its liberal contents, further reduced the need for such choice of a "foreign" law in lieu of the (Model) Law of the place of arbitration; it was pointed out that the Model Law itself allowed the parties wide freedom in shaping the rules of the arbitral proceedings, including the faculty of agreeing on the procedural provisions of a "foreign" law so long as they did not conflict with the mandatory provisions of the Model Law.

74. Another view was that the place of arbitration should not be exclusive in the sense that parties would be precluded from choosing the law of another State as the law applicable to the arbitration procedure. A State which adopted the Model Law might wish to apply it also to those cases where parties had chosen the law of that State even though the place of arbitration was in a different State. It was recognized that such choice might be subject to certain restrictions, in particular as regards fundamental notions of justice, reasons of public policy and rules of court competence intrinsic to the legal and judicial system of each State.

75. The Commission was agreed that the basic criterion for the territorial scope of application, whatever its precise final wording, would not govern the court functions envisaged in articles 8 (1), 9, 35 and 36, which were entrusted to the courts of the particular State adopting the Model Law irrespective of where the place of arbitration was located or under which law the arbitration was conducted.

76. As regards the court functions referred to in article 6, i.e. those envisaged in articles 11 (3), 11 (4), 13 (3), 14 and 34 (2), it was agreed that a decision should be made in the context of the discussion on each of those articles whether the basic criterion would be appropriate. In that connection, it was suggested that an extension of the territorial scope of application might be desirable with regard to the court functions envisaged in articles 11, 13 and 14 so as to make available the assistance of the court specified in article 6 even before the place of arbitration or other general connecting factor for the applicability of the (Model) Law of a particular State had been established. Various suggestions were made as to which should be the special connecting factor for that purpose: (*a*) defendant has place of business in this State; (*b*) claimant has place of business in this State; (*c*) claimant or defendant has place of business in this State; (*d*) arbitration agreement was concluded in this State; (*e*) for certain instances: place of residence of arbitrator concerned is in this State.

77. While some doubts were expressed as to the practical need for and feasibility of such an extension, others felt that such a need existed in many cases. The Commission was agreed that the question should be decided in the context of its discussion of the relevant articles (i.e. articles 11, 13 and 14).

78. The Commission requested the secretariat to prepare, on the basis of the above discussion, draft provisions on the territorial scope of application of the Model Law in general, including suggestions as to possible exceptions to the general scope.

79. The secretariat prepared the following draft of a new paragraph (1 *bis*) of article 1 for consideration by the Commission:

"(1 *bis*) The provisions of this Law apply if the place of arbitration is in the territory of this State. However, those provisions on functions of courts of this State set forth in articles 8, 9, 35 and 36 apply irrespective of whether the place of arbitration is in the territory of this State; those provisions on functions of courts of this State set forth in articles 11, 13 and 14 apply even where the place of arbitration is not yet determined, provided that the respondent [or the claimant] has his place of business in the territory of this State."

The secretariat added the suggestion that, if the Commission were to decide that the court assistance envisaged in articles 11, 13 and 14 need not be made available in those cases where the place of arbitration was not yet determined, the following short version of paragraph (1 *bis*) might be sufficient:

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

80. In discussing the above proposal, the Commission decided that, for reasons stated in support of the strict territorial criterion (see above, para. 73), the applicability of the Model Law should depend exclusively on the place of arbitration as defined in the Model Law. As to the question of extending the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined, some support was expressed for such an extension since it was important to provide court assistance in the cases where parties could not reach an agreement on the place of arbitration. However, the prevailing view was that the Model Law should not deal with court assistance to be available before the determination of the place of arbitration. In support of the prevailing view it was stated that neither the place of business of the claimant nor the place of business of the defendant provided an entirely satisfactory connecting factor for the purpose of determining whether court assistance should be provided. Moreover, a provision of that kind in the Model Law might interfere with other rules on court jurisdiction. It was also pointed out that even without such an extension of the applicability of the Model Law a party might be able to obtain court assistance under laws other than the Model Law. Previous discussion as to whether the applicability of articles 11, 13 and 14 should be extended to the time before the place of arbitration was determined is reported below, paras. 107-110 (article 11), para. 133 (article 13), para. 143 (article 14) and para. 148 (article 15 with reference to article 11).

81. The Commission agreed that a provision implementing that decision, which had to be included in article 1, should be formulated along the following lines: "The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State."

* * *

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

82. The text of article 7 as considered by the Commission was as follows:

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

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

reference is such as to make that clause part of the contract."

Paragraph (1)

83. The Commission adopted the paragraph; it referred to its Drafting Group a suggestion to replace the words "all or certain disputes which have arisen or which may arise" by the words "any existing or future dispute".

Paragraph (2)

84. The Commission noted that paragraph (2) did not cover cases, encountered in practice, where one of the parties did not declare in writing his consent to arbitration. Practical examples, which were recognized by some national laws as constituting valid arbitration agreements, included the arbitration clause in a bill of lading, in certain commodity contracts and reinsurance contracts which customarily become binding on a party by oral acceptance, and in other contracts which were concluded by a written offer and an oral acceptance or by an oral offer and a written confirmation.

85. Various suggestions were made with a view to expanding the scope of paragraph (2) in order to accommodate all or at least some such cases. One suggestion was to adopt the solution found in the 1978 version of article 17 of the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, which referred to agreements "in writing or, in international trade or commerce, in a form which accords with practices in that trade or commerce of which the parties are or ought to have been aware". While there was considerable support for that suggestion, which was said to reflect the current trend towards a more liberal approach to the question of form, the Commission, after deliberation, did not accept it. It was felt that a more modest approach was appropriate in the different context of validity as to form of arbitration agreements, because the reference to trade usages was too vague to ensure uniform interpretation and entailed the possible risk that a consent to arbitration would be imposed upon a party unfamiliar with the customs prevailing in certain trades or regions.

86. Another suggestion was to add at the end of paragraph (2) the following sentence: "If a bill of lading or another document, signed by only one of the parties, gives sufficient evidence of a contract, an arbitration clause in the document, or a reference in the document to another document containing an arbitration clause, shall be considered to be an agreement in writing." While considerable support was expressed for the suggestion, the Commission, after deliberation, did not adopt the additional wording because it appeared unlikely that many States would be prepared to accept the concept of an arbitration agreement which, although contained in a document, was not signed or at least consented to in writing by both of the parties. It was also pointed out that there might be difficulties with regard to the recognition and enforcement under the 1958 New York Convention of awards based on such agreements.

87. A more limited suggestion was to include those cases where parties who had not concluded an arbitration agreement in the form required under paragraph (2) nonetheless participated in arbitral proceedings and where that fact, whether viewed as a submission or as the conclusion of an oral agreement, was recorded in the minutes of the arbitral tribunal, even though the signatures of the parties might be lacking. It was pointed out in support of the suggested extension that, although awards made pursuant to arbitration agreements evidenced in that manner would possibly be denied enforcement under the 1958 New York Convention, adoption of that extension in the Model Law might eventually lead to an interpretation of article II (2) of that Convention whereby arbitration agreements evidenced in the minutes of arbitral tribunals would be acceptable. It was noted that, if the suggestion were adopted, the condition of recognition and enforcement laid down in article 35 (2) of the Model Law, i.e. supply of original or certified copy of the arbitration agreement referred to in article 7, might have to be modified to accommodate that instance of submission (A/CN.9/264, note 91). The Commission, after deliberation, decided to extend the scope of paragraph (2) along the lines of the suggestion.

88. To implement that decision the Commission decided to add to the end of the second sentence of article 7 (2) such wording as "or in an exchange of statements of claim and defence in which one party has alleged and the other party has not denied the existence of an agreement".

* * *

Article 8.
Arbitration agreement and substantive claim before court

89. The text of article 8 as considered by the Commission was as follows:

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

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

90. It was suggested that paragraph (2) could be read to apply only if the arbitral proceedings had commenced prior to the commencement of the judicial proceedings. The Commission agreed that the text of paragraph (2) should be amended so as to make clear that a party was not precluded from initiating arbitral proceedings by the fact that the matter had been brought before a court.

91. There was a divergence of opinion in the Commission as to whether the text should be amended so as to preclude the possibility that proceedings might go

forward concurrently in both the arbitral tribunal and the court. Under one view, if the arbitral proceedings had already commenced, the court should normally postpone its ruling on the arbitral tribunal's jurisdiction until the award was made. That would prevent the protraction of arbitral proceedings and would be in line with article VI (3) of the European Convention on International Commercial Arbitration (Geneva, 1961). Under another view, once the issue as to whether the arbitration agreement was null and void was raised before the court, priority should be accorded to the court proceedings by recognizing a power in the courts to stay the arbitral proceedings or, at least, by precluding the arbitral tribunal from rendering an award.

92. The prevailing view was to leave the current text of paragraph (2) unchanged on that point. Permitting the arbitral tribunal to continue the proceedings, including the making of an award, while the issue of its jurisdiction was before the court contributed to a prompt resolution of the arbitration. It was pointed out that expenses would be saved by awaiting the decision of the court in those cases where the court later ruled against the jurisdiction of the arbitral tribunal. However, it was for that reason not recommendable to provide for a postponement of the court's ruling on the jurisdiction of the arbitral tribunal. Furthermore, where the arbitral tribunal had serious doubts as to its jurisdiction, it would probably either proceed to a final determination of that issue in a ruling on a plea referred to in article 16 (2) or, in exercising the discretion accorded to it by article 8 (2), await the decision of the court before proceeding with the arbitration.

93. It was noted that objections to the existence of a valid arbitration agreement were referred to in articles 8 (1), 16 (2), 34 (2) (*a*) (i) and 36 (1) (*a*) (i), which apparently allowed a party wishing to obstruct or delay the arbitration to raise the same objection at four different stages. The Commission was agreed that, while it was not possible in a model law to solve potential conflicts of competence between courts of different States or between any such court and an arbitral tribunal, when considering those articles account should be taken of the need for inner consistency with a view to reducing the effects of possible dilatory tactics.

94. The Commission, after deliberation, adopted article 8, subject to modifying paragraph (2) along the following lines: "The fact that an action is brought before a court as referred to in paragraph (1) of this article does not preclude a party from initiating arbitral proceedings or, if arbitral proceedings have already commenced, the arbitral tribunal from continuing the proceedings [, including the making of an award,] while the issue of [its] jurisdiction is pending with the court."

* * *

Article 9.
Arbitration agreement and interim measures by court

95. The text of article 9 as considered by the Commission was as follows:

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

96. The Commission adopted the policy underlying the article and confirmed the view that the range of measures covered by the provision was a wide one and included, in particular, pre-award attachments. It was pointed out that the interim measures compatible with an arbitration agreement might, for example, also relate to the protection of trade secrets and proprietary information. It was understood that article 9 itself did not regulate which interim measures of protection were available to a party. It merely expressed the principle that a request for any court measure available under a given legal system and the granting of such measure by a court of "this State" was compatible with the fact that the parties had agreed to settle their dispute by arbitration.

97. That understanding also provided the answer to the question whether article 9 would prevent parties from excluding in the agreement resort to courts for all or certain interim measures. While the article should not be read as precluding such exclusion agreement, it should also not be read as positively giving effect to any such exclusion agreement. It was agreed that the correct understanding of article 9 might be made clearer by using the term "an arbitration agreement" instead of the term "the arbitration agreement". The Commission adopted article 9 subject to that modification.

* * *

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10.
Number of arbitrators

98. The text of article 10 as considered by the Commission was as follows:

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

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

99. The Commission adopted the article.

* * *

Article 11.
Appointment of arbitrators

100. The text of article 11 as considered by the Commission was as follows:

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

"(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to

the provisions of paragraphs (4) and (5) of this article.

"(3) Failing such agreement,

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

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

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

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

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

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

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

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

Paragraphs (1) and (2)

101. The Commission adopted those paragraphs. In that connection, it was noted that the Model Law did not contain an express provision to the effect that the arbitral tribunal had to be composed of impartial and independent members. It was understood, however, that that agreed principle was sufficiently clear from other provisions of the Model Law, in particular article 12, which set forth the grounds for challenge.

Paragraph (3)

102. The Commission adopted subparagraph (*a*), subject to replacing the words "within thirty days after having been requested to do so by the other party" by such words as "within thirty days of receipt of such request from the other party".

103. A suggestion was made to lay down in subparagraph (*b*) a time-limit, as was done in respect of the provision of subparagraph (*a*). The Commission was agreed that no such time-limit was required in subparagraph (*b*) since the persons expected to agree were the parties themselves whose inability to reach an agreement became evident by a request of one of them to the Court. Accordingly, subparagraph (*b*) was adopted in its current form.

Paragraph (4)

104. It was noted that the term "appointing authority" used in subparagraph (*c*) was not defined in the Model Law. The Commission was agreed that the term should be replaced by appropriate wording and the subparagraph be revised along the following lines: "(*c*) a third party, including an institution, entrusted by the parties with a function in connection with the appointment of arbitrators fails to perform this function". It was noted that such a modification made it unnecessary to include in article 2 a definition of the term "appointing authority".

Paragraph (5) and suggestions relating to functions of Court

105. The Commission adopted paragraph (5).

106. In respect of the functions of the Court envisaged under paragraphs (3), (4) and (5), an observation was made based on the concern which had earlier been expressed in the context of article 2 (*e*) (see above, para. 42). It was observed that the provisions of article 11 dealing with the functions of the Court, in particular if read together with the provisions of the Model Law on receipt of written communications, could be interpreted as precluding the Court from applying domestic procedural rules which, by requiring, for instance, a certain form of service or advertising, would help to reduce the risk of a party being caught in arbitral proceedings without his knowledge. The Commission decided to clarify that the provision on receipt of communications did not apply to court proceedings or measures but only to the arbitral proceedings proper, including any steps in the appointment process by a party, an arbitrator or an appointing authority.

107. As agreed in the context of the discussion on the territorial scope of application and any possible exceptions thereto (see above, paras. 76-77), the Commission considered whether court assistance in the appointment process, as provided for in article 11 (3), 11 (4) and 11 (5), should be made available even before the place of arbitration was determined, since it was the determination of the place of arbitration which triggered the general applicability of the (Model) Law in a State that had enacted it.

108. Under one view, the Model Law need not contain any such provision since it was difficult to find an acceptable connecting factor and, above all, there was no pressing need in view of the infrequency of cases where parties had agreed neither on a place of arbitration nor on an appointing authority and since even in such rare cases the existing applicable law or

laws might come to their assistance with a coherent system.

109. The prevailing view, however, was that a practical problem existed and the Model Law should provide for such assistance in order to facilitate international commercial arbitration by enabling the diligent party to secure the constitution of the arbitral tribunal. As to which should be the connecting factor, the following proposals were made: (*a*) place of business of defendant, (*b*) place of business of claimant, (*c*) place of business of either claimant or defendant.

110. The Commission, after deliberation, tentatively concluded that a State adopting the Model Law should make available the services of its Court referred to in article 6 for appointing an arbitrator under article 11 in those cases where the defendant had his place of business in "this State" and, possibly, in those cases where the claimant had his place of business in "this State", provided that the court in the defendant's country did not perform that function.

111. In the subsequent discussion concerning the territorial scope of application of the Model Law, the Commission decided not to extend the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined. (That discussion is reported above, paras. 79-81.)

* * *

Article 12. Grounds for challenge

112. The text of article 12 as considered by the Commission was as follows:

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

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

Paragraph (1)

113. The Commission adopted paragraph (1).

Paragraph (2)

114. It was noted that parties sometimes agreed that arbitrators had to have certain professional or trade qualifications and it was proposed that the Model Law should respect that aspect of party autonomy by including in paragraph (2) a reference to any additional grounds for challenge on which the parties might agree. While some doubt was expressed as to the necessity for making such an addition to article 12, the Commission decided to adopt the proposal and requested an *ad hoc* working party, composed of the representatives of Algeria, India and the United States, to prepare a draft reflecting the decision.

115. On the basis of a proposal by the *ad hoc* working party, the Commission adopted the following amended wording of the first sentence of article 12 (2): "An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties."

116. Divergent views were expressed as to the word "only" in the first sentence of paragraph (2). Under one view, the word should be deleted because there might be grounds for challenge which would not necessarily be covered by the words "impartiality or independence". By way of example, it was suggested that, without calling into question the integrity or impartiality of an arbitrator, his nationality might be a sound ground for challenge in view of the policies followed by his Government.

117. Under another view, the word "only" was useful in that it excluded other grounds for challenge not dealt with in the model law. It was pointed out that in most cases of the type falling within the example cited above the circumstances would in any event give rise to justifiable doubts as to the impartiality or independence of the arbitrator.

118. Under yet another view, the first sentence of paragraph (2) should be interpreted as limiting the grounds for challenge to the grounds provided in the model law even without the word "only". However, in order to make that point clear, some proponents of that view suggested the retention of the word "only".

119. The Commission decided to retain the word "only" in the first sentence of paragraph (2). In doing so, the Commission observed that the corresponding provision of article 10 (1) of the UNCITRAL Arbitration Rules, on which the discussed provision of the Model Law was modelled, did not contain the word "only". However, it was suggested that the UNCITRAL Arbitration Rules as contractual rules could not affect the application of any other grounds for challenge provided in mandatory rules in the applicable law, whereas it might be desirable that the Model Law prevented such other grounds for challenge from being applied in international commercial arbitration.

* * *

Article 13.
Challenge procedure

120. The text of article 13 as considered by the Commission was as follows:

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

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

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

General discussion on appropriateness of court control during arbitral proceedings

121. The Commission, before considering the provisions of article 13 in detail, embarked on a general discussion on the appropriateness of court control during arbitral proceedings. Divergent views were expressed on that matter.

122. Under one view, the court control envisaged under article 13 (3) was inappropriate and should at least be limited, in order to reduce the risk of dilatory tactics. One suggestion was to delete the provision, thus excluding court control during the arbitral proceedings, or to restrict its application considerably, for example, to those rare cases where the sole arbitrator or a majority of the arbitrators were challenged. Another suggestion was to replace in paragraph (1) the words "subject to the provisions of paragraph (3) of this article" by the words "and the decision reached pursuant to that procedure shall be final". The thrust of the suggestion was to allow the court control envisaged in paragraph (3) only if the parties had not agreed on a procedure for challenges and, in particular, not entrusted an institution or third person with deciding on the challenge. Yet another suggestion was to let the arbitral tribunal decide whether court control should be allowed immediately or only after the award was made. The suggestion was advanced as a possible solution to the problem that under article 13 a challenged arbitrator appeared to have full freedom to withdraw and that as a result of such withdrawal the party who appointed the arbitrator might be adversely affected by additional costs and delay.

123. Under another view, the weight accorded to court intervention in article 13 (3) was not sufficient in that the provision empowered the arbitral tribunal, including the challenged arbitrator, to continue the arbitral proceedings irrespective of the fact that the challenge was pending with the Court. It was stated in support of the view that such continuation would cause unnecessary waste of time and costs if the court later sustained the challenge. At least, it should be expressed in article 13 that the arbitral tribunal was precluded from continuing the proceedings if the Court ordered a stay of the arbitral proceedings.

124. The prevailing view, however, was to retain the system adopted in article 13 since it struck an appropriate balance between the need for preventing obstruction or dilatory tactics and the desire of avoiding unnecessary waste of time and money.

125. The Commission, after deliberation, adopted the prevailing view.

Paragraph (1)

126. The Commission adopted the provision.

Paragraph (2)

127. The Commission did not adopt a suggestion to provide in paragraph (2) that the mandate of a sole arbitrator who was challenged but did not withdraw from his office terminated on account of the challenge.

128. The Commission did not adopt a suggestion to exclude the challenged arbitrator from the deliberations and the decision of the arbitral tribunal on the challenge.

129. It was noted that the challenge procedure of paragraph (2) was applicable to a sole arbitrator as well as to the challenge of one or more arbitrators of a multi-arbitrator tribunal. The refusal of a sole arbitrator to resign would constitute a rejection of the challenge, making available resort to the court under paragraph (3).

130. The Commission adopted paragraph (2), subject to certain drafting suggestions which the Commission referred to the Drafting Group.

Paragraph (3)

131. Subsequently, the Commission decided to align article 13 (3) to the modified version of article 16 (3) (see below, para. 161) and replaced the period of time of fifteen days by thirty days.

132. As regards the words "which decision shall be final", the Commission was agreed that the wording was intended to mean that no appeal was available against that decision and that that understanding might be made clear by appropriate wording. Subject to those modifications, paragraph (3) was adopted by the Commission.

133. The Commission discussed whether the Model Law should provide for Court assistance for the functions envisaged in article 13 (3) even before the place of arbitration had been determined. The Commission was agreed that the Model Law could not effectively confer international competence on the court of one State to the exclusion of the competence of another State. What the Model Law could do was to

describe those cases, by using connecting factors such as the place of business of the defendant or of the claimant, in which the particular State would render the Court assistance envisaged under article 13 (3). It was pointed out, however, that there might be less need for such assistance than in the appointment process since court control on a challenge was either provided in the applicable arbitration law or, once the Model Law applied in the case, could be exercised in the setting aside proceedings under article 34.

134. In the subsequent discussion concerning the territorial scope of application of the Model Law, the Commission decided not to extend the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined. (That discussion is reported above, paras. 79-81.)

* * *

Article 14.
Failure or impossibility to act

135. The text of article 14 as considered by the Commission was as follows:

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

136. It was noted that article 14, unlike articles 11 and 13, did not expressly give the parties the freedom to agree on a procedure in cases of an arbitrator's inability or failure to act. It was understood, however, that the provision was not intended to preclude parties from varying the grounds which would give rise to the termination of the mandate or from entrusting a third person or institution with deciding on such termination.

137. As regards the grounds for termination set forth in the article, various suggestions were made. One suggestion was to delete the words "*de jure* or *de facto*" since they were unnecessary and a potential source of difficulty in interpretation. The Commission did not adopt the suggestion for the sake of harmony with the corresponding provision in the UNCITRAL Arbitration Rules (article 13 (2)).

138. Another suggestion was to describe more precisely what was meant by the words "fails to act", for instance, by adding such words as "with due dispatch and with efficiency" or "with reasonable speed". It was stated in reply that the criteria of speed and efficiency, while important guidelines for the conduct of an arbitration, should not be given the appearance of constituting absolute and primary criteria for assessing the value of an arbitration. It was pointed out that the criterion of efficiency was particularly inappropriate in the context of article 14 since it could open the door to court review and assessment of the substantive work of the arbitral tribunal. There were fewer reservations to expressing the idea of reasonable speed, which was regarded as a concretization of the time element inherent in the term "failure to act".

139. While considerable support was expressed for leaving the wording of article 14 unchanged, which corresponded with the wording found in article 13 (2) of the UNCITRAL Arbitration Rules, the Commission, after deliberation, was agreed that the expression "fails to act" should be qualified by such words as "with reasonable speed". It was understood that the addition served merely to clarify the text and should not be construed as attaching to the words "fails to act" a meaning different from the one given to the wording in the UNCITRAL Arbitration Rules.

140. A proposal was made for redrafting article 14 with a view to covering also the instances of termination included in article 15, without changing the substance of those two articles. The Commission entrusted an *ad hoc* working party, composed of the representatives of India and the United Republic of Tanzania, with the task of preparing a draft of article 14.

141. The *ad hoc* working party suggested the following modified version of article 14:

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

142. Concern was expressed in the Commission that the suggested redraft of article 14 might have changed the substance of the provision in unintended ways. In particular, it was not clear when the arbitrator's mandate terminated for his failure to act. After discussion the proposal was rejected and the original text retained with the addition of words such as "with reasonable speed", as had been previously decided.

143. In the subsequent discussion concerning the territorial scope of application of the Model Law, the Commission decided not to extend the applicability of articles 11, 13 and 14 to the time before the place of arbitration was determined. (That discussion is reported above, paras. 79-81.)

* * *

Article 14 bis

144. The text of article 14 *bis* as considered by the Commission was as follows:

"The fact that, in cases under article 13 (2) or 14, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator

does not imply acceptance of the validity of any ground referred to in article 12 (2) or 14."

145. The Commission adopted the substance of the article. It was subsequently incorporated by the Drafting Group into article 14 as new paragraph (2).

* * *

Article 15.
Appointment of substitute arbitrator

146. The text of article 15 as considered by the Commission was as follows:

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

147. The Commission adopted the suggestion to delete in article 15 the words "unless the parties agree otherwise" since those words might create difficulties. It was understood, however, that the party autonomy recognized in article 11 for the original appointment of an arbitrator applied with equal force to the procedure of appointing the substitute arbitrator, since article 15 referred to the rules that were applicable to the appointment of the arbitrator being replaced.

148. With reference to the cases where the place of arbitration had not yet been determined, it was observed that where it was for the claimant to appoint the substitute arbitrator and the claimant failed to do so, the rule envisaged for article 11 (i.e. competence of Court of State where defendant has place of business) might not be appropriate for the appointment of the substitute arbitrator. It was suggested that a possible solution might be to provide that assistance in the appointment of the substitute arbitrator would be rendered by the Court of the State in which the party who failed to appoint his arbitrator had his place of business, and only if the Court of that State did not render such assistance could the appointment be sought from the Court in the State where the other party had his place of business. However, according to a subsequent decision, reported above in para. 111, the applicability of article 11 was not extended to the time before the place of arbitration was determined.

* * *

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16.
Competence to rule on own jurisdiction

149. The text of article 16 as considered by the Commission was as follows:

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

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

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

Paragraph (1)

150. The Commission was agreed that the words "including any objections with respect to the existence or validity of the arbitration agreement" were not intended to limit the *Kompetenz-Kompetenz* of the arbitral tribunal to those cases where a party had raised an objection. Consequently, the arbitral tribunal could decide on its own motion if there were doubts or questions as to its jurisdiction, including the issue of arbitrability.

151. As regards the power given to the arbitral tribunal in paragraph (1), concern was expressed that the provision would not be acceptable to certain States which did not grant such power to arbitrators or to those parties who did not want arbitrators to rule on their own jurisdiction. It was stated in reply that the principle embedded in the paragraph was an important one for the functioning of international commercial arbitration; nonetheless, it was ultimately for each State, when adopting the Model Law, to decide whether it wished to accept the principle and, if so, possibly to express in the text that parties could exclude or limit that power.

152. It was noted that the apparent vigor of the English words "has the power to rule" was, for example, not reflected in the French wording "*peut statuer*". The Commission, after deliberation, decided to use in all languages the less vigorous wording "may rule" without thereby intending to deviate in substance from the corresponding wording used in article 21 (1) of the UNCITRAL Arbitration Rules.

153. The Commission adopted paragraph (1) as so amended.

Paragraph (2)

154. It was stated that the third sentence of paragraph (2) was too imprecise in that it referred to the indication of the arbitral tribunal's intention to decide on a matter alleged to be beyond the scope of its authority. It was pointed out that such intention would normally be clear only when there was an award covering that matter. It was, therefore, suggested that the sentence should be replaced by a provision modelled on article V (1) of the 1961 Geneva Convention to the effect that the plea must be raised as soon as the question on which the arbitral tribunal was alleged to have no jurisdiction was raised during the arbitral proceedings.

155. It was recognized that the proposed text was more precise but also more rigid than the current text. For instance, it would cover not only those instances where there was an indication of the intention of the arbitral tribunal itself, e.g. where it requested or examined evidence relating to a matter outside its scope of authority, but also the case where one party in its written or oral statements raised such a matter. In such a case, under the proposed text the other party would have to raise his objection promptly. The concern was expressed that parties who were not sophisticated in international commercial arbitration might not realize that a matter exceeding the arbitral tribunal's jurisdiction had been raised and that they were compelled to object promptly. Moreover, it was suggested that in some cases the governing law, and therefore limitations on arbitrability of certain disputes, might not be determined until the time of award, making an earlier plea impossible. As a result, failure to raise the plea at an earlier time should not necessarily preclude its use in setting aside proceedings or in recognition and enforcement proceedings.

156. The Commission, after deliberation, adopted paragraph (2), subject to modification of the third sentence along the following lines: "A plea that the arbitral tribunal has exceeded the scope of its authority shall be raised as soon as the question on which the arbitral tribunal is alleged to have no jurisdiction is raised during the arbitral proceedings."

Paragraph (3)

157. The Commission adopted the principle underlying paragraph (3), namely that the competence of the arbitral tribunal to rule on its own jurisdiction was subject to court control. However, there was a divergence of views as to when and under what circumstances such resort to a court should be available.

158. Under one view, the solution adopted in paragraph (3) was appropriate in that it permitted such court control only in setting aside proceedings and, as should be clarified in the text, in the context of recognition and enforcement of awards. That solution was preferred to instant court control since it would prevent abuse by a party for purposes of delay or obstruction of the proceedings.

159. Under another view, paragraph (3) should be modified so as to empower the arbitral tribunal to grant leave for an appeal to the court or in some other way, for instance by making its ruling in the form of an award, permit instant court control. It was stated in support that such flexibility was desirable since it would enable the arbitral tribunal to assess in each particular case whether the risk of dilatory tactics was greater than the opposite danger of waste of money and time. As regards that possible danger, the suggestion was made to reduce its effect by providing some or all of the safeguards envisaged in the context of court control over a challenge of an arbitrator in article 13 (3), i.e. short time-period, finality of decision, discretion to continue the arbitral proceedings and to render an award.

160. Under yet another view, it was necessary to allow the parties instant resort to the court in order to obtain certainty in the important question of the arbitral tribunal's jurisdiction. Various suggestions were made for achieving that result. One suggestion was to adopt the solution found in article 13 (3) and thus to allow immediate court control in each case where the arbitral tribunal ruled on the issue of its jurisdiction as a preliminary question. Another suggestion was to require the arbitral tribunal, if so requested by a party, to rule on its jurisdiction as a preliminary question, which ruling would be subject to immediate court control. Yet another suggestion was to reintroduce in the text previous draft article 17.[8] It was pointed out that, if draft article 17 were reintroduced in the model law, it might not be necessary to adopt for the concurrent court control in article 16 (3) the strict solution which would exclude any discretion on the part of the arbitral tribunal.

161. The Commission, after deliberation, decided not to reintroduce previous draft article 17 but to provide for instant court control in article 16 (3) along the lines of the solution adopted in article 13 (3). The Commission adopted article 16 (3) in the following modified form, subject to redrafting by the Drafting Group:

"(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal determines in a preliminary ruling that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the Court specified in article 6 to decide the matter, which decision shall not be subject to appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings."

[8]The text of draft article 17, which was deleted by the Working Group at its last session (A/CN.9/246, paras. 52-56), was as follows:

"Article 17. *Concurrent court control*

"(1) [Notwithstanding the provisions of article 16,] a party may [at any time] request the Court specified in article 6 to decide whether a valid arbitration agreement exists and [, if arbitral proceedings have commenced,] whether the arbitral tribunal has jurisdiction [with regard to the dispute referred to it].

"(2) While such issue is pending with the Court, the arbitral tribunal may continue the proceedings [unless the Court orders a stay of the arbitral proceedings]."

162. The Commission decided to align article 13 (3) to that modified version of article 16 (3) and thus to replace in article 13 (3) the time-period of fifteen days by a time-period of thirty days and the expression "final" by such words as "not subject to appeal".

163. It was noted that the second sentence of article 16 (3) did not cover the case where the arbitral tribunal ruled that it had no jurisdiction. Consequently, in such a case, article 16 (3), read together with article 5, did not preclude resort to a court for obtaining a decision on whether a valid arbitration agreement existed. It was recognized that a ruling by the arbitral tribunal that it lacked jurisdiction was final as regards its proceedings since it was inappropriate to compel arbitrators who had made such a ruling to continue the proceedings.

* * *

Article 18.
Power of arbitral tribunal to order interim measures

164. The text of article 18 as considered by the Commission was as follows:

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

165. A suggestion was made that the provision should not be retained since its scope was not clearly defined and because its was of limited practical relevance in view of the availability of enforceable interim measures by courts. Furthermore, the power granted to the arbitral tribunal could operate to the detriment of a party if it later turned out that the interim measure was not justified. Therefore, if the provision were to be retained, that risk should be reduced by enlarging the extent of the security referred to in the second sentence to cover not only the costs of such interim measure but also any possible or foreseeable damage to a party.

166. The Commission, after deliberation, decided to retain the article since it was useful in confirming that the arbitral tribunal's mandate included the faculty of ordering such measures, unless the parties had agreed otherwise. As regards the suggestion to enlarge the extent of the security which the arbitral tribunal might require from a party or the parties, the Commission was agreed that, on the one hand, any implied limitation on security for the costs of such measure should not be maintained but that, on the other hand, a reference to the damages of a party was not appropriate since the Model Law should not deal with questions relating to the basis or extent of possible liability for damages. The Commission, therefore, decided to use more general wording and to say that the arbitral tribunal might require any party to provide "appropriate security". It was pointed out that the modification should not lead to an interpretation of the words "security for the costs of such measures", as used in article 26 (2) of the UNCITRAL Arbitration Rules, as excluding the possibility of including in the amount of such security any foreseeable damage of a party.

167. As regards the range of interim measures covered by the provision, it was observed that one of the possible measures was, under appropriate circumstances, an order relating to the protection of trade secrets and proprietary information.

168. It was noted that the range of interim measures covered by article 18 was considerably narrower than that envisaged under article 9 and that article 18 did not regulate the question of enforceability of such measures taken by the arbitral tribunal. It was observed that, nonetheless, there remained an area of overlapping and possible conflict between measures by the arbitral tribunal and by a court. Therefore, a suggestion was made that the Model Law should provide a solution for such conflicts, for instance, by according priority to the decision of the courts.

169. The Commission, after deliberation, was agreed that the Model Law should not embody a solution for such conflicts. It was stated that any such solution was a matter for each State to decide in accordance with its principles and laws pertaining to the competence of its courts and the legal effects of court decisions. It was noted, in that context, that article 9 itself neither created nor aggravated the potential of such conflict since it did not regulate whether and to what extent court measures were available under a given legal system but only expressed the principle that any request for, and the granting of, such interim measure, if available in a legal system, was not incompatible with the fact that the parties had agreed to settle their dispute outside the courts by arbitration.

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CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19.
Determination of rules of procedure

170. The text of article 19 as considered by the Commission was as follows:

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

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

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

Paragraph (1)

171. Two suggestions of divergent significance were made with respect to paragraph (1). One suggestion was to make clear in the model law that the freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceedings. The other suggestion was to permit the parties to determine rules of procedure after the arbitrators had accepted their duties to the extent the arbitrators agreed.

172. Neither suggestion was adopted. Although the provision as it now stood implied that the parties had a continuing right to change the procedure, the arbitrators could not in fact be forced to accept changes in the procedure because they could resign if they did not wish to carry out new procedures agreed to by the parties. It was noted that the time-frame allowed for changing the procedures to be followed could be settled between the parties and the arbitrators.

Paragraph (2)

173. An observation was made that, since in some legal systems a question of admissibility, relevance, materiality and weight of evidence would be considered to be a matter of substantive law, the question arose as to the relationship between the second sentence of paragraph (2) and article 28.

174. It was understood that the objective of paragraph (2) was to recognize a discretion of the arbitral tribunal which would not be affected by the choice of law applicable to the substance of the dispute.

175. The Commission adopted paragraph (2).

Paragraph (3)

176. The Commission was agreed that the provision contained in paragraph (3) constituted a fundamental principle which was applicable to the entire arbitral proceedings and that, therefore, the provision should form a separate article 18 *bis* to be placed at the beginning of chapter V of the Model Law. That decision was tentatively made in the context of the discussion of article 22 (see below, paras. 189-194) and confirmed in a later discussion of article 19 (3).

* * *

Article 20.
Place of arbitration

177. The text of article 20 as considered by the Commission was as follows:

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

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

178. A proposal was made to add to the end of the second sentence of paragraph (1) the words: "having regard to the circumstances of the arbitration, including the convenience of the parties". It was stated in support of the proposal that the venue of arbitration was of considerable practical importance and that inclusion of the convenience of the parties as a guiding factor could meet the concern felt by some persons, in particular in developing countries, that an inconvenient location might be imposed on them. It was noted that the concern was also felt in other countries.

179. Divergent views were expressed as to the appropriateness of the proposed wording. Under one view the additional words were unnecessary since they expressed a principle which was already implicit in article 19 (3). Particular opposition was expressed to the words "including the convenience of the parties". It was said to be unbalanced to mention only some circumstances to be taken into consideration by the arbitrators in determining the place of arbitration, since other factors such as the suitability of the applicable procedural law, the availability of procedures for recognition or enforcement of awards under the 1958 New York Convention or other multilateral or bilateral treaties or, eventually, whether a State had adopted the Model Law might be of at least equal importance. It was also noted that article 16 (1) of the UNCITRAL Arbitration Rules provided that in determining the place of arbitration the arbitrators were to have regard to the circumstances of the arbitration but that the convenience of the parties was not mentioned. It was suggested that a discrepancy between the two texts on that point was undesirable.

180. However, the prevailing view was that the Model Law should refer to the convenience of the parties as a circumstance of great importance in the determination of the place of arbitration in international commercial arbitration. It was understood at the same time that the convenience of the parties should be interpreted as including the above-mentioned considerations regarding the applicable procedural law and the recognition and enforcement of awards.

181. The Commission adopted article 20 as so amended.

* * *

Article 21.
Commencement of arbitral proceedings

182. The text of article 21 as considered by the Commission was as follows:

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

183. A proposal was made that had two parts. The first part would give a request which referred a dispute to arbitration the same legal effect as if the request had been filed with a court. The second part of the proposal would permit a claimant who commenced an action in court within a short period of time following receipt of a ruling by an arbitral tribunal rejecting jurisdiction or following receipt of a judgment setting aside an award to be free of the plea that the period of limitation had run.

184. It was suggested that the problem was important. The proposal would enhance the effectiveness of international commercial arbitration by providing a claimant in arbitration a degree of protection against the running of the period of limitation equivalent to that enjoyed by the plaintiff in a court proceeding. A number of legal systems had rules such as the one proposed while many legal systems did not, and uniformity in that respect would be useful. It was noted that a similar result was achieved by articles 14 (1) and 17 of the 1974 Convention on the Limitation Period in the International Sale of Goods, which had been elaborated by the Commission. Those provisions read as follows:

Article 14

"(1) Where the parties have agreed to submit to arbitration, the limitation period shall cease to run when either party commences arbitral proceedings in the manner provided for in the arbitration agreement or by the law applicable to such proceedings."

Article 17

"(1) Where a claim has been asserted in legal proceedings within the limitation period in accordance with articles 13, 14, 15 or 16, but such legal proceedings have ended without a decision binding on the merits of the claim, the limitation period shall be deemed to have continued to run.

"(2) If, at the time such legal proceedings ended, the limitation period has expired or has less than one year to run, the creditor shall be entitled to a period of one year from the date on which the legal proceedings ended."

185. However, the prevailing view was not to include in the Model Law a provision on the proposed issues, although it was recognized that the problem existed and that a unified solution of the problem would be welcome. Such a provision touched upon issues regarded by many legal systems as matters of substantive law and might therefore be considered to be outside the scope of the Model Law. In some countries periods of limitation were to be found in a number of different statutes and, in some cases, were subject to different domestic legal rules. It would be anomalous and a source of confusion to have a special rule for the effects on the limitation period arising out of the commencement of an international commercial arbitration. As a result of those factors the elaboration of a rule of the proposed type, in order to be acceptable in different legal systems, required a close study of the issues involved, which, for lack of time, could not be undertaken during the current session.

186. It was especially for that last reason that the Commission, after deliberation, decided not to adopt the proposal. It was agreed, however, that the attention of States should be drawn to that problem of considerable practical importance with a view to inviting consideration of enacting provisions which, in harmony with the principles and norms of the given legal system, would place arbitral proceedings on equal footing with court proceedings in that respect.

187. The Commission did not adopt a proposal to include in article 21 a rule providing that in the case of arbitration administered by an arbitral institution the arbitral proceedings commenced on the date on which a request for arbitration was received by the arbitral institution. While some support was expressed for the proposal, the prevailing view was that, as a result of the wide variety of rules used by different arbitral institutions for the commencement of arbitral proceedings, including the fact that in some rules the request for arbitration need not be received by the institution, it would be difficult to formulate one approach to the issue. It was noted that, since article 21 was subject to contrary agreement by the parties, the purpose of the above proposal could be achieved by a provision in the arbitration rules, as is often found in standard rules of arbitral institutions, to the effect that the arbitral proceedings commenced on the date on which a request for arbitration was received by the arbitral institution.

* * *

Article 22.
Language

188. The text of article 22 as considered by the Commission was as follows:

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

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

189. The Commission noted that the determination of the language or languages of the arbitral proceedings involved both a matter of principle and a matter of practicality. The principle, set forth in article 19 (3), was that the parties must be treated with equality and each party must be given a full opportunity of presenting his case. At the same time, it was recognized that extensive interpretation of oral proceedings and translation of written documents would increase the costs of the arbitration and, in the case of extensive translations, prolong the proceedings.

190. A proposal that article 22 should specifically provide that, failing agreement of the parties, the language or languages to be used in the proceedings should be determined by the arbitral tribunal in accordance with article 19 (3) was not accepted as being unnecessary. For the same reason the Commission did not accept a proposal to state expressly that a party had a right to express himself in his own language provided he arranged for interpretation into the language of the proceedings.

191. Yet another proposal was that the arbitral proceedings should be conducted in the languages of the parties unless the parties agreed on one language or the arbitral tribunal, on the basis of an express mandate conferred to it by the parties, determined the language of the proceedings. The proponents of that proposal suggested that, if this was not accepted, the Model Law should provide that any party whose language was not chosen as the language of the proceedings had the right of presenting his case in his language, and the costs of translation and interpretation should form part of the costs of the proceedings. However, the proposal was not accepted since it was considered to be too rigid and not capable of providing a suitable solution for the wide variety of situations which arose in practice. It was thought to be appropriate to leave the determination of the language or languages of the proceedings to the arbitral tribunal, which was in all circumstances bound by article 19 (3).

192. Noting that the word "translation" in paragraph (2) was not defined, a proposal was made that a translation should be duly certified. The proposal was not accepted on the ground that a general requirement of certification of translations would unnecessarily add to the costs of proceedings.

193. It was noted that where proceedings were to be conducted in more than one language, it might be reasonable and not prejudicial to the interests of the parties if a document was translated into only one of the languages of the proceedings. Consequently, it was proposed that article 22 should provide expressly that it would not be *per se* contrary to the Model Law if in a multi-language arbitration the arbitral tribunal decided that a particular document did not have to be translated into all the languages of the proceedings. While the Commission was of the view that such cost-saving practices were not prohibited by article 22, it referred to the Drafting Group the question whether the text expressed that view with sufficient clarity.

194. The Commission adopted article 22, subject to the review by the Drafting Group as indicated in the previous paragraph. In order to emphasize the fundamental nature of the principles embodied in article 19 (3) and to clarify that they governed all aspects of the arbitral proceedings, it was agreed that the paragraph should be presented in a separate article.

* * *

Article 23.
Statements of claim and defence

195. The text of article 23 as considered by the Commission was as follows:

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

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

Paragraph (1)

196. The Commission was agreed that paragraph (1) expressed a basic principle of arbitral procedure from which the parties should not be able to derogate but that the specific rules of procedure in respect of the statements of claim and defence should be subject to the agreement of the parties. It was pointed out that the procedure provided in paragraph (1) was not entirely consistent with the procedure in some institutional arbitration rules. The Commission decided to express the distinction between the mandatory nature of the principle expressed in paragraph (1) and the non-mandatory nature of the procedural rules by adding to the end of the first sentence words along the lines of "unless the parties have otherwise agreed on the contents and form of such statements".

197. It was also noted that the verb "annex" contained in the second sentence of paragraph (1) might be interpreted to require a statement of claim or defence always to be in writing. The Commission, being in agreement that that was not the intended interpretation, referred the matter to the Drafting Group.

Paragraph (2)

198. Different views were expressed as to the power of the arbitral tribunal to allow an amendment of a statement of claim or defence. Under one view, the parties should not be prevented from amending their statements of claim or defence since any limitation in that respect would be contrary to their right to present their case. Under that view a full stop should be placed after the words "arbitral proceedings". Recognizing that a late amendment might cause delay in the proceedings, it was suggested that the appropriate way of dealing with the problem was by apportioning the costs of the proceedings or by deciding on the issues presented in good time in a partial award and postponing the settlement of the remaining issues.

199. However, under the prevailing view the arbitral tribunal should have a power not to allow amendments to the statement of claim or defence under certain circumstances. Several views were expressed as to how the scope of that power should be delimited. Under one view, which received considerable support, the entire text of paragraph (2) should be retained because it provided appropriate guarantees against delay in arbitral proceedings while allowing sufficient flexibility in justified cases. Under another view, the words "any other circumstances" were too vague and should either be replaced by the words "any other relevant circumstances" or deleted. Under yet another view, the desired precision could be achieved only by deletion of the words "or prejudice to the other party" as well since it was not clear what kind of prejudice was meant.

200. The Commission adopted the latter view and decided to delete the words "or prejudice to the other party or any other circumstances".

Counter-claim

201. A suggestion was made to add a provision, either in article 23 or in another appropriate place, that any provision of the Model Law referring to the claim would apply, *mutatis mutandis*, to a counter-claim. It was agreed that the Commission would consider the matter after it had completed its consideration of the entire draft Model Law. The subsequent decision in respect of counter-claims is reflected below in para. 327.

* * *

Article 24.
Hearings and written proceedings

202. The text of article 24 as considered by the Commission was as follows:

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

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

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

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

Paragraphs (1) and (2)

203. The Commission noted that article 24 dealt with the issue of the mode of arbitral proceedings as a matter of principle and did not deal with the procedural aspects of deciding that issue. For example, the article did not deal with the question of the point of time when the arbitral tribunal would have to decide on the mode of the arbitral proceedings. That meant that the arbitral tribunal was free to decide that question at the outset of the proceedings, or it could postpone the determination of the mode of the proceedings and make such determinations in the light of the development of the case. Before so deciding the arbitral tribunal would normally request the parties to express their view or possible agreement on the question. The article also did not deal with, and therefore did not limit, the power of the arbitral tribunal to decide on the length of oral hearings, on the stage at which oral hearings could be held, or on the question whether the arbitral proceedings would be conducted partly on the basis of oral hearings and partly on the basis of documents. It was noted that such procedural decisions were governed by article 19, including its paragraph (3).

204. The Commission was agreed that an agreement by the parties that oral hearings were to be held was binding on the arbitral tribunal.

205. As to the question whether an agreement by the parties that there would be no oral hearings was also binding, different views were expressed. Under one view, the right to oral hearings was of such fundamental importance that the parties were not bound by their agreement and a party could always request oral hearings. Under another view, the agreement of the parties that no oral hearings would be held was binding on the parties but not on the arbitral tribunal so that the arbitral tribunal, if requested by a party, had the discretion to order oral hearings. However, the prevailing view was that an agreed exclusion of oral hearings was binding on the parties and the arbitral tribunal. Nevertheless, it was noted that article 19 (3), requiring that each party should be given a full opportunity to present his case, might in exceptional circumstances provide a compelling reason for holding an oral hearing. It was understood that parties who had earlier agreed that no hearings should be held were not precluded from later modifying their agreement, and thus to allow a party to request oral hearings.

206. The Commission was agreed that where there was no agreement on the mode of the proceedings a party had a right to oral hearings if he so requested. In that connection it was noted that the French version of paragraph (2) reflected that view while according to other versions of that paragraph the arbitral tribunal retained the discretion whether to hold oral hearings even if requested by a party.

207. The Commission was also agreed that where there was no agreement on the mode of the proceedings, and no party had requested an oral hearing, the arbitral tribunal was free to decide whether to hold oral hearings or whether the proceedings would be conducted on the basis of documents and other materials.

208. The Commission referred the implementation of its decisions to the Drafting Group.

209. During consideration of the second sentence of article 24 (1), as presented by the Drafting Group, which read as follows: "However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall, if so requested by a party at an appropriate stage of the proceedings, hold such hearings", the question was raised whether "at an appropriate stage" should refer to the request or to the proceedings. After discussion the Commission decided to re-word the sentence as follows: "However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party."

Paragraph (3)

210. The Commission was agreed that the words "for inspection purposes" were meant to include the inspection of goods, other property, or documents as referred to in article 20 (2), and that that should be made clear in the text. Subject to that modification, paragraph (3) was adopted.

Paragraph (4)

211. The Commission agreed with the first sentence of paragraph (4) that all documents supplied to the arbitral tribunal by one party, regardless of their nature, had to be communicated to the other party. However, the Commission was agreed that in the second sentence of paragraph (4) it should be made clear that such documents as research material prepared or collected by the arbitral tribunal did not have to be communicated to the parties. The Drafting Group was invited to consider whether that result should be achieved by deletion of the words "or other document".

* * *

Article 25.
Default of a party

212. The text of article 25 as considered by the Commission was as follows:

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

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

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

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

213. The Commission agreed that the text of article 25 should make it clear that in order for the party in default to escape the consequences of article 25, he should show to the arbitral tribunal sufficient cause for his failure to act as required. It was thought that the text was already sufficiently clear that the sufficient cause for the delay had to exist before the time the action was due. However, as to the point of time when sufficient cause was to be shown to the arbitral tribunal, it was thought that, although it was clear from the article that the question whether there was sufficient cause for the failure had to be settled before the arbitral tribunal decided on a consequence of default, a definition of a point of time in the text would be difficult and would unnecessarily interfere with the discretion of the arbitral tribunal to assess the cause for delay and to extend the period of time when the party must communicate a statement or produce evidence.

214. It was suggested that subparagraph (*b*) should not be interpreted as meaning that the arbitral tribunal would have no discretion as to how to assess the cause of the failure to communicate the statement of defence as required and that it would be precluded from drawing inferences from such failure. The Commission was agreed that the correct interpretation should be made clear in subparagraph (*b*) by using an expression such as "without treating such failure in itself . . .".

215. A proposal was made to restrict the discretion of the arbitral tribunal in subparagraph (*c*) by obliging it to continue the arbitral proceedings if the party not in default so requested. The Commission did not adopt the proposal on the ground that an obligation to continue the arbitral proceedings might be seen as a restriction of the discretion of the arbitral tribunal in assessing whether there was sufficient cause for a party's failure to appear at a hearing or to produce documentary evidence.

216. The Commission adopted article 25, subject to the amendments to the opening words of the article and to subparagraph (*b*), which were referred to the Drafting Group.

* * *

Article 26.
Expert appointed by arbitral tribunal

217. The text of article 26 as considered by the Commission was as follows:

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

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

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

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

218. A proposal was made to amend the opening words of paragraph (1) to read: "Unless otherwise agreed by the parties before an arbitrator is appointed, . . .". Under one view the proposal was desirable since it might be of great importance to a person when asked to serve as an arbitrator whether the arbitral tribunal would be empowered to order an expertise. The rules under which the arbitrators would be expected to function should be clear to them from the beginning.

219. However, under the prevailing view the parties should always have the right to decide that the arbitral tribunal was not free to appoint experts. Even though the parties could be expected to have confidence in the arbitrators they had named to settle their dispute, they might not have confidence in the expert or experts that the arbitral tribunal proposed to appoint. Moreover, the appointment of experts might increase the costs of the arbitration beyond the amount the parties were willing to spend. If the joint refusal of the parties to permit the arbitral tribunal to appoint an expert was of such importance to the arbitrators, they were free to resign. If such resignation was a likely result, it could be assumed that the parties would carefully consider their decision and the risk that the money already spent on the arbitration would be wasted. Since article 26 represented a compromise between the common law system of adjudication in which appointment of experts by the court or tribunal was not usual and the civil law system in which such appointments were common, the balance of the compromise should not be disturbed.

220. A proposal to delete the words "Unless otherwise agreed by the parties," was not retained.

221. The Commission adopted article 26.

* * *

Article 27.
Court assistance in taking evidence

222. The text of article 27 as considered by the Commission was as follows:

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

"(*a*) the names and addresses of the parties and the arbitrators;

"(*b*) the general nature of the claim and the relief sought;

"(*c*) the evidence to be obtained, in particular,

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

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

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

Paragraph (1)

223. The commission was in agreement that, in conformity with a general decision previously taken, the scope of application of the article should be limited territorially. Subject to drafting changes called for as a result of the decision yet to be taken on the specific text in regard to territorial scope of application of the Model Law as a whole, the Commission decided to delete the words "or under this Law".

224. Subsequently, in light of the decision to adopt the text of article 1 (1 *bis*) (see above, para. 81), the Commission also decided to delete the words "held in this State" as being unnecessary since, except as provided in that article, the entire Model Law applied only to arbitral proceedings held in "this State".

225. The Commission was also in agreement that the question of international assistance in the taking of evidence in arbitral proceedings should not be governed by the Model Law. It noted that the Hague Conference on Private International Law was studying the possibility of preparing a protocol to the 1970 Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters to extend its application to arbitral proceedings and that the Hague Conference would be interested in the views of arbitration experts whether such a protocol would be desirable.

226. The Commission did not adopt a proposal to limit paragraph (1) to an indication that a competent court might be requested to assist in taking evidence without referring to whether it was the arbitral tribunal or the parties who might make the request to the court. It was noted that the current provision was a compromise between those legal systems in which only the arbitral tribunal might request the court for assistance and those legal systems in which a party might request the court for assistance. In the current text either the arbitral tribunal or a party might request such assistance, but in the latter case only if the arbitral tribunal approved.

227. It was noted that paragraph (1) indicated only the court to which the request should be addressed, but that the routing by which that request should reach the court would be determined by local procedures. An observation was made that States adopting the Model Law might wish to entrust the functions of court assistance in taking evidence to the court or other authority specified in article 6 and that that should be reflected by appropriate drafting.

228. The Commission decided to delete the second sentence of paragraph (1), including subparagraphs (*a*), (*b*) and (*c*), on the grounds that they entered into excessive detail that did not need to be expressed in the Model Law.

229. The Commission did not adopt a proposal to add a new provision to the effect that, where evidence was possessed by a party and the party refused to comply with an order to produce it, the arbitral tribunal should be expressly empowered to interpret the refusal to that party's disadvantage. It was suggested, and not contradicted in the Commission, that such a provision was unnecessary since the arbitral tribunal already had that power, particularly under article 25 (*c*).

Paragraph (2)

230. The Commission decided to place a full stop after the words "execute the request" and to delete the remainder of the sentence. It was felt that there was no need to indicate the manner in which the court should execute the request. Moreover, in some countries it would be difficult to imagine the court ordering that the evidence be provided directly to the arbitral tribunal.

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CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

231. The text of article 28 as considered by the Commission was as follows:

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

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

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

Paragraphs (1) and (2)

232. In the discussion on paragraph (1), the Commission was divided on the question whether the Model Law should recognize the right of the parties to subject their legal relationship to "rules of law". Under one view, the Model Law should recognize that right of the parties since it was not appropriate in international commercial arbitration to limit the freedom of the parties to choosing the law of a given State. While recognizing the novel and imprecise character of the term "rules of law", which to date had been adopted only in one international convention and two national laws, it was stated in support that it would provide the necessary flexibility to allow parties in international commercial transactions to subject their relationship to those rules of law which they regarded as the most suitable ones for their specific case. It would enable them, for example, to choose provisions of different laws to govern different parts of their relationship, or to select the law of a given State except for certain provisions, or to choose the rules embodied in a convention or similar legal text elaborated on the international level, even if not yet in force or not in force in any State connected with the parties or their transaction. It was pointed out that, as regards any interest of the State where the arbitration took place, to recognize such freedom was not essentially different from allowing the designation of the law of a State which was in no way connected with the parties or their relationship. Furthermore, since article 28 (3) permitted the parties to authorize the arbitral tribunal to decide *ex aequo et bono* (as *amiable compositeur*), there was no reason to deny the parties the right to agree on rules of law which offered more certainty than the rules to be applied in an *ex aequo et bono* arbitration.

233. Under another view, article 28 (1) should limit itself to providing that a dispute shall be decided in accordance with the law chosen by the parties. That was in line with the solution adopted in many international texts on arbitration (e.g. 1961 Geneva Convention, 1966 ECAFE Rules for International Commercial Arbitration and Standards for Conciliation, 1976 UNCITRAL Arbitration Rules, 1975 ICC Rules). That traditional approach provided a greater degree of certainty than the novel and ambiguous notion of "rules of law", which might cause considerable difficulties in practice. It was not appropriate for a model law designed for universal application to introduce a concept which was not known in, and unlikely to be accepted by, many States. Furthermore, it was stated that the right to select provisions of different laws for different parts of the relationship (the so-called *dépeçage*) was recognized by most legal systems even under the more traditional approach; if there was a need for clarification on that point, the report should express the understanding of the Commission that such a right was included in the freedom of the parties to designate the law applicable to the substance of the dispute.

234. In the light of that discussion the Commission decided to amend the first sentence of paragraph (1) to read as follows: "The arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute." It was agreed that the formulation would allow parties to designate portions of the legal systems from different States to govern different aspects of their relationship. It was also agreed to state in the report that States when enacting the model law were free to give the term "law" a wider interpretation. It was understood that parties might agree in their contracts to apply rules such as those in international conventions not yet in force.

235. As regards the second sentence of paragraph (1), it was agreed that the rule of interpretation of the parties' designation of the law of a given State was useful in that it made clear that, unless otherwise expressed in such agreement, the dispute was to be decided in accordance with the substantive law of that State and not by the substantive law as determined by the conflict of laws rules of that State.

236. In the subsequent discussion on paragraph (2), views were divided as to whether the arbitral tribunal should be required to apply conflict of laws rules which it considered applicable in order to determine the substantive law to be applied or whether it could directly determine the applicable law it considered appropriate in the particular case. Under one view, the Model Law should provide guidance to the arbitral tribunal by providing that the applicable law was to be determined by a decision on the applicable conflict of laws rules. It was noted that, although a court, under the Model Law and most national laws, could not review the decision of the arbitral tribunal on the conflict of laws rules and consequently on the applicable substantive law, a desirable effect of the rule contained in paragraph (2) was that the arbitral tribunal would be expected to give reasons for its decision on the choice of the conflict of laws rule. Furthermore, that approach would provide the parties with a greater degree of predictability or certainty than the approach of allowing the arbitral tribunal to determine directly the law applicable to the substance of the dispute.

237. Under another view, it was not appropriate to limit the power of the arbitral tribunal to decide on the law applicable to the substance of the dispute by requiring it to decide first on an existing conflict of laws rule. In practice an arbitral tribunal did not necessarily first decide on conflict of laws rules but often arrived at a decision on substantive law by more direct means. It was suggested that it would not be appropriate for a model law on international commercial arbitration to disregard such practices which developed on the basis of a broad scope of party autonomy recognized in many legal systems. Furthermore, it was doubtful whether the requirement of applying first a conflict of laws rule would, in fact, provide a higher degree of certainty than a direct determination of the governing law since, on the one hand, the conflict of laws rules often differed from one legal system to another and since, on the other hand, the reasons which led the arbitral tribunal to select the appropriate applicable law were often similar to the connecting factors used in conflict of laws rules. It was also pointed out that the freedom of the arbitral tribunal under paragraph (2) should not be narrower than the one accorded to the parties under paragraph (1).

238. In view of the division of views on paragraphs (1) and (2), it was suggested that article 28 might be deleted since it was not necessary for a law on arbitral procedure to deal with the law relative to the substance of the dispute. Moreover, since the Model Law did not provide for court review of an award on the ground of wrong application of article 28, it served as little more than a guideline for the arbitral tribunal. However, there was wide support in the Commission for retaining article 28. It was pointed out that the Model Law would be incomplete without a provision on rules applicable to the substance of disputes, particularly in view of the fact that the Model Law dealt with international commercial arbitration where a lack of rules on that issue would give rise to uncertainty.

239. The Commission, after deliberation, decided to reverse its previous decision in respect of paragraph (1) and to adopt the original texts of paragraphs (1) and (2).

Paragraph (3)

240. The Commission adopted the text of paragraph (3).

New paragraph to be added to article 28

241. The Commission decided to include in article 28 a provision modelled on article 33 (3) of the UNCITRAL Arbitration Rules as follows: "In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."

Freedom to authorize third person to determine applicable law

242. The Commission recalled a suggestion made in the context of article 2 (*c*) that the freedom of the parties to authorize a third person to determine a certain issue did not extend to the determination of the rules of law applicable to the substance of the dispute (see above, para. 40). It was agreed to make clear that article 2 (*c*) did not apply to article 28.

* * *

Article 29.
Decision-making by panel of arbitrators

243. The text of article 29 as considered by the Commission was as follows:

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

244. It was suggested that article 29 should empower a presiding arbitrator, if no majority could be reached, to decide as if he were a sole arbitrator. The Commission did not adopt the suggestion since it might, under certain circumstances, lend itself to precluding the other members of the arbitral tribunal from having an appropriate influence on the decision-making. It was noted that parties who preferred that solution were free to agree thereon, since the provision was of a non-mandatory character.

245. The Commission decided to express in the second sentence of article 29 that a decision of the arbitral tribunal to authorize a presiding arbitrator to decide questions of procedure had to be unanimous. Subject to that modification, which was referred to the Drafting Group, the Commission adopted article 29.

246. It was noted that is was implicit in the Model Law that, subject to contrary agreement, arbitrators might

make decisions without necessarily being present at the same place.

* * *

Article 30.
Settlement

247. The text of article 30 as considered by the Commission was as follows:

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

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

248. A proposal was made to delete, in paragraph (1), the words "and not objected to by the arbitral tribunal". It was stated in support that if the parties wanted their settlement to be in the form of an award, rendering it enforceable as an award under the 1958 New York Convention or other applicable procedures, the arbitral tribunal should not be able to disagree.

249. It was stated in reply that a distinction should be drawn between the right of the parties to have the arbitral proceedings terminate as a result of their settlement and their right to have their settlement recorded as an award. It was pointed out that arbitrators should not be forced to attach their signatures to whatever settlement the parties have reached since the terms of such settlement might, in exceptional cases, be in conflict with binding laws or public policy, including fundamental notions of fairness and justice. Furthermore, even if the words were deleted, arbitrators who felt sufficiently strongly that they should not record the settlement in the form of an award might resign. After discussion, the proposal was not adopted.

250. Another proposal was that the request to record the settlement as an award needed to be made by only one of the parties. The Commission, after deliberation, was agreed that there must be the dual will of the two parties that the settlement be recorded as an award, but that the formal request needed to be made by only one of them.

* * *

Article 31.
Form and contents of award

251. The text of article 31 as considered by the Commission was as follows:

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

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

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

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

Paragraphs (1) and (2)

252. Paragraphs (1) and (2) were adopted.

Paragraph (3)

253. Various views were expressed in respect of a proposal made to amend the second sentence of paragraph (3) to read "The award shall be deemed to have been made at that place and on that date." Under one view the amendment was desirable because it would make the second sentence consistent with the first sentence. Moreover, the date of the award might be significant in a number of different contexts. Since an award might be circulated among the arbitrators by mail for their signature, it might be difficult to know the date of the award. The only date that could be certain was the date on the award, even if that date was a deemed date.

254. Under another view there was a basic difference between the place stated on the award being deemed to be the place of the award and the date stated on the award being deemed to be the date of the award. The former is an irrebuttable presumption to assure the territorial link between the award and the place of arbitration. The latter must be rebuttable, since the arbitrators, as well as the parties, might have reasons for stating the date of the award to be earlier or later than the date it was actually rendered.

255. The Commission, after discussion, did not adopt the proposal.

Date on which award becomes binding

256. It was observed that according to article 36 (1) (*a*) (v) of the Model Law and article V (1) (*e*) of the 1958 New York Convention, recognition or enforcement of an award might be refused if the award had not yet become binding on the parties and that article 35 (1) in dealing with the binding nature of an award did not specify the moment when an award became binding. In the light of that observation it was proposed that the Model Law should define that moment. The Commission considered the following three variants of a possible rule: an arbitral award becomes binding on the parties as of (*a*) the date on which the award is made, (*b*) the date on which the award is delivered to the

parties, or (*c*) the date on which the period of time for making an application for setting aside the award expires.

257. There was general approval of the idea that it would be useful to have such a provision, although some doubt was raised as to whether it was necessary. In that regard it was pointed out that under article 34 (3) the setting aside procedure already specified that it was the date on which the party making the application received the award that commenced the three-month period after which application for setting aside could not be made. There was little agreement as to the date on which the award should become binding. The previous discussion had demonstrated the difficulties of relying either on the date stated on the award or the date of the award. As regards the date on which one or both parties were notified of the award, the practical difficulties of establishing that date in the various factual situations arising in arbitration were described. Moreover, it was difficult to conceive of an award becoming binding on the parties on different dates simply because they were notified of it on different dates.

258. After discussion the Commission did not adopt the proposal.

Res judicata

259. A proposal was made to include in article 31 a provision clarifying that the award made in the form provided in article 31 had the effect of *res judicata*. While not disagreeing with the general principle that awards were binding on the parties, the Commission did not adopt the proposal because it was considered that the term *res judicata* was a complex one which could have different applications in various legal systems.

* * *

Article 32.
Termination of proceedings

260. The text of article 32 as considered by the Commission was as follows:

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

"(2) The arbitral tribunal

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

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

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

261. The Commission decided to move the reference to the agreement of the parties from paragraph (1) to paragraph (2) so as to make clear that such agreement was a basis for the arbitral tribunal's order for the termination of the arbitral proceedings.

262. Concern was expressed that paragraph (2) (*a*) might operate unfairly against a claimant in that he might be forced to continue participation in arbitral proceedings although he had good reasons for withdrawing his claim. It was stated in reply that the provision was balanced in that it enabled the arbitral tribunal to meet such concern in a particular case and, in appropriate circumstances, to meet the possible concern of a respondent that the claimant might withdraw his claim at a late stage of the proceedings and then compel the respondent to participate in other proceedings.

263. The Commission was agreed that paragraph (2) (*b*) should express more clearly that its intended meaning was that the arbitral tribunal had to make a judgement whether the continuation of the arbitral proceedings was unnecessary or inappropriate, but that, when the arbitral tribunal found continuation of the proceedings to be unnecessary or inappropriate, it had to issue an order for termination. The Commission was also agreed that the word "inappropriate" in paragraph (2) (*b*) might be seen as giving too much discretion to the arbitral tribunal and that it should be replaced by a word of a more precise meaning such as "impossible".

264. The Commission adopted article 32, subject to the above modifications which were referred to the Drafting Group.

* * *

Article 33.
Correction and interpretation of awards and additional awards

265. The text of article 33 as considered by the Commission was as follows:

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

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

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

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

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

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

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

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

266. Divergent views were expressed in respect of a proposal to delete subparagraph (1) (*b*). Under one view, the provision granting either party the right to request an interpretation of a specific point or of a part of the award might permit parties to open new proceedings in the guise of an interpretation or be used as a means for the losing party to harass the arbitral tribunal. During the period when a request for interpretation might be made and until the interpretation of the award had been given by the arbitral tribunal, the finality of the award was disturbed and some questions were raised as to the interrelationship with setting aside proceedings by the losing party or enforcement proceedings by the winning party.

267. Under another view it would be too rigid not to allow for some procedure of interpretation of the award by the arbitral tribunal. The award might have been written in a language other than the mother tongue of its drafter, increasing the possibility of ambiguity. If the award was too ambiguous, it might be difficult to enforce it.

268. Several suggestions were made for modification of the provision. It was suggested that, since the word "interpretation" might imply too broad a power to re-examine the dispute, the word "interpretation" might be replaced by "clarification". It was also suggested that an interpretation of only the motives of the award but not its dispositive portion might be allowed. Yet another suggestion was that interpretation of the award by the arbitral tribunal should be allowed only if both parties requested the interpretation.

269. The Commission, after discussion, decided that a request for interpretation might be made only if so agreed by the parties.

270. The Commission adopted the suggestion that the words "if it considers the request to be justified", found in paragraph (3), should also be added to paragraph (1).

271. The Commission was of the view that it was not necessary to indicate any procedural details for the interpretation procedure other than that the other party must be notified of the request. It was noted that article 19 (3), especially if it was set out as a separate article, would give the basis for assuring procedural regularity and fairness to the parties.

* * *

CHAPTER VII. RECOURSE AGAINST AWARD

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

272. The text of article 34 as considered by the Commission was as follows:

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

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

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

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

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

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

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

"(*b*) the Court finds that:

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

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

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

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

273. The Commission was agreed that the Model Law should regulate the setting aside of arbitral awards and decided to retain provisions along the lines of article 34.

Paragraph (1)

274. The Commission adopted the principle underlying paragraph (1) to provide for one exclusive type of recourse against an arbitral award. It was understood that the application for setting aside was exclusive in the sense that it constituted the only means for actively attacking the award. A party was not precluded from defending himself by requesting refusal of recognition or enforcement in proceedings initiated by the other party.

275. An observation was made that the words "Recourse to a court" were too vague and that they might be made more precise by adding such words as "competent for arbitration matters".

276. As regards the words placed between square brackets "[in the territory of this State] [under this Law]", it was noted that they addressed the question of the territorial scope of application which the Commission had discussed at an earlier stage (see above, paras. 72-81). In conformity with the clearly prevailing view, the Commission was agreed that the Court of the given State, which enacted the Model Law, was competent for setting aside those awards made in its territory. It was agreed to determine at a later stage, when the final wording of a general provision on the territorial scope of application of the Model Law would be considered, whether the territorial restriction should be expressed in article 34 or whether the general provision sufficed. Subsequently, in light of the adoption of article 1 (1 *bis*) containing a general provision on the territorial scope of application of the Model Law (see above, para. 81), the Commission decided that an expression of the territorial restriction in article 34 was not necessary. It was noted that the adoption of the so-called strict territorial criterion did not preclude parties from selecting the procedural law of a State other than that of the place of arbitration, provided that the selected provisions were not in conflict with the mandatory provisions of the (Model) Law in force at the place of arbitration.

Paragraph (2)

Concern about restrictive list of grounds

277. Concern was expressed that the list of grounds on which an award may be set aside under paragraph (2) might be too restrictive to cover all cases of procedural injustice where annulment was justified. To illustrate the point, it was questioned whether the following cases were covered by any of the grounds set forth in article 34 (2), more specifically subparagraphs (*a*) (ii) and (iv), read together with article 19 (3), or subparagraph (*b*) (ii): 1. the award was founded on evidence which was proved or admitted to have been perjured; 2. the award was obtained by corruption of the arbitrator or of the witnesses of the losing party; 3. the award was subject to a mistake, admitted by the arbitrator, of a type which did not fall within article 33 (1) (*a*); 4. fresh evidence had been discovered that could not have been discovered by the exercise of due diligence during the arbitral proceedings, which demonstrated that through no fault on the part of the arbitrator the award was fundamentally wrong. It was suggested that, unless the Commission was agreed that such serious instances of procedural injustice were covered by paragraph (2) and the understanding was clearly reflected in the report of the session and any commentary on the final text, the provision should be modified by appropriate wording so as to cover those instances.

278. Another suggestion was to make the list of grounds non-exhaustive so as to allow for future inclusion of worthy cases which might not be foreseeable by the Commission.

279. The Commission postponed its consideration of the above concern and suggestions until after it had examined the grounds set forth in paragraph (2). As fully discussed during that later consideration (see below, paras. 298-302) and known from the deliberations of the Working Group, there were divergent opinions on whether or to what extent the concern was met by the existing text or should be met by additional wording. One view was, for example, that only some and not all of the grounds presented in the above illustrative cases justified setting aside an award.

Subparagraph (a) (i)

280. As regards the first ground set forth in the subparagraph, it was suggested that the wording, which was taken from article V (1) (*a*) of the 1958 New York Convention, was unsatisfactory in two respects. First, the reference to "the parties" was inappropriate since it sufficed that one of the parties lacked the capacity to conclude an arbitration agreement. Second, the words "under the law applicable to them" were inappropriate in that they appeared to contain a conflict of laws rule which in fact was either incomplete or misleading in that the rule might be understood as referring to the law of the nationality, domicile or residence of the parties. It was, therefore, proposed to modify the wording of the first ground along the following lines: "a party to the arbitration agreement referred to in article 7 lacked the capacity to conclude such an agreement".

281. In response to that proposal, it was stated that it was unnecessary and even dangerous to deviate from the wording embodied in the 1958 New York Convention and other international texts on arbitration such as the 1961 Geneva Convention. It was unnecessary since the original wording did not appear to have led to considerable difficulties or disparities and certainly had not led in general to an interpretation different from the one aimed at by the proposed clarification. The deviation was dangerous in that it might lead to divergent interpretations, based on the different wordings, in an issue which should be dealt with in a uniform manner.

282. The Commission, after deliberation, decided to adopt the proposal. It was noted that in the context of article 34 the need for harmony with the 1958 New York Convention was less strong than in the context of article 36.

283. As regards the second ground set forth in subparagraph (*a*) (i), a proposal was made to substitute the words "or there is no valid arbitration agreement" for the words "or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State". It was pointed out that the conflict of laws rule contained in that latter wording, which was taken from the 1958 New York Convention, was inappropriate in that it declared as applicable, failing a choice of law by the parties, the law of the place of arbitration. The place of arbitration, however, was not necessarily connected with the subject-matter of the dispute. It was unjustified to let the law of that State determine the issue with global effect, which would be the effect of a setting aside by virtue of article 36 (1) (*a*) (v) of the Model Law or article V (1) (*e*) of the 1958 New York Convention; it was also said that such a result would be in conflict with a modern trend to determine the issue in accordance with the law of the main contract.

284. It was stated in reply that it was preferable to retain the present text not simply because it was the wording of the 1958 New York Convention but also because the rule was in substance a sound one. It was pointed out that the rule recognized party autonomy, which was important in view of the fact that some legal systems applied the *lex fori*. Furthermore, to use the place of arbitration as a secondary criterion was beneficial in that it provided the parties with a degree of certainty which was lacking under the proposed formula. There were also doubts as to whether in fact a trend could be discerned in favour of determining the question of the validity of the arbitration agreement according to the law of the main contract.

285. The Commission, after deliberation, did not adopt the proposal. Accordingly, subparagraph (*a*) (i) was adopted in its original form, subject to modifying the first ground along the following lines: "a party to the arbitration agreement referred to in article 7 lacked the capacity to conclude such an agreement".

Subparagraph (a) (ii)

286. The Commission decided to replace in subparagraph (*a*) (ii) the words "appointment of the arbitrator(s)" by the words "appointment of an arbitrator". It was understood that in arbitral proceedings with more than one arbitrator, failure to give proper notice of the appointment of any one of them constituted a ground for setting aside an award.

287. As regards the ground that a party "was otherwise unable to present his case", it was suggested that the wording should be aligned with that used in article 19 (3). The Commission accepted the suggestion but postponed its implementation until after a decision was reached in respect of article 19 (3). It was suggested, in that connection, that the alignment, coupled with the inclusion of the second principle embodied in article 19 (3), could go a long way towards meeting the above expressed concern about the restrictive list of grounds contained in paragraph (2) (see above, para. 277). (See, however, below, para. 302.)

Subparagraph (a) (iii)

288. In the context of the discussion of the subparagraph, a suggestion was made to clarify, either in that article or in article 16, that a party who had failed to raise a plea as to the jurisdiction of the arbitral tribunal in accordance with article 16 (2) would be precluded from relying on such objection in setting aside proceedings. It was noted that the same question of preclusion or waiver arose with regard to other grounds set forth in article 34 (2) (*a*), in particular subparagraph (*a*) (i). It was recognized that the failure to raise such plea could not have the effect of a waiver in all circumstances, especially where the plea under subparagraph (2) (*b*) was that the dispute was non-arbitrable or that the award was in conflict with public policy.

289. The Commission decided not to embark on an in-depth discussion with a view to elaborating a comprehensive provision covering all eventualities and details. It was agreed not to modify the text and, thus, to leave the question to the interpretation, and possibly regulation, by the States adopting the Model Law.

Subparagraph (a) (iv)

290. As regards the standards set forth in the subparagraph, it was understood that priority was accorded to the agreement of the parties. However, where the agreement was in conflict with a mandatory provision of "this Law" or where the parties had not made an agreement on the procedural point at issue, the provisions of "this Law", whether mandatory or not, provided the standards against which the composition of the arbitral tribunal and the arbitral procedure were to be measured. The Commission requested the Drafting Group to consider whether that understanding was clearly expressed by the current wording of the subparagraph.

Subparagraph (b) (i)

291. Divergent views were expressed as to the appropriateness of the provision. Under one view, the provision should be deleted since it declared as applicable to the question of arbitrability the law of the State where the award was made. That solution was not appropriate in view of the fact that the place of arbitration might not be connected in any way with the transaction of the parties or the subject-matter of their dispute. The solution was not acceptable in the context of article 34 since a decision to set aside the award had effect *erga omnes*.

292. Under another view, the provision should be retained without that or any other conflict of laws rule. It was stated in support that, while the conflict of laws rule set forth in the provision was not appropriate, non-arbitrability had to be maintained as a ground for setting aside. It was noted that, if the entire subparagraph (*b*) (i) were deleted, the question of arbitrability would, in certain legal systems, be regarded as a matter concerning the validity of the arbitration agreement (under subparagraph (*a*) (i)) and by others as a matter of public policy of "this State" under subparagraph (*b*) (ii).

293. Under yet another view, the provision should be retained in its current form. It was stated in support that deletion of the entire provision or of the conflict of laws rule would be contrary to the need for predictability and certainty in that important issue. It was noted that parties could in fact achieve that goal by selecting a suitable place of arbitration and, thus, the governing law.

294. The Commission, after deliberation, adopted the latter view and retained the provision in its current form.

Subparagraph (b) (ii)

295. It was proposed that the provision should be deleted since the term "public policy" was too vague and because it did not constitute a justified ground for setting aside, while it might be appropriate in the context of article 36.

296. In discussing the term "public policy", it was understood that it was not equivalent to the political stance or international policies of a State but comprised the fundamental notions and principles of justice. It was noted, however, that in some common law jurisdictions that term might be interpreted as not covering notions of procedural justice while in legal systems of civil law tradition, inspired by the French concept of "*ordre public*", principles of procedural justice were regarded as being included. It was observed that the divergence of interpretation might have contributed to the above expressed concern that the list of reasons in paragraph (2) did not cover all serious instances of procedural injustice (see above, para. 277).

297. The Commission, after deliberation, was agreed that the provision should be retained, subject to deletion of the words "or any decision contained therein", which were superfluous. It was understood that the term "public policy", which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural respects. Thus, instances such as corruption, bribery or fraud and similar serious cases would constitute a ground for setting aside. It was noted, in that connection, that the wording "the award is in conflict with the public policy of this State" was not to be interpreted as excluding instances or events relating to the manner in which an award was arrived at.

Suggestions for widening the scope of paragraph (2)

298. After having examined the grounds contained in paragraph (2), the Commission continued its consideration of the above concerns and suggestions as to the restrictive list of grounds (above, paras. 277-278). It was agreed that the list of grounds should retain its exclusive character for the sake of certainty.

299. Thus, considering whether any ground should be added, divergent views were expressed as to the need for such addition. Under one view, there was a need for adding wording to subparagraph (*a*) (ii) which would cover instances of serious departure from fundamental principles of procedure. Under another view, there was a need for establishing a separate régime, providing for a considerably longer period of time than the one set forth in article 34 (3), for such cases as fraud or false evidence which had materially affected the award.

300. Under yet another view, there was no need for any addition in view of the understanding agreed to by the Commission as regards the ground set forth in subparagraph (*b*) (ii). In reply to the suggestion for allowing a considerably longer period of time in which to apply for setting aside an award on the grounds of fraud, or that evidence was false or discovered only later, it was stated that such extension was contrary to the need for speedy and final settlement of disputes in international commercial relationships.

301. The Commission, after deliberation, decided to incorporate in subparagraph (*a*) (ii) the text of article 19 (3).

302. In connection with the subsequent decision to transfer the provision of article 19 (3) to the beginning of chapter V of the Model Law as a separate article 18 *bis* (see above, para. 176), the Commission reversed its decision to incorporate in subparagraph (*a*) (ii) the text of article 19 (3) and restored the text of subparagraph (*a*) (ii) as it had been elaborated by the Working Group. The reasons for the restoration of the text of subparagraph (*a*) (ii) were that the alignment between articles 34 and 36 was thought to be more important than the alignment between articles 34 and 18 *bis* and that it was the Commission's understanding that, in spite of the resulting difference between the text of article 18 *bis* and article 34 (2) (*a*) (ii), any violation of article 18 *bis* would constitute a ground for setting aside

the award under article 34 (2) subparagraph (*a*) (ii), subparagraph (*a*) (iv) or subparagraph (*b*) and that the concerns which led to the proposal to amend subparagraph (*a*) (ii) were, therefore, already met.

303. It was understood that an award might be set aside on any of the grounds listed in paragraph (2) irrespective of whether such ground had materially affected the award.

Paragraph (3)

304. The Commission did not adopt a proposal to make the period of time set forth in paragraph (3) subject to contrary agreement by the parties. The Commission adopted paragraph (3) in its current form.

Paragraph (4)

305. Divergent views were expressed as to the appropriateness of the provision. Under one view, the paragraph should be deleted since it dealt with a procedure which was of limited practical relevance and known only in certain legal systems. Furthermore, the provision was obscure, in particular, as regards the relationship between the court and the arbitral tribunal and as regards the scope of the function expected from the arbitral tribunal in a case of remission. In that respect, it was proposed that, if the provision were to be retained, it should be restricted to defects which were remediable without reopening the proceedings or that guidelines should be elaborated as to the steps expected from the arbitral tribunal.

306. The prevailing view, however, was that the provision should be retained. The mere fact that the procedure of remitting the award to the arbitral tribunal was not known in all legal systems was no compelling reason for excluding it from the realm of international commercial arbitration where it should prove useful and beneficial. It was pointed out in support that the procedure, where found appropriate by the court, would enable the arbitral tribunal to cure certain defects which otherwise would necessarily lead to the setting aside of the award. Furthermore, the general wording of paragraph (4) was advantageous in that it provided the court and the arbitral tribunal sufficient flexibility to meet the needs of the particular case.

307. The Commission did not adopt a proposal to delete the requirement that the remission procedure of the paragraph must be requested by a party. After deliberation, the Commission adopted the paragraph in its current form.

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CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

308. Divergent views were expressed as to whether the Model Law should contain provisions on the recognition and enforcement of both domestic and foreign awards. Under one view, the draft chapter on recognition and enforcement should be deleted. It was not appropriate to retain in the Model Law provisions which would cover foreign awards, in view of the existence of widely adhered-to multilateral treaties such as the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It was stated that those States which had not ratified or acceded to that Convention should be invited to do so, but that a State which decided not to adhere to that Convention was unlikely to adopt the almost identical rules laid down in articles 35 and 36. It was pointed out that provisions on recognition and enforcement of foreign awards were not needed by those States which adhered to the 1958 New York Convention. In addition, such provisions in the Model Law might cast doubt on the effect of the reciprocity reservation made by many member States and might create other difficulties in the application of the Convention. Furthermore, retention in the Model Law of provisions on enforcement of domestic awards raised problems of co-ordination with the provisions on setting aside in article 34 and, in some States at least, were unnecessary in view of the existing law, which treated domestic awards as self-enforcing by equating them with judgements of local courts.

309. The prevailing view, however, was to retain provisions covering both domestic and foreign awards. It was pointed out that the existence and generally satisfactory operation of the 1958 New York Convention, to which many States adhered, was no compelling reason for deleting the draft chapter on recognition and enforcement. There were a great number of States, in fact a majority of all States members of the United Nations, that had not ratified or acceded to that Convention. Some of those States might, for constitutional or other reasons, find it easier to adopt the provisions on recognition and enforcement as part of the Model Law than to ratify or accede to that Convention. A model law on arbitration would be incomplete if it lacked provisions on such an important subject as recognition and enforcement of arbitral awards. As regards those States that were parties to that Convention, the draft chapter might provide supplementary assistance by providing a régime for non-convention awards, without adversely affecting the operation of that Convention. It was pointed out, in that respect, that the Model Law, as expressed in its article 1 (1), was subject to any such treaty, that any State adopting the Model Law could consider incorporating certain restrictions, for instance, based on the idea of reciprocity, and that articles 35 and 36 were closely modelled on the provisions of that Convention. Furthermore, the concept of uniform treatment of all awards irrespective of the country of origin was beneficial for the functioning of international commercial arbitration.

310. The Commission, after deliberation, decided to retain in the Model Law the chapter on recognition and enforcement of awards, irrespective of where they were made. It was noted that it was compatible with that decision and in fact desirable to invite the General Assembly of the United Nations to recommend to those

States that had not already done so to consider adhering to the 1958 New York Convention.

* * *

Article 35.
Recognition and enforcement

311. The text of article 35 as considered by the Commission was as follows:

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

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

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

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

Paragraph (1)

312. It was noted that the scope of application of articles 35 and 36 was not identical to that of the 1958 New York Convention and that the classification of awards was not the same as in that Convention. Articles 35 and 36 covered only those awards arising out of an international commercial arbitration in the terms of article 1, even as regards awards made in a foreign State. It was understood that that did not mean that the State in which the award was made must have itself adopted the Model Law in order for those provisions to apply to the enforcement of the award.

313. It was noted that article 35 (1) did not determine the point of time when an award became binding. As regards foreign arbitral awards, that question would have to be answered, in conformity with the rule laid down in article 36 (1) (*a*) (v), by the law of the State in which, or under the law of which, the award was made. As regards awards made in the State where recognition or enforcement is sought under article 35, the discussion of that issue was subsequently held in the context of article 31 (see above, paras. 256-258).

314. The Commission adopted the paragraph.

Paragraph (2)

315. The Commission adopted the paragraph.

Paragraph (3)

316. It was suggested that the question as to whether an award must be filed, registered or deposited should be left to each State. It was also suggested that it would be inconsistent for a State to require awards to be registered but to enforce those awards even though they were not registered.

317. The Commission deleted the paragraph.

* * *

Article 36.
Grounds for refusing recognition or enforcement

318. The text of article 36 as considered by the Commission was as follows:

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

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

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

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

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

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

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

"(*b*) if the court finds that:

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

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

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

319. The Commission rejected a proposal that article 36 should be made applicable only to international commercial arbitration awards made in a State other than "this State". It was felt that the general policy decision to retain chapter VIII on recognition and enforcement applicable to awards irrespective of where they were made should be confirmed.

Paragraph (1)

320. The suggestion was made that article 36 should be interpreted in the sense that an award would not be recognized where the court found that the arbitral tribunal had proceeded without jurisdiction or had infringed the exclusive jurisdiction of the court before which the recognition or enforcement was sought. It was suggested that that matter might have become of greater importance in light of the Commission's decision in respect of article 1 (2) (*c*) that an arbitration was international if the parties had expressly agreed that the subject-matter of the arbitration agreement related to more than one country.

321. The Commission adopted the proposal to modify article 36 (1) (*a*) (i) to conform to the change previously made in article 34 (2) (*a*) (i). The change involved replacing the words "the parties" with the words "a party" and the words "were, under the law applicable to them, under some incapacity," with such words as "lacked the capacity to conclude such an agreement". The Commission adopted the suggestion for the purpose of maintaining textual harmony between articles 34 and 36. However, the Commission expressed the view that the modification did not entail any substantive discrepancy between article 36 (1) (*a*) (i) and the corresponding provision in the 1958 New York Convention.

322. The Commission decided, in line with its decision on article 34 (2) (*a*) (ii) (above, para. 286), to replace in subparagraph (1) (*a*) (ii) the words "appointment of the arbitrator(s)" by the words "appointment of an arbitrator".

323. It was proposed that subparagraph (*b*) (ii) be deleted since in some common law jurisdictions the term "public policy" might be interpreted as not covering notions of procedural justice. However, the Commission was agreed that the subparagraph should be retained under the same understanding which the Commission expressed in connection with article 34 (2) (*b*) (ii) (see above, paras. 296-297).

324. Paragraph (1) was adopted with the modifications indicated above.

Paragraph (2)

325. The Commission adopted the paragraph.

* * *

D. *Discussion of other matters*

Article headings

326. The Commission decided to retain the footnote annexed to the heading of article 1 in order to inform the recipients of the Model Law about the understanding of the Commission that article headings were for reference purposes only and were not to be used for purposes of interpretation.

Counter-claim

327. The Commission recalled a suggestion made in the context of article 23 for adding a new provision that any provision of the Model Law referring to the claim would apply, *mutatis mutandis*, to a counter-claim (see above, para. 201). On the basis of a proposal prepared by the representatives of Czechoslovakia and the United States, the Commission decided to add the following provision to article 2 as new subparagraph (*f*):

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

Burden of proof

328. It was proposed to make clear in the Model Law that each party was to have the burden of proving the facts relied on to support his claim or defence. In support of the proposal it was stated that, absent such clarification, some parties might not be diligent or some arbitral tribunals might misconceive their role as being investigatory. The Commission decided not to include in the Model Law a provision on that point. In support of the decision it was stated that certain aspects of burden of proof might be regarded to be issues of substantive law and therefore subject to the provisions of article 28; moreover, such a provision could unnecessarily interfere with the general principle of article 19, according to which it was for the parties, and subordinately for the arbitral tribunal, to determine the rules of procedure. However, it was understood that it was a generally recognized principle that reliance of a party on a fact in support of his claim or defence required that party to prove the fact.

Evidence of witnesses

329. A proposal was made to provide in the Model Law that evidence of witnesses might also be presented in the form of written statements signed by them, since it would be useful if the Model Law dispelled any doubt

about that cost-saving, and sometimes the only available, method of taking evidence of witnesses. The Commission did not adopt the proposal since it was considered better to leave a point of detail like the one proposed under the aegis of the general principle of article 19.

Reciprocal application of articles 35 and 36

330. A proposal was made to include in article 35, or in a footnote to article 35, an indication that, following the example of the 1958 New York Convention, articles 35 and 36 might be made subject to the condition of reciprocity as regards the recognition and enforcement of foreign arbitral awards. However, in response to the proposal it was stated that the idea of reciprocity might be appropriate in a convention but was not desirable in a unification by way of a model law. It was also stated that, since a reciprocity provision would have to be a detailed one specifying what kind of reciprocity was meant and it would be difficult to agree on a unified approach to the question, it was better to leave the formulation of any reciprocity provision to each State adopting the Model Law. The Commission, after deliberation, adopted the view that, while the use of territorial links in international commercial arbitration should not be promoted, each State that wanted to subject the application of the provisions on recognition or enforcement of foreign awards to a requirement of reciprocity should express the requirement in its legislation, specifying the basis or connecting factor and the technique used by it.

E. *Consideration of the draft articles by the Drafting Group*

331. After consideration of the individual articles of the draft Model Law by the Commission, they were submitted to the Drafting Group for implementation of the decisions taken by the Commission and revision to ensure consistency within the text and between language versions. In the final version, all article numbers were maintained, with the following exceptions: article 2 (*e*) was placed in a separate article, numbered as article 3, article 14 *bis* was incorporated into article 14 as its paragraph (2), article 18 was renumbered as article 17, and article 19 (3) was placed in a separate article, numbered as article 18.

F. *Adoption of the Model Law*

332. The Commission, after consideration of the text of the draft Model Law as revised by the Drafting Group, at its 333rd meeting on 21 June 1985 decided to adopt the UNCITRAL Model Law on International Commercial Arbitration as it appears in Annex I to this report.

333. The Commission invited the General Assembly to recommend to States that they should consider the Model Law when they enact or revise their laws to meet the current needs of international commercial arbitration and to request the Secretary-General to send the text of the Model Law, together with the *travaux préparatoires* from the current session of the Commission, to Governments and to arbitral institutions and other interested bodies such as chambers of commerce.

Chapter III. International payments

A. *Draft Convention on International Bills of Exchange and International Promissory Notes*[9]

334. The United Nations Commission on International Trade Law, at its seventeenth session in 1984, considered the draft Convention on International Bills of Exchange and International Promissory Notes as prepared by the Working Group on International Negotiable Instruments and contained in document A/CN.9/211. As regards its future course of action, the Commission decided that further work should be undertaken with a view to improving the draft Convention and entrusted that work to the Working Group on International Negotiable Instruments.[10]

335. The mandate of the Working Group was to revise the draft Convention on International Bills of Exchange and International Promissory Notes in the light of decisions and discussion at the seventeenth session of the Commission,[11] and also taking into account those comments of Governments and international organizations in documents A/CN.9/248 and A/CN.9/249/Add.1 which were not discussed at that session.

336. The Commission, at its current session, had before it the report of the Working Group on the work of its thirteenth session, held in New York from 7 to 18 January 1985 (A/CN.9/261). The Commission agreed that, in the light of the progress made in solving the major controversial issues, namely the concepts of holder and protected holder, the effect of forged endorsements and the liability of the transferor by mere delivery or by endorsement, it was reasonable to request the Working Group to complete the consideration of the major controversial issues and, to the extent possible, the remaining issues, with a view to submitting a draft to the Commission in a form suitable for consideration at its nineteenth session.

337. However, in view of the fact that the Working Group might not have sufficient time to reformulate the draft in such a form in one session planned for 9 to 20 December 1985, the Commission also agreed that the Working Group might hold an additional session in February or March 1986, or might complete its mandate by other appropriate means.

[9]The Commission considered this subject at its 331st meeting, on 19 June 1985.

[10]Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 88.

[11]The discussion and conclusions on major controversial and other issues are set forth in the report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), paras. 21-82.

338. It was suggested that when the Commission, at its nineteenth session, considers the draft Convention, which would have been prepared by the Working Group to which all member States of the Commission were invited, as were all other States and interested international organizations, the re-examination of issues that had been thoroughly discussed should be discouraged unless there was evidently substantial ground for such a re-examination.

B. *Electronic funds transfers*[12]

339. The Commission, at its fifteenth session in 1982, had before it a report of the Secretary-General which considered several legal problems arising out of electronic funds transfers (A/CN.9/221). In the light of those legal problems, the report suggested that, as a first step, the Commission should prepare a guide on the legal problems arising out of electronic funds transfers. The Guide, it was suggested, should be oriented towards providing guidance for legislators or lawyers preparing the rules governing particular systems for such funds transfers.

340. The Commission accepted that recommendation and requested the secretariat to begin the preparation of a legal guide on electronic funds transfers in co-operation with the UNCITRAL Study Group on International Payments.[13] Several chapters of the draft Legal Guide were submitted to the Commission at its seventeenth session in 1984 for general observations.[14] At the current session the Commission had before it a report of the Secretary-General containing the remaining draft chapters of the Legal Guide (A/CN.9/266 and Add. 1 and 2).

341. The Commission was of the view that the draft Legal Guide was of particular importance because of the existing legal vacuum in that rapidly evolving area of activity. It was noted that there was a close link between the draft Legal Guide and the report on legal security of computer records (A/CN.9/265) and it was suggested that the final version of the Legal Guide should include a chapter on the question of evidence.

342. After discussion, the Commission decided to request the Secretary-General to send the draft Legal Guide on electronic funds transfers to Governments and interested international organizations for comment. It also requested the secretariat, in co-operation with the UNCITRAL Study Group on International Payments, to revise the draft in the light of the comments received for submission to the nineteenth session of the Commission in 1986 for consideration and possible adoption.

[12]The Commission considered this subject at its 328th meeting on 18 June 1985.

[13]Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), para.73.

[14]The draft chapters are to be found in A/CN.9/250/Add.1-4.

Chapter IV. New International Economic Order: industrial contracts[15]

343. The Commission had before it the reports of its Working Group on the New International Economic Order on the work of its sixth and seventh sessions (A/CN.9/259 and A/CN.9/262). The reports set forth the deliberations of the Working Group on the basis of the reports and draft chapters of the draft Legal Guide on drawing up international contracts for construction of industrial works which had been prepared by the secretariat (A/CN.9/WG.V/WP.11/Add. 4-5, A/CN.9/WG.V/WP.13 and Add. 1-6 and A/CN.9/WG.V/WP.15 and Add. 1-10).

344. The Commission also had before it a note by the secretariat entitled "Further work of the Commission in the area of international contracts for construction of industrial works" (A/CN.9/268). The note by the secretariat stated that, in view of the fact that the work on the Legal Guide was reaching its concluding stages, the secretariat had given consideration to enhancing the value of the Legal Guide by the preparation of annexes dealing with areas closely related to the construction of industrial works. The note informed the Commission that the Asian-African Legal Consultative Committee (AALCC) had, at its session in Kathmandu, Nepal (6-13 February 1985), recommended that the Commission should consider the preparation of an annex dealing with legal issues related to joint ventures arising in the context of industrial contracts. It had also recommended that the Commission take up concession agreements and other agreements in the field of natural resources. Preliminary consideration had also been given by the secretariat to the preparation of an annex dealing with the area of tendering and procurement in relation to the construction of industrial works. The work so far undertaken on the Legal Guide had suggested that a more detailed examination of the issues involved in procurement and tendering than was possible in the Legal Guide itself might be very valuable. The note indicated the intention of the secretariat to submit to a future session of the Commission a report setting forth proposals on how the value of the Legal Guide might be further enhanced.

345. The Commission took note of the reports of the Working Group on the work of the sixth and seventh sessions and expressed its appreciation to the Working Group for the efficient manner in which the work had been conducted. The Commission requested the Working Group to continue its work expeditiously and to submit a report on the work of its eighth session to the next session of the Commission.

346. The Commission considered the note by the secretariat on further work of the Commission in the area of international contracts for construction of industrial works. The Commission took note of the intention of the secretariat to submit to a future session of the Commission a report setting forth proposals on

[15]The Commission considered this subject at its 331st meeting, on 19 June 1985.

how the value of the legal guide might be enhanced by the preparation of some annexes thereto. It was observed that, in the preparation of that report, the secretariat should take into consideration the recommendations made by the Asian-African Legal Consultative Committee which were quoted in the note by the secretariat.

Chapter V. Liability of operators of transport terminals[16]

347. The Commission, at its sixteenth session in 1983, decided to include the topic of liability of operators of transport terminals in its programme of work, and to assign work on the preparation of uniform rules on that subject to a working group.[17] At its seventeenth session in 1984, the Commission decided to assign that work to its Working Group on International Contract Practices.[18] The Working Group commenced work on the topic at its eighth session, held at Vienna from 3 to 13 December 1984.

348. The Commission had before it the report of the Working Group on International Contract Practices on the work of its eighth session (A/CN.9/260). The report set forth the deliberations and decisions of the Working Group with respect to its method of work for carrying out the task of preparing uniform rules on the liability of operators of transport terminals, and with respect to issues arising in connection with the subject.

349. The Commission expressed its satisfaction with the work thus far accomplished, expressed its appreciation to the Working Group for the progress made, and requested the Working Group to proceed with its work expeditiously. In view of the particular importance of the secretariat study requested by the Working Group for the next session, the secretariat was requested to prepare the documentation in sufficient time to enable it to be considered by delegations before the beginning of the session.

Chapter VI. Co-ordination of work

A. *General co-ordination of activities*[19]

350. The Secretary of the Commission orally reported on the co-ordination activities in the field of international trade law during the preceding year. He noted that General Assembly resolution 39/82 of 13 December 1984 had reaffirmed "the mandate of the Commission, as the core legal body within the United Nations system in the field of international trade law, to co-ordinate activities in this field in order to avoid duplication of effort and to promote efficiency, consistency and coherence in the unification and harmonization of international trade law". He reported that the designation of the Commission as the core legal body in the field had come to be recognized by other international organizations, both within and outside the United Nations, who regularly turned to the Commission and to its secretariat for leadership in the field.

351. The participation of the large number of other international organizations in the meetings of the Commission and its Working Groups, as reflected in the reports of those meetings, was noted by the Commission. It was recognized that by their participation they contributed their expertise to the development of the Commission's own programme of work. It was also recognized that their participation in the meetings of the Commission served as an effective form of co-ordination of their activities with those of the Commission.

352. The Commission welcomed the continuing contact between the secretariat and other organizations interested in international trade law and urged the secretariat, within the limits of available resources, to strengthen those relationships to the extent possible.

353. It was noted that for the nineteenth session of the Commission the secretariat intended to present a report on current activities of other international organizations in the field of international trade law in general, similar to those presented most recently in 1981 and 1983. In addition, a report would be presented on current activities of other organizations in the field of international commercial arbitration.

B. *Legal value of computer records*[20]

354. The Commission at its fifteenth session in 1982 considered a report of the Secretary-General containing a discussion of certain legal problems arising in electronic funds transfers.[21] In respect of the question of the legal value of computer records, the report concluded: "The problem, while of particular importance to international electronic funds transfers, is one of general concern for all aspects of international trade. Generalized solutions would, therefore, be desirable."[22] On the basis of that report the Commission requested the secretariat to submit to some future session a report on the legal value of computer records in general.[23]

355. At its seventeenth session in 1984 the Commission decided to place the subject of legal problems

[16]The Commission considered this subject at its 331st meeting, on 19 June 1985.

[17]Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17* (A/38/17), para. 115.

[18]Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 113.

[19]The Commission considered this subject at its 328th meeting, on 18 June 1985.

[20]The Commission considered this subject at its 328th meeting, on 18 June 1985.

[21]A/CN.9/221 (and Corr. 1, French only).

[22]*Ibid.*, para. 81.

[23]See footnote 13.

arising out of the use of automatic data processing in international trade on the programme of work as a priority item.[24] At its current session the Commission had before it a report on the legal value of computer records (A/CN.9/265).

356. As part of the preparation for the report, the secretariat had prepared a questionnaire on the use of computer-readable data as evidence in court proceedings. At the same time and in co-operation with the secretariat of the Commission, the Customs Co-operation Council prepared a questionnaire on the acceptability to customs authorities of a goods declaration in computer-readable form and the subsequent use of such a declaration in court proceedings. The information contained in the replies had been used in the preparation of the report.

357. The report came to the conclusion that on a global level there were fewer problems in the use of data stored in computers as evidence in litigation than might have been expected. Almost all of the countries that replied to the questionnaire appeared to have legal rules which were at least adequate to permit the use of computer records as evidence and to permit the court to make the evaluation necessary to determine the proper weight to be given to the data or document.

358. The report noted that a more serious legal obstacle to the use of computers and computer-to-computer telecommunications in international trade arises out of requirements that documents be signed or that documents be in paper-based form.

Discussion in the Commission

359. The Commission welcomed this first report prepared by the secretariat in implementation of the decision at its seventeenth session to place the subject of legal problems arising out of the use of automatic data processing in international trade on the programme of work as a priority item. The information it contained and the analysis of the problems would aid States in reviewing their legal rules affecting the use of computers and other forms of automatic data processing. The Commission noted that the report had been prepared by the secretariat in co-operation with other international organizations which are interested in the subject and encouraged the secretariat to continue its collaboration with those and other organizations active in the field. In that regard it noted that the secretariat would submit for the nineteenth session a further report in respect of legal aspects of automatic data processing.

Decision

360. After deliberation, the Commission decided to adopt the following recommendation:

The United Nations Commission on International Trade Law,

Noting that the use of automatic data processing (ADP) is about to become firmly established throughout the world in many phases of domestic and international trade as well as in administrative services,

Noting also that legal rules based upon pre-ADP paper-based means of documenting international trade may create an obstacle to such use of ADP in that they lead to legal insecurity or impede the efficient use of ADP where its use is otherwise justified,

Noting further with appreciation the efforts of the Council of Europe, the Customs Co-operation Council and the United Nations Economic Commission for Europe to overcome obstacles to the use of ADP in international trade arising out of these legal rules,

Considering at the same time that there is no need for a unification of the rules of evidence regarding the use of computer records in international trade, in view of the experience showing that substantial differences in the rules of evidence as they apply to the paper-based system of documentation have caused so far no noticeable harm to the development of international trade,

Considering also that the developments in the use of ADP are creating a desirability in a number of legal systems for an adaptation of existing legal rules to these developments, having due regard, however, to the need to encourage the employment of such ADP means that would provide the same or greater reliability as paper-based documentation,

1. *Recommends* to Governments:

(*a*) to review the legal rules affecting the use of computer records as evidence in litigation in order to eliminate unnecessary obstacles to their admission, to be assured that the rules are consistent with developments in technology, and to provide appropriate means for a court to evaluate the credibility of the data contained in those records;

(*b*) to review legal requirements that certain trade transactions or trade related documents be in writing, whether the written form is a condition to the enforceability or to the validity of the transaction or document, with a view to permitting, where appropriate, the transaction or document to be recorded and transmitted in computer-readable form;

(*c*) to review legal requirements of a hand-written signature or other paper-based method of authentication on trade related documents with a view to permitting, where appropriate, the use of electronic means of authentication;

(*d*) to review legal requirements that documents for submission to governments be in writing and manually signed with a view to permitting, where appropriate, such documents to be submitted in computer-readable form to those administrative services which have acquired the necessary equipment and established the necessary procedures;

[24] Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 136.

2. *Recommends* to international organizations elaborating legal texts related to trade to take account of the present Recommendation in adopting such texts and, where appropriate, to consider modifying existing legal texts in line with the present Recommendation.

C. *Current activities of other organizations in the field of transfer of technology*[25]

361. The Commission, at its fourteenth session in 1981, suggested that the Secretariat should select a particular area of international trade law for detailed consideration as part of its regular report on current activities of international organizations related to the harmonization and unification of international trade law. At its current session the Commission had before it a report of the Secretary-General on the current activities of international organizations within the United Nations system relating to the legal aspects of technology transfer (A/CN.9/269). The Commission took note of the report with appreciation.

Chapter VII. Training and assistance[26]

362. At its seventeenth session in 1984, the Commission agreed that the sponsorship of regional symposia and seminars on international trade law in general and the activities of the Commission in particular should be continued and strengthened.[27] It was stressed that such symposia and seminars were of great benefit to lawyers and businessmen in developing countries. The Commission approved the approach taken by the secretariat in organizing symposia and seminars on a regional basis in collaboration with other organizations.

363. By its resolution 39/82 of 13 December 1984 on the report of the Commission on the work of its seventeenth session, the General Assembly reaffirmed the importance, in particular for the developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law, and the desirability of the Commission sponsoring symposia and seminars organized on a regional basis. The General Assembly also expressed its appreciation to those Governments, organizations and institutions that had collaborated with the secretariat of the Commission in organizing symposia and seminars, and invited Governments, international organizations and institutions to assist the secretariat of the Commission in financing and organizing regional seminars and symposia.

364. The Commission had before it a report of the Secretary-General on training and assistance (A/CN.9/270), which described the measures taken by the secretariat to implement the decisions of the Commission and of the General Assembly. The report noted, in particular, the association of the secretariat with the holding of several regional seminars. An Asian-Pacific Regional Trade Law Seminar (Canberra, Australia, 22-27 November 1984) had been conducted by the Attorney-General's Department of Australia, in association with the UNCITRAL secretariat and the Asian-African Legal Consultative Committee. The International Institute for the Unification of Private Law (UNIDROIT) and the Hague Conference on Private International Law also participated. Some of the main subjects emanating from the work of the Commission were discussed. The UNCITRAL secretariat participated in a regional seminar (Dubrovnik, Yugoslavia, 11-23 March 1985) on the international sale of goods (with special reference to the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)) organized by the Inter-University Centre of Postgraduate Studies, Dubrovnik. The Chamber of Commerce of Bogotá, the Iberoamerican Association of Chambers of Commerce, and the UNCITRAL secretariat, with the support of the secretariat of the Organization of American States, organized a regional seminar (Bogotá, Colombia, 22-23 April 1985) on the work of UNCITRAL and international trade law.

365. The report noted that on several occasions other than those mentioned above, the secretariat had participated in symposia and seminars which dealt with the work of the Commission, and that the secretariat intended to keep in touch with Governments and organizations with a view to collaborating with them in organizing symposia and seminars.

366. There was general agreement that the sponsorship of symposia and seminars on international trade law in general, and the activities of the Commission in particular, should be continued and strengthened. It was noted that such symposia and seminars were of great value to young lawyers and government officials from developing countries. During the course of the deliberations it was suggested that the activities on training and assistance would benefit if funds could be assured for the organization by the secretariat of symposia and seminars, and it was suggested that an attempt should be made at an appropriate time to obtain a regular budget allocation for such activities. It was also noted that on two occasions seminars on the activities of the Commission had been organized in connection with an annual session of the Commission and that efforts should be made to organize such seminars in connection with future sessions.

367. The Commission expressed its deep appreciation to all Governments and organizations which had assisted the secretariat in the financing and organization of symposia and seminars. The Commission also expressed its appreciation of the efforts undertaken in this area by the secretariat, and approved the general approach taken by the secretariat towards the organizing of symposia and seminars.

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[25]The Commission considered this subject at its 328th meeting, on 18 June 1985.

[26]The Commission considered this subject at its 331st meeting, on 19 June 1985.

[27]Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 141.

368. Several statements were made concerning proposals for the holding of symposia and seminars in the field of international trade law. The representative of Cuba stated that a seminar devoted to international trade law was planned to be held at Havana in 1987 in collaboration with the UNCITRAL secretariat. It was proposed to consult with the secretariat on the subjects to be considered, and the detailed organization of the seminar. The representative of the Regional Centre for Commercial Arbitration, Cairo, confirmed that a regional seminar on international commercial arbitration would be held, in collaboration with the UNCITRAL secretariat, in Cairo in January 1986. The representative extended an invitation to all delegates and observers present to attend that seminar. The representative of Kenya stated that consideration was being given in collaboration with the UNCITRAL secretariat, for the holding in Nairobi of a symposium dealing with international trade law and the activities of the Commission. The seminar would probably be scheduled for 1986. The representative of Australia stated that a trade law seminar similar to the Asian Pacific Regional Trade Law Seminar held in 1984 was planned to be held in 1988 in connection with Australia's bicentennial celebrations.

Chapter VIII. Status of conventions[28]

369. The Commission considered the status of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) (hereinafter referred to as the Limitation Convention); the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980); the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg) (hereinafter referred to as the Hamburg Rules); and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (hereinafter referred to as the Vienna Sales Convention). The Commission had before it a note by the secretariat on the status of those Conventions, which set forth the status of signatures, ratifications and accessions to them (A/CN.9/271).

370. Several delegations reported on the progress being made within their countries towards ratification of the Vienna Sales Convention, indicating the likelihood that in the near future sufficient ratifications would be obtained to bring the Convention into force. Noting that promising trend, the Secretary of the Commission indicated that he had been informed that many States which were parties to the Convention relating to a Uniform Law on the International Sale of Goods (the Hague, 1964) (hereinafter referred to as the 1964 Hague Convention) were awaiting the entry into force of the Vienna Sales Convention, so that concerted action could be taken by parties to the 1964 Hague Convention to denounce that Convention and become parties to the Vienna Sales Convention.

[28]The Commission considered this subject at its 328th meeting, on 18 June 1985.

Chapter IX. Relevant General Assembly resolutions, future work and other business[29]

A. *General Assembly resolution on the work of the Commission*

371. The Commission took note with appreciation of General Assembly resolution 39/82 of 13 December 1984, on the report of the Commission on the work of its seventeenth session.

B. *Date and place of the nineteenth session of the Commission*

372. It was decided that the Commission would hold its nineteenth session for four weeks from 16 June to 11 July 1986 in New York. It was noted that the main agenda item of the nineteenth session would be consideration of the draft Convention on International Bills of Exchange and International Promissory Notes, and views were expressed that the Commission should make every effort to complete its work on the draft Convention at that session.

C. *Sessions of the Working Groups*

373. It was decided that the Working Group on International Negotiable Instruments would hold its fourteenth session from 9 to 20 December 1985 at Vienna and, if an additional session was necessary to put the draft Convention on International Bills of Exchange and International Promissory Notes in a suitable form for consideration by the Commission at its nineteenth session, the fifteenth session would be held in February or March 1986 in New York.

374. It was decided that the Working Group on International Contract Practices would hold its ninth session from 6 to 17 January 1986 in New York.

375. It was decided that the Working Group on the New International Economic Order would hold its eighth session from 17 to 27 March 1986 at Vienna.

D. *Dissemination of decisions concerning UNCITRAL legal texts and uniform interpretation of such texts*

376. At the sixteenth and seventeenth sessions of the Commission, suggestions were made that means should be explored to disseminate judicial and arbitral decisions concerning legal texts emanating from the work of the Commission.[30] At the session of the Sixth Committee held during the thirty-ninth session of the General Assembly, a request was also made that the secretariat

[29]The Commission considered this subject at its 328th and 331st meetings, on 18 and 19 June 1985.

[30]Report of the United Nations Commission on International Trade Law on the work of its sixteenth session, *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17* (A/38/17), para. 137; Report of the United Nations Commission on International Trade Law on the work of its seventeenth session, *Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 17* (A/39/17), para. 155.

submit a paper on that subject to the eighteenth session of the Commission.[31]

377. The Commission had before it a note by the secretariat (A/CN.9/267) which discussed possible mechanisms for the collection and dissemination of decisions relating to legal texts emanating from the work of the Commission, and various measures to promote the uniform interpretation of such texts. The report noted that it might be premature at the present time for the Commission to formulate concrete mechanisms and measures, and suggested that the Commission might wish to consider doing so after the entry into force of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). The Commission decided to defer consideration of the matter to an appropriate future session.

378. In connection with this item, the Secretary of the Commission noted that pursuant to an authorization previously given by the Commission to the UNCITRAL secretariat,[32] the secretariat was in the process of preparing a book on the work of the Commission, including a discussion of the history, mandate, methods of work, and work programme of the Commission, as well as a discussion of the topics worked on by the Commission. The book would reproduce all legal texts adopted by the Commission and would contain a comprehensive list of all UNCITRAL documents.

[31]Summary record of the fourth meeting (A/C.6/39/SR.4), para. 28.

[32]Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), paras. 142, 143.

ANNEX I

UNCITRAL Model Law on International Commercial Arbitration

[Annex reproduced in part three, I, of this *Yearbook*.]

ANNEX II

List of documents of the session

[Annex not reproduced; see check-list of UNCITRAL documents in part three, IV, A, of this *Yearbook*.]

B. United Nations Conference on Trade and Development (UNCTAD): extract from the report of the Trade and Development Board (thirty-first session) (TD/B/1077)[a]

"B. *Progressive development of the law of international trade: eighteenth annual report of the United Nations Commission on International Trade Law (agenda item 8 (b))*

"918. At the 677th meeting, on 25 September 1985, the President drew attention to the eighteenth annual report of the United Nations Commission on International Trade Law (UNCITRAL) (A/40/17), which had been circulated under cover of document TD/B/1072.

"919. The representative of the USSR, noting that UNCITRAL successfully coped with its task, said that his delegation supported the draft resolution proposed by UNCITRAL in its annual report for eventual adoption by the General Assembly concerning the draft Model Law on international commercial arbitration. He felt that major attention should be given to the provision contained therein, according to which each State had the right, in case of its adoption of national legislation based on the Model Law, that its provisions concerning recognition and execution of foreign decisions should be based on reciprocity.

"Action by the Board

"920. At the same meeting the Board took note of the report of the United Nations Commission on International Trade Law on its eighteenth session (A/40/17) and of the comments made thereon."

[a]Official Records of the Trade and Development Board, Thirty-first Session, Supplement No. 1A (TD/B/1077).

C. General Assembly: report of the Sixth Committee (A/40/935)*

1. On the recommendation of the General Committee, the General Assembly decided at its 3rd plenary meeting, on 20 September 1985, to include in the agenda of its fortieth session the item entitled "Report of the United Nations Commission on International Trade Law on the work of its eighteenth session" and to allocate it to the Sixth Committee.

2. In connection with this item, the Sixth Committee had before it the report in question, which was introduced by the Chairman of the United Nations

*27 November 1985, Official Records of the General Assembly, Fortieth Session, annexes, agenda item 135.