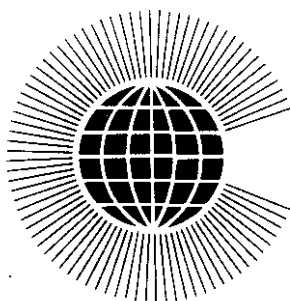


# **UNCITRAL Model Law on International Commercial Arbitration**

Explanatory Documentation prepared for  
Commonwealth Jurisdictions



Commonwealth Secretariat

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**Explanatory Documentation prepared for  
Commonwealth Jurisdictions**

Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX,  
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## Introductory Note

This "Accession Kit" has been prepared for the Commonwealth Secretariat by Dr. Gavan Griffiths, Solicitor-General of Australia, at the request of the Secretariat in order to provide Commonwealth countries with information concerning the UNCITRAL Model Law on international commercial arbitration. This was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985.

Unlike most of the previous accession kits, the subject text is not a Treaty. As a model law it is intended to be implemented by enactment by national legislatures as part of domestic law.

The model law has become of special relevance in recent times as a number of countries have sought to encourage the holding of international arbitrations in their jurisdiction. The traditional arbitration laws of most Commonwealth countries (and most non-Commonwealth countries) have hitherto acted as an impediment as they generally envisage a greater degree of involvement by the domestic courts than is provided for in the model law. Those countries which have sought to establish international arbitration centres therefore moved to amend their arbitration legislation to bring it into line with the UNCITRAL model law.

The "accession kit" should therefore be welcomed by Commonwealth Governments who are presently considering how best to foster the holding of international arbitrations in their own countries.

What follows in this "kit" is a discussion of the purpose of the model law, its salient features and the means for its adoption.

The Commonwealth Secretariat will be glad to supply further information upon request of any member governments and expresses its deep appreciation to Dr Griffiths for the assistance he has given by preparing this explanatory documentation.

Legal Division  
Commonwealth Secretariat  
October 1991

# CHAPTER I

## 1. Introduction

- 1.01 On 21 June 1985 the United Nations Commission on International Trade Law (UNCITRAL) adopted a Model Law on International Commercial Arbitration. The text of the Model Law is reproduced in Appendix A.
- 1.02 Before undertaking the Model Law project, UNCITRAL had adopted a set of Rules for Arbitration (1976) and for Conciliation (1980). There also existed the widely adopted Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (the New York Convention). Nonetheless, the diversity of national laws on international commercial arbitration was believed to constitute a serious impediment to the efficiency of the international arbitral process. The Model Law was proposed as a vehicle for harmonisation.
- 1.03 The task of drafting the Model Law was begun by the Working Group on International Contract Practices in February 1982. By June 1985, the project had attracted considerable interest: 62 State members or observers attended, as well as 18 international organisations. A list of participants is set out in Appendix C. When the final text was complete, the General Assembly of the United Nations recommended in Resolution 40/72 of 11 December 1985 "that all States give due consideration to the Model Law on International Commercial Arbitration, in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice".

## Purposes of the Model Law

- 1.04 Disparities amongst national laws have given rise to distinct difficulties. Mandatory rules of law in the country of arbitration have operated to preclude parties from conducting arbitration according to their agreement, or understanding as to what was appropriate to their case. In some legal systems, for example, the courts enjoy a discretion as to whether or not the parties should be referred to arbitration, irrespective of the parties' express consent. Even unfamiliar local non-mandatory rules may prevent the parties following the arbitral course most suited to their needs, as for example, where they inadvertently fail to exclude the application of such rules to their agreement.
- 1.05 Disparities in national laws can be fundamental, affecting the extent of court involvement, the rules of procedure, annulment and setting aside of awards, as well as award enforcement and recognition. Diversity problems are not confined to any one kind of legal system, although they are particularly acute where national arbitration laws are undeveloped, incomplete or out-of-date, or indeed not readily ascertainable by foreign parties. They tend to deny parties those assurances necessary for efficient international arbitration.
- 1.06 The Model Law is intended to end this state of affairs so that parties are undeterred by perceived qualitative differences in national laws and are confident to arbitrate wherever the practical interests of their arbitration can best be served. Furthermore, the Model Law can be viewed as a means of correcting the natural tendency of national laws



to have regard to domestic, rather than international arbitral needs. The Model Law thus aims to promote harmonisation of national laws, to satisfy the needs of arbitrating parties (and arbitral tribunals) and to enhance international commercial arbitration.

### The Nature of the Model Law

- 1.07 The Model Law is of its nature a flexible device. It is not a Convention and carries no obligation to enact legislation in its entirety in strict conformity with its terms. There may, for example, be competing interests which it might be thought desirable to protect. A strong case can, however, be made to say that a State would best be served by reasonably close adherence to the Model Law. The Model Law provides a set of provisions for the management of international commercial arbitration which each country may choose to accept, subject to those modifications or additions which its national legislature considers appropriate. Naturally, however, harmonisation is best promoted (and the interests of international arbitration best served) by the Law's close implementation. Mechanisms for adoption are discussed in Chapter 2 (below). There is little to be gained from adherence to local variants and much merit in providing foreign users of the arbitral system with a statement of the law which is easily ascertainable, certain and in conformity with that of other countries.

### Adoption of the Model Law

- 1.08 The Model Law's example has already proved persuasive. Some of its provisions have now been incorporated in standard arbitration rules, as for example, by the London Court of International

Arbitration in its 1985 International Rules. Legislation based on the Law has been enacted in Australia, Bulgaria, Canada (the Federal Parliament and by the Legislatures of all Provinces and Territories), Cyprus, Hong Kong, Nigeria, Scotland and within the United States of American, California, Connecticut and Texas. By the Model Law's adoption, these jurisdictions are creating an inviting legal forum for the settlement of international commercial disputes, a factor conducive to international trade and commerce.

- 1.09 One reason for the Model Law's increasing popularity is its international origin. Representatives from all regions and legal systems participated in its drafting, assisted by many others highly experienced in international arbitration. Participants are listed in Appendix C. The Law has, therefore, been framed in a manner particularly appropriate to the international problems it is designed to meet. Its international language (sometimes differing in style from national legislation) is peculiarly suited to the international context in which it is intended to operate. Moreover, the Model Law clearly complements other international instruments designed to apply to international arbitration, as for example, the widely-accepted New York Convention and the UNCITRAL Arbitration Rules.

#### Features of the Model Law

- 1.10 Apart from the interests of harmonisation, the Model Law has much intrinsic merit. Drafted to meet the parties' arbitral needs, it provides an excellent framework for international arbitration, by satisfying all the principal requirements of arbitral parties and tribunals. Thus -

- (1) The Model Law has a broad application and comprehensively covers all those circumstances which, practically speaking, constitute an international arbitration.
- (2) The competence and impartiality of arbitrators is appropriately protected. Chapter III (Arts 10-15) contains detailed provisions ensuring a properly appointed arbitral tribunal is established to determine the dispute.
- (3) Practical and effective provisions, especially in Chapter IV, constrain the arbitral tribunal to the limits of its jurisdiction.
- (4) The Model Law, in Chapter IV, makes provision for a procedure which is fair, efficient and capable of meeting the needs of the specific arbitration.
- (5) By the Model Law, an arbitral tribunal is required to reach a decision on the merits of the dispute in accordance with the rules of law chosen by the parties, or if necessary by the tribunal (Article 21), and to give reasons for its decision (Article 28). The tribunal cannot decide *ex aequo et bono* unless specifically authorised to do so.
- (6) Other provisions of the Law recognise and specifically provide for the recognition and enforcement of the award. These provisions complement the New York Convention, now governing the practice of many countries.

- (7) Finally, whilst the Model Law clearly affirms the consensual basis of arbitration, it also provides for appropriate court protections.

1.11 In fulfilling the requirements of international commercial arbitration, the Model Law observes the following principles -

- (1) That the parties should be free to agree on how their arbitration should be conducted.
- (2) That, in the absence of agreement, the arbitral tribunal should be able to fashion the arbitration to suit the parties' needs.
- (3) That the arbitration should be conducted in accordance with rules, enforceable in courts.
- (4) That the arbitration should be conducted fairly.
- (5) That the arbitration should not be unduly affected by the municipal law of the country in which it is held.
- (6) That there should be uniform treatment of all awards, irrespective of their place of origin.
- (7) That there should be certainty as to the extent of court involvement.
- (8) That national legislation should take account of the principal international instruments, especially the New York Convention.

## 2. Application of the Model Law

- 2.01 The Model Law has a wide, but nonetheless relatively specific coverage. Under Article 1.1, the Law applies solely to "international commercial arbitration". It does not purport to apply to domestic arbitration of any kind (although a State might so extend it). Further, save for Articles 8, 9, 35 and 36, the Law applies only when the nominated 'place of arbitration' is the adopting State.
- 2.02 The notion of what is commercial is a broad one. It is not defined by reference to the identity of the parties: see Article 1.1. Article 1.3 lays down four tests for internationality.
- 2.03 The basic criterion is provided by Article 1.3(a), according to which an arbitration is international if the parties have their place of business in different States. The remaining criteria cover situations which would be regarded as international in practice. If more than one place, the relevant place of business will ordinarily be the place of business with the closest relationship to the arbitration agreement: Article 1.4(a). cf European Convention on International Commercial Arbitration (Geneva 1961), Article 1(1)(a), and the UN Convention on Contracts for the International Sale of Goods (Vienna 1980).
- 2.04 Under Article 1.3(b), the arbitration will be international if any one of the following is in a State other than the one in which the parties have their place of business: (i) the place of arbitration, if determined in the arbitration agreement; (ii) the place of arbitration, if

determined 'pursuant to' the arbitration agreement; (iii) any place in which a substantial proportion of the obligation is performed; or (iv) the place with which the dispute is most closely connected. Thus, in recognition of the essentially consensual nature of the arbitration, Article 1.3(a) permits parties having their place of business in the same State to turn an otherwise 'domestic' arbitration into an arbitration subject to the Model Law, by selecting a foreign place of arbitration.

- 2.05 Further, the arbitration also will be international under Article 1.3(c) if the parties agree that the subject matter of the arbitration agreement relates to more than one country, subject to the possibility that such agreement may be of limited effect if there is in fact no relationship outside the State.

### **3. The Arbitral Tribunal**

- 3.01 The composition of the arbitral tribunal is the subject of Chapter III. In the absence of contrary agreement, the number of arbitrators is to be three: Article 10. There is provision for court assistance in the appointment of arbitrators whenever necessary: Article 11. Arbitrators are required to disclose any interests likely to affect their impartiality and independence, or any lack of the qualifications agreed to by the parties. The obligation to disclose continues throughout the proceedings: Article 12. Parties are entitled to challenge an arbitrator on related grounds, although any such challenge to a party-appointed arbitrator must be made at the time of appointment, unless it can be shown that the relevant circumstances came to light only at a later date. Challenge procedure is set out in Article 13 which

further provides that a dissatisfied party may, within 30 days of notice of the decision, appeal to a court. At the discretion of the tribunal, the arbitration may continue during ensuing litigation. The judgment of the court is not subject to further appeal.

3.02 The task of an arbitral tribunal is to determine the substance of a dispute, arising out of a valid arbitration agreement. The requisite form of a valid agreement is dealt with in Article 7, the provisions of which are modelled on the New York Convention. Thus, an award made in respect of an agreement conforming to Article 7 would be enforceable under the Convention.

3.03 The tribunal has power, under Article 17, to order interim measures of protection in respect of the subject matter of the dispute absent a contrary agreement by the parties. cf UNCITRAL Arbitration Rules, Article 26(1)(2). The Model Law does not deal with the matter of enforcement.

3.04 The tribunal is, moreover, empowered by Article 16 to determine its own jurisdiction. This conforms to generally accepted principle: see UNCITRAL Arbitration Rules, Article 21(1), Rules for the ICC Court of Arbitration, Article 8(3); European Convention on International Commercial Arbitration, Article V (3); Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Article 41(1) (Washington 1965). Despite its seeming breadth, the provision is in fact well circumscribed. The tribunal's decision is subject to immediate court review (Article 16(3)) and, possibly, to subsequent court challenge in setting aside applications (Article 34), or in

actions for recognition and enforcement (Article 36). See also Article 8.

- 3.05 The obvious intent of the Model Law (including the limited provision for challenging an arbitrator in Article 13) is to ensure that the arbitration is not impeded by delaying tactics. They provide sensible solutions which nonetheless recognise that the private consensual nature of arbitration must, on occasion, give way to court review.

#### **4. Conduct of Arbitration**

- 4.01 Articles 19-27 relate to the rules of procedure for arbitration, including the place of arbitration, the commencement of arbitration, written proceedings, party default, experts appointed by the arbitral tribunal, and court assistance in the taking of evidence. In general, they conform to the provisions of the UNCITRAL Arbitration Rules. The principle of party choice controls and absent agreement, procedural matters lie largely in the tribunal's discretion.
- 4.02 Articles 18 and 19 enact the basic charter for arbitral procedures. Under Article 19, the parties are free to agree on the procedure to be adopted by the arbitral tribunal and, absent agreement, the tribunal may conduct the arbitration as it considers appropriate. In substance, the provision enables the parties to free themselves of unfamiliar, local standards and to adopt rules suited to their particular concerns. At the same time, any such agreement and, indeed, any action taken by the arbitral tribunal is subject to the stipulation contained in Article 18, that each party be treated with equality and afforded full



opportunity to present its case. See also Article 34(2)(a)(ii) and (b)(ii); Article 36.

- 4.03 Other salient provisions include the stipulation that arbitral proceedings commence with the receipt by the respondent of the request for arbitration (Article 21). The parties have a right to oral hearings, and may demand them, unless they have agreed that the arbitration be conducted on the basis of documents and other materials (Article 24). A party's failure to appear at a hearing, if duly notified of it, amounts to a default and arbitrators are authorised to decide the matter *ex parte* (Article 25). Parties have the right to question any expert appointed by the tribunal (Article 26) and the tribunal, or any party with the tribunal's approval, may petition the Model State's courts for assistance in taking evidence (Article 27). In conformity with generally recognised principles, there may be an implied waiver of the right to object to non-compliance with procedural requirements in situations such as failure to object within stipulated time limits or without undue delay: see, generally, Article 4.

## **5. Making of Awards**

- 5.01 There are obvious difficulties in selecting the rules applicable to the substance of international commercial disputes. Particularly in the case of arbitration, no one body of law especially commends itself: the applicable law could be that of the place of arbitration, the place of substantial performance, or the place of business of one or other party. Commonly, parties stipulate for the law of a jurisdiction which has no connection with the agreement to apply. Article 28 resolves the problem entirely. It provides first, that the

dispute shall be determined according to the rules of law chosen by the parties and, absent agreement, according to the applicable law determined by the tribunal based on the conflict of laws rules which it considers appropriate.

5.02 The Model Law recognises the capacity of parties to agree that their disputes should be resolved pursuant to no law, by the intervention of an amiable compositeur a procedure known to civil law jurisdictions. Similarly, the parties may agree to resolution ex aequo et bono, ie, according to principles of equity or fairness to be applied by the arbitrator independently of any applicable law. To this extent the concepts are relatively unfamiliar to common law jurisdictions, but readily capable of application by specific agreement of the parties. Indeed, the concept is already being used by the arbitration laws of some common law countries, eg, in each of the Australian States and Territories, by provisions equivalent to section 22 of the Commercial Arbitration Act 1984 of New South Wales.

5.03 Articles 29-33 deal with other pertinent topics, including decision-making by a panel of arbitrators, settlement, form and content of awards, termination of proceedings, the correction and interpretation of awards and the making of additional awards. These provisions are straightforward and speak for themselves.

## **6. Recognition and Enforcement of Awards**

6.01 On matters of recognition and enforcement, the Model Law is modelled on the almost universally accepted New York Convention (Article IV). However, it also complements and supplements the Convention: Article 35

provides that awards under the Model Law are considered binding and enforceable, irrespective of the country in which they are made.

- 6.02 The grounds for refusing recognition are the same as those in the New York Convention, and mirror the grounds for the setting aside of awards contained in Article 34. A party who has not moved in due time to set aside an award under Article 34 is not thereby foreclosed from defences to recognition and enforcement.

## **7. The Role of the Courts**

- 7.01 The Model Law requires a court to refer the parties to arbitration, if the dispute is the subject of a valid arbitration agreement. See Article 8(1).
- 7.02 It specifically prohibits a court from intervening in matters governed by the Law except where express provision is made. Such provision is in fact made in Article 8 (arbitration agreement and substantive claim before the court); Article 9 (interim measures); Article 11 (appointment of arbitrators); Article 13 (challenge procedure); Article 14 (failure or impossibility to act); Article 16 (competence of arbitral tribunal to rule on jurisdiction); Article 27 (court assistance in taking evidence); Article 34 (setting aside an award); and Articles 35 and 36 (recognition and enforcement of awards). The effect of Article 5 is to exclude any general or residual court powers in relation to matters governed by the Model Law.
- 7.03 The Model Law has, in this respect, the considerable merit of certainty. Further, it permits foreign parties readily to ascertain the possible occasions for court intervention. Moreover, although it is to be

hoped that adopting States will take the Law largely as defined, any State could extend the scope of judicial review without breaching any international obligation.

- 7.04 The Model Law provides for a defined and limited court supervisory role as, for example, in Article 13 (appeal against unsuccessful challenge), or Article 34 (application to set aside an award). The short list of grounds contained in Article 34 is modelled on Article V of the New York Convention. It raises considerations of 'public policy' in Article 34(2)(b)(ii). Other grounds include lack of capacity, invalidity of the arbitration agreement, excess of jurisdiction, non-arbitrability and like matters.
- 7.05 It is only if a matter is not governed by the Model Law that court involvement will be determined by domestic law. Such matters include the capacity of the parties to conclude the arbitration agreements, the impact of State immunity, contractual or other relations between parties and arbitrators, fixing of fees and costs and requests for deposits and security; the competence of the arbitral tribunal to adapt contracts; enforcement by courts of interim measures of protection ordered by arbitral tribunals under Article 17; the period of time for enforcement of arbitral awards; liability of arbitrators for misconduct or error; and the rules according to which the court may assist in taking evidence under Article 27.

## CHAPTER II

### 8. Implementing the Model Law

- 8.01 As its name indicates, the Model Law provides a text which if enacted by national legislatures would not only form a sound basis for an arbitration regime, but also conform to internationally approved standards. It is, however, for each country to decide whether it takes advantage of the Model Law by enacting it as part of its municipal law.
- 8.02 Generally speaking, States have thus far implemented the Model Law with few substantial changes. In 1989, the Australian Parliament amended the Arbitration (Foreign Awards and Agreements) Act 1974 by the International Arbitration Amendment Act 1989. The outcome of these amendments is set out at Appendix B as one example of legislative adoption and conveniently illustrates the kind of matters to which consideration might appropriately be given by a Commonwealth legislature proposing to adopt the Model Law.
- 8.03 The Model Law has a capacity for universality of operation. It is appropriate for adoption by States irrespective of whether they have effective and up to date arbitration laws for domestic arbitration. When enacting the Model Law, States which have pre-existing and effective domestic arbitration laws may choose to confer on the parties the capacity to stipulate that their arbitration should proceed under the domestic regime rather than the Model Law. This is the course followed by the Australian Act. At the same time the Model Law provides a very effective law

for domestic as well as international arbitrations, and it is within the freedom of choice of an enacting jurisdiction to apply the Model Law to both domestic and international arbitration. Such universal enactment is a convenient mechanism for a State to enact a general relevant and up-to-date arbitration law.

8.04 The terms of the Model Law also require an adopting State to make specific provision for certain matters. Thus, under Article 6 an enacting State should specify the court which is to perform the functions referred to in Articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2).

8.05 There are certain other relevant matters which the Model Law does not address. Consideration may be given to whether they could usefully be included in the text of adopting legislation. These matters are:-

(1) Liability of an Arbitrator

The Model Law makes no provision for the liability of an arbitrator. The Australian legislation provides, however, that whilst an arbitrator is not liable for negligence, he or she will be liable for fraud.

(2) Interest

It is desirable that there be a power to award interest, both for the period up to the making of the award, and after the award is made until payment. There usually is no difficulty in ordering payments on account of interest in civil law jurisdictions and the Model Law contains no specific provisions for the award of interest. Common law jurisdictions usually award

interest only if specifically empowered to do so, and, for example, the Australian Act makes special provisions for interest along these lines (sections 25 and 26).

(3) Costs

The Model Law makes no provision for costs. The Australian Act confers a discretion on the arbitral tribunal to award costs of the arbitration (including the fees and expenses of the arbitrator): see section 27.

(4) Orders under Article 17

As noted, the Model Law does not make provision for the enforcement of Article 17 orders (arbitral orders for interim measures). Provision is specifically made in the Australian Act (section 23).

8.06 Furthermore, the appropriate application of any adopting legislation may well be assisted by the incorporation of some interpretive rules, or definitions. It would, for example, be appropriate to provide for reference to the travaux préparatoires, viz UNCITRAL's preparatory documents, including the material of the working group. See, in this regard, section 17 of the Australian Act. Given the vagueness of the 'public policy' concept in common law jurisdictions, it may also be advisable to include a provision confirming that, in the context of Articles 34 and 36, the term is intended to cover issues of procedural justice, as well as substantive principle and would embrace instances of corruption, bribery, fraud, as well as breaches of natural justice, or any other violation of Article 18: see the Australian Act, section 19.





## **APPENDIX A: The Model Law**



# ***UNCITRAL Model Law on International Commercial Arbitration***

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

## **CHAPTER I. GENERAL PROVISIONS**

### **Article 1. *Scope of application*\***

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

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

(3) An arbitration is international if:

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

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

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

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

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

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

- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
  - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
  - (b) if a party does not have a place of business, reference is to be made to his habitual residence.
- (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

## *Article 2. Definitions and rules of interpretation*

For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

## *Article 3. Receipt of written communications*

(1) Unless otherwise agreed by the parties:

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

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

Article 4. *Waiver of right to object*

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

Article 5. *Extent of court intervention*

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

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

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

## CHAPTER II. ARBITRATION AGREEMENT

Article 7. *Definition and form of arbitration agreement*

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

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. *Arbitration agreement and substantive claim before court*

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute,

refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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

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

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

### CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

*Article 10. Number of arbitrators*

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

*Article 11. Appointment of arbitrators*

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

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

- (3) Failing such agreement,
  - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
  - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
  - (a) a party fails to act as required under such procedure, or
  - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
  - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

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

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

#### *Article 12. Grounds for challenge*

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

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

#### *Article 13. Challenge procedure*

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

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

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

Article 14. *Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

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

Article 15. *Appointment of substitute arbitrator*

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

#### CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

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

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

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

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



the arbitral tribunal may continue the arbitral proceedings and make an award.

*Article 17. Power of arbitral tribunal to order interim measures*

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

## CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

*Article 18. Equal treatment of parties*

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

*Article 19. Determination of rules of procedure*

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

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

*Article 20. Place of arbitration*

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

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

*Article 21. Commencement of arbitral proceedings*

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

#### Article 22. *Language*

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

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

#### Article 23. *Statements of claim and defence*

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

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

#### Article 24. *Hearings and written proceedings*

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

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

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

Article 25. *Default of a party*

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

- (a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. *Expert appointed by arbitral tribunal*

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

- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

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

Article 27. *Court assistance in taking evidence*

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

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. *Rules applicable to substance of dispute*

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

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

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

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

#### Article 29. *Decision-making by panel of arbitrators*

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

#### Article 30. *Settlement*

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

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

#### Article 31. *Form and contents of award*

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

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

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

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

#### Article 32. *Termination of proceedings*

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

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

- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

Article 33. *Correction and interpretation of award; additional award*

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

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

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

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

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

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

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

## CHAPTER VII. RECOURSE AGAINST AWARD

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

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

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

- (a) the party making the application furnishes proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
  - (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
  - (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or
- (b) the court finds that:
  - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the award is in conflict with the public policy of this State.

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

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

as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

### Article 35. *Recognition and enforcement*

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

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

### Article 36. *Grounds for refusing recognition or enforcement*

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

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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\*\*\* 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.

- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
  - (v) the award has not yet become binding on the parties or has been set aside or suspended by a court of the country in which, or under the law of which, that award was made; or
- (b) if the court finds that:
- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of this State; or
  - (ii) the recognition or enforcement of the award would be contrary to the public policy of this State.

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



**APPENDIX B:   Draft Model Act: The Australian  
International Arbitration Act 1974,  
as amended by the International  
Arbitration Amendment Act 1989**





REPRINT No. 2

## INTERNATIONAL ARBITRATION ACT 1974

*Reprinted as at 31 January 1990*

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**SCHEDULE 1**

United Nations Conference on International Commercial Arbitration

Convention on the Recognition and Enforcement of Foreign Arbitral  
Awards

**SCHEDULE 2**

UNCITRAL Model Law on International Commercial Arbitration



## INTERNATIONAL ARBITRATION ACT 1974

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An Act relating to the recognition and enforcement of foreign arbitral awards, and the conduct of international commercial arbitrations, in Australia, and for related purposes.

### PART I—PRELIMINARY

#### Short title of Principal Act

1. This Act may be cited as the *International Arbitration Act 1974*.<sup>1</sup>

#### Commencement

2.<sup>1</sup> (1) Sections 1, 2, 3 and 4 shall come into operation on the day on which this Act receives the Royal Assent.

(2) The remaining provisions of this Act shall come into operation on a date to be fixed by Proclamation, being a date not earlier than the date on which the Convention enters into force for Australia.

#### Territories

2A. This Act extends to all external Territories.

#### Crown to be bound

2B. This Act binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.

#### Effect on Sea-carriage of Goods Act

2C. Nothing in this Act affects the operation of section 9 of the *Sea-carriage of Goods Act 1924*.

## PART II—ENFORCEMENT OF FOREIGN AWARDS

### Interpretation

3. (1) In this Part, unless the contrary intention appears:

- “**agreement in writing**” has the same meaning as in the Convention;
- “**arbitral award**” has the same meaning as in the Convention;
- “**arbitration agreement**” means an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention;
- “**Australia**” includes the Territories;
- “**Convention**” means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration at its twenty-fourth meeting, a copy of the English text of which is set out in Schedule 1;
- “**Convention country**” means a country (other than Australia) that is a Contracting State within the meaning of the Convention;
- “**court**” means any court in Australia, including a court of a State or Territory;
- “**foreign award**” means an arbitral award made, in pursuance of an arbitration agreement, in a country other than Australia, being an arbitral award in relation to which the Convention applies.

(2) In this Part, where the context so admits, “**enforcement**”, in relation to a foreign award, includes the recognition of the award as binding for any purpose, and “**enforce**” and “**enforced**” have corresponding meanings.

(3) For the purposes of this Part, a body corporate shall be taken to be ordinarily resident in a country if, and only if, it is incorporated or has its principal place of business in that country.

### Accession to Convention

4. Approval is given to accession by Australia to the Convention without any declaration under sub-article 3 of Article 1 but with a declaration under Article X that the Convention shall extend to all the external Territories other than Papua New Guinea.

### Enforcement of foreign arbitration agreements

7. (1) Where:

- (a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

- (b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;
- (c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or
- (d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

this section applies to the agreement.

- (2) Subject to this Part, where:
  - (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
  - (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

**Recognition of foreign awards**

8. (1) Subject to this Part, a foreign award is binding by virtue of this Act for all purposes on the parties to the arbitration agreement in pursuance of which it was made.

(2) Subject to this Part, a foreign award may be enforced in a court of a State or Territory as if the award had been made in that State or Territory in accordance with the law of that State or Territory.

(4) Where:

- (a) at any time, a person seeks the enforcement of a foreign award by virtue of this Part; and
- (b) the country in which the award was made is not, at that time, a Convention country;

subsections (1) and (2) do not have effect in relation to the award unless that person is, at that time, domiciled or ordinarily resident in Australia or in a Convention country.

(5) Subject to subsection (6), in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may, at the request of the party against whom it is invoked, refuse to enforce the award if that party proves to the satisfaction of the court that:

- (a) that party, being a party to the arbitration agreement in pursuance of which the award was made, was, under the law applicable to him, under some incapacity at the time when the agreement was made;
- (b) the arbitration agreement is not valid under the law expressed in the agreement to be applicable to it or, where no law is so expressed to be applicable, under the law of the country where the award was made;
- (c) that party was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case in the arbitration proceedings;
- (d) the award deals with a difference not contemplated by, or not falling within the terms of, the submission to arbitration, or contains a decision on a matter beyond the scope of the submission to arbitration;
- (e) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or



- (f) the award has not yet become binding on the parties to the arbitration agreement or has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made.

(6) Where an award to which paragraph (5) (d) applies contains decisions on matters submitted to arbitration and those decisions can be separated from decisions on matters not so submitted, that part of the award which contains decisions on matters so submitted may be enforced.

(7) In any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court may refuse to enforce the award if it finds that:

- (a) the subject matter of the difference between the parties to the award is not capable of settlement by arbitration under the laws in force in the State or Territory in which the court is sitting; or
- (b) to enforce the award would be contrary to public policy.

(8) Where, in any proceedings in which the enforcement of a foreign award by virtue of this Part is sought, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may, if it considers it proper to do so, adjourn the proceedings, or so much of the proceedings as relates to the award, as the case may be, and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

#### **Evidence of awards and arbitration agreements**

9. (1) In any proceedings in which a person seeks the enforcement of a foreign award by virtue of this Part, he shall produce to the court:

- (a) the duly authenticated original award or a duly certified copy; and
- (b) the original arbitration agreement under which the award purports to have been made or a duly certified copy.

(2) For the purposes of subsection (1), an award shall be deemed to have been duly authenticated, and a copy of an award or agreement shall be deemed to have been duly certified, if:

- (a) it purports to have been authenticated or certified, as the case may be, by the arbitrator or, where the arbitrator is a tribunal, by an officer of that tribunal, and it has not been shown to the court that it was not in fact so authenticated or certified; or

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- (b) it has been otherwise authenticated or certified to the satisfaction of the court.

(3) If a document or part of a document produced under subsection (1) is written in a language other than English, there shall be produced with the document a translation, in the English language, of the document or that part, as the case may be, certified to be a correct translation.

(4) For the purposes of subsection (3), a translation shall be certified by a diplomatic or consular agent in Australia of the country in which the award was made or otherwise to the satisfaction of the court.

(5) A document produced to a court in accordance with this section is, upon mere production, receivable by the court as *prima facie* evidence of the matters to which it relates.

**Evidence relating to Convention**

10. (1) For the purposes of this Part, a certificate purporting to be signed by the Secretary to the Department of Foreign Affairs and stating that a country specified in the certificate is, or was at a time so specified, a Convention country is, upon mere production, receivable in any proceedings as *prima facie* evidence of that fact.

(2) For the purposes of this Part, a copy of the *Gazette* containing a Proclamation fixing a date under subsection 2 (2) is, upon mere production, receivable in any proceedings as *prima facie* evidence of:

- (a) the fact that Australia has acceded to the Convention in accordance with section 4; and
- (b) the fact that the Convention entered into force for Australia on or before the date so fixed.

**Delegation by Secretary to the Department of Foreign Affairs and Trade**

10A. (1) The Secretary may, either generally or as otherwise provided by the instrument of delegation, in writing, delegate to the person occupying a specified office in the Department of Foreign Affairs and Trade all or any of the Secretary's powers under subsection 10 (1).

(2) A power delegated under subsection (1) shall, when exercised by the delegate, be deemed to have been exercised by the Secretary.

(3) The delegate is, in the exercise of a power delegated under subsection (1), subject to the directions of the Secretary.

(4) The delegation of a power under subsection (1) does not prevent the exercise of the power by the Secretary.

(5) In this section, “**Secretary**” means the Secretary to the Department of Foreign Affairs and Trade.

#### **Effect of this Part on other laws**

12. (1) This Part applies to the exclusion of any provisions made by a law of a State or Territory with respect to the recognition of arbitration agreements and the enforcement of foreign awards, being provisions that operate in whole or in part by reference to the Convention.

(2) Except as provided in subsection (1), nothing in this Part affects the right of any person to the enforcement of a foreign award otherwise than in pursuance of this Act.

#### **Judiciary Act**

13. A matter arising under this Part, including a question of interpretation of the Convention for the purposes of this Act, shall, for the purposes of section 38 of the *Judiciary Act 1903-1973*, be deemed not to be a matter arising directly under a treaty.

#### **Application of Part**

14. The application of this Part extends to agreements and awards made before the date fixed under subsection 2 (2), including agreements and awards made before the day referred to in subsection 2 (1).

### **PART III—INTERNATIONAL COMMERCIAL ARBITRATION**

#### *Division 1—Preliminary*

#### **Interpretation**

15. (1) In this Part:  
“**Model Law**” means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, the English text of which is set out in Schedule 2.

(2) Except so far as the contrary intention appears, a word or expression that is used both in this Part and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in this Part, the same meaning as it has in the Model Law.

*Division 2—Model Law***Model Law to have force of law**

**16. (1)** Subject to this Part, the Model Law has the force of law in Australia.

**(2)** In the Model Law:

“**State**” means Australia (including the external Territories) and any foreign country;

“**this State**” means Australia (including the external Territories).

**Interpretation of Model Law—use of extrinsic material**

**17. (1)** For the purposes of interpreting the Model Law, reference may be made to the documents of:

(a) the United Nations Commission on International Trade Law; and

(b) its working group for the preparation of the Model Law;

relating to the Model Law.

**(2)** Subsection (1) does not affect the application of section 15AB of the *Acts Interpretation Act 1901* for the purposes of interpreting this Part.

**Courts specified for purposes of Article 6 of Model Law**

**18.** The following courts shall be taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in that article:

(a) if the place of arbitration is, or is to be, in a State—the Supreme Court of that State;

(b) if the place of arbitration is, or is to be, in a Territory:

(i) the Supreme Court of that Territory; or

(ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory.

**Articles 34 and 36 of Model Law—public policy**

**19.** Without limiting the generality of subparagraphs 34 (2) (b) (ii) and 36 (1) (b) (ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:

(a) the making of the award was induced or affected by fraud or corruption; or

- (b) a breach of the rules of natural justice occurred in connection with the making of the award.

**Chapter VIII of Model Law not to apply in certain cases**

20. Where, but for this section, both Chapter VIII of the Model Law and Part II of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.

**Settlement of dispute otherwise than in accordance with Model Law**

21. If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute.

*Division 3—Optional provisions*

**Application of optional provisions**

22. If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that the other provisions, or any of the other provisions, of this Division are to apply in relation to the settlement of any dispute (being a dispute that is to be settled in accordance with the Model Law) that has arisen or may arise between them, those provisions apply in relation to the settlement of that dispute.

**Orders under Article 17 of the Model Law**

23. Chapter VIII of the Model Law applies to orders by an arbitral tribunal under Article 17 of the Model Law requiring a party:

- (a) to take an interim measure of protection; or
- (b) to provide security in connection with such a measure;

as if any reference in that chapter to an arbitral award or an award were a reference to such an order.

**Consolidation of arbitral proceedings**

24. (1) A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that:

- (a) a common question of law or fact arises in all those proceedings;

## s. 24

- (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
  - (c) for some other reason specified in the application, it is desirable that an order be made under this section.
- (2) The following orders may be made under this section in relation to 2 or more arbitral proceedings:
- (a) that the proceedings be consolidated on terms specified in the order;
  - (b) that the proceedings be heard at the same time or in a sequence specified in the order;
  - (c) that any of the proceedings be stayed pending the determination of any other of the proceedings.
- (3) Where an application has been made under subsection (1) in relation to 2 or more arbitral proceedings (in this section called the **"related proceedings"**), the following provisions have effect.
- (4) If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.
- (5) If 2 or more arbitral tribunals are hearing the related proceedings:
- (a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and
  - (b) the tribunals shall, as soon as practicable, deliberate jointly on the application.
- (6) Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:
- (a) the tribunals shall jointly make the order;
  - (b) the related proceedings shall be dealt with in accordance with the order; and
  - (c) if the order is that the related proceedings be consolidated—the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Articles 10 and 11 of the Model Law, from the members of the tribunals.
- (7) If the tribunals are unable to make an order under subsection (6), the related proceedings shall proceed as if no application has been made under subsection (1).

(8) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.

**Interest up to making of award**

25. (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where an arbitral tribunal determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the tribunal may, subject to subsection (2), include in the sum for which the award is made interest, at such reasonable rate as the tribunal determines on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(2) Subsection (1) does not:

- (a) authorise the awarding of interest upon interest;
- (b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise; or
- (c) affect the damages recoverable for the dishonour of a bill of exchange.

**Interest on debt under award**

26. Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where an arbitral tribunal makes an award for the payment of money, the tribunal may direct that interest, at such reasonable rate as the tribunal determines, is payable, from the day of the making of the award or such later day as the tribunal specifies, on so much of the money as is from time to time unpaid and any interest that so accrues shall be deemed to form part of the award.

**Costs**

27. (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) shall be in the discretion of the arbitral tribunal.

(2) An arbitral tribunal may in making an award:

- (a) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid;
- (b) tax or settle the amount of costs to be so paid or any part of those costs; and

- (c) award costs to be taxed or settled as between party and party or as between solicitor and client.

(3) Any costs of an arbitration (other than the fees or expenses of an arbitrator) that are directed to be paid by an award are, to the extent that they have not been taxed or settled by the arbitral tribunal, taxable in the Court having jurisdiction under Article 34 of the Model Law to hear applications for setting aside the award.

(4) If no provision is made by an award with respect to the costs of the arbitration, a party to the arbitration agreement may, within 14 days after receiving the award, apply to the arbitral tribunal for directions as to the payment of those costs, and thereupon the tribunal shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the tribunal thinks proper with respect to the payment of the costs of the arbitration.

#### *Division 4—Miscellaneous*

##### **Liability of arbitrator**

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

##### **Representation in proceedings**

29. (1) Where, in accordance with the Model Law, with the agreement of the parties or at the request of a party, as the case may be, the arbitral tribunal holds oral hearings for the presentation of evidence or for oral argument, or conducts proceedings on the basis of documents or other materials, the following provisions shall, without prejudice to the Model Law, apply.

(2) A party may appear in person before an arbitral tribunal and may be represented:

- (a) by himself or herself;
- (b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or
- (c) by any other person of that party's choice.

(3) A legal practitioner or a person, referred to in paragraphs (2) (b) or (c) respectively, while acting on behalf of a party to an arbitral proceeding to which Part III applies, including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within the legal jurisdiction in which the arbitral proceedings are conducted.



(4) Where, subject to the agreement of the parties, an arbitral tribunal conducts proceedings on the basis of documents and other materials, such documents and materials may be prepared and submitted by any legal practitioner or person who would, under subsection (2), be entitled to appear before the tribunal, and, in such a case, subsection (3) shall apply with the same force and effect to such a legal practitioner or person.

### **Application of Part**

30. This Part does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of this Part unless the parties have (whether in the agreement or in any other document in writing) otherwise agreed.

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## **SCHEDULE 1**

Section 3

### **UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL ARBITRATION CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS**

#### **ARTICLE I**

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

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

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

#### **ARTICLE II**

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

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

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

**SCHEDULE 1—continued****ARTICLE III**

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

**ARTICLE IV**

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

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

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

**ARTICLE V**

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

- (a) The parties to the agreement referred to in article II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

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

**ARTICLE VI**

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

**SCHEDULE 1—continued**

**ARTICLE VII**

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

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

**ARTICLE VIII**

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

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

**ARTICLE IX**

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

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

**ARTICLE X**

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

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

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

**ARTICLE XI**

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

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

**SCHEDULE 1—continued****ARTICLE XII**

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

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

**ARTICLE XIII**

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

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

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

**ARTICLE XIV**

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

**ARTICLE XV**

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

- (a) Signatures and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

**ARTICLE XVI**

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

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

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**SCHEDULE 2**

Subsection 15 (1)

*UNCITRAL Model Law on International Commercial Arbitration*

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

**CHAPTER I. GENERAL PROVISIONS**

**Article 1. Scope of application\***

(1) This Law applies to international commercial<sup>\*\*</sup> arbitration, subject to any agreement in force between this State and any other State or States.

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

(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
  - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

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

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

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

**Article 2. Definitions and rules of interpretation**

For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

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

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

## SCHEDULE 2—continued

- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. *Receipt of written communications*

- (1) Unless otherwise agreed by the parties:
  - (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last-known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;
  - (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.

Article 4. *Waiver of right to object*

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

Article 5. *Extent of court intervention*

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

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

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

## CHAPTER II. ARBITRATION AGREEMENT

Article 7. *Definition and form of arbitration agreement*

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

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 8. *Arbitration agreement and substantive claim before court*

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

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

**SCHEDULE 2—continued**

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

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

**CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL**

*Article 10. Number of arbitrators*

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

*Article 11. Appointment of arbitrators*

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

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

(3) Failing such agreement,

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

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

- (a) a party fails to act as required under such procedure, or
- (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
- (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

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

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

*Article 12. Grounds for challenge*

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

## SCHEDULE 2—continued

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

### Article 13. *Challenge procedure*

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

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

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

### Article 14. *Failure or impossibility to act*

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

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

### Article 15. *Appointment of substitute arbitrator*

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

## CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

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

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

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

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice



## **SCHEDULE 2—continued**

of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

### *Article 17. Power of arbitral tribunal to order interim measures*

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

## **CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS**

### *Article 18. Equal treatment of parties*

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

### *Article 19. Determination of rules of procedure*

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

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

### *Article 20. Place of arbitration*

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

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

### *Article 21. Commencement of arbitral proceedings*

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

### *Article 22. Language*

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

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

### *Article 23. Statements of claim and defence*

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

## SCHEDULE 2—continued

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

### Article 24. *Hearings and written proceedings*

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

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

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

### Article 25. *Default of a party*

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

- (a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

### Article 26. *Expert appointed by arbitral tribunal*

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

- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

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

### Article 27. *Court assistance in taking evidence*

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

## CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

### Article 28. *Rules applicable to substance of dispute*

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

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

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

**SCHEDULE 2—continued**

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

*Article 29. Decision-making by panel of arbitrators*

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

*Article 30. Settlement*

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

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

*Article 31. Form and contents of award*

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

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

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

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

*Article 32. Termination of proceedings*

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

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

- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

*Article 33. Correction and interpretation of award; additional award*

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

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

## SCHEDULE 2—continued

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

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

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

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

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

### CHAPTER VII. RECOURSE AGAINST AWARD

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

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

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

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

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

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

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

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

## SCHEDULE 2—continued

### CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

#### Article 35. *Recognition and enforcement*

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

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

#### Article 36. *Grounds for refusing recognition or enforcement*

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

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

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing such 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.

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<sup>\*\*\*</sup> 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.

## NOTE

1. The *International Arbitration Act 1974* as shown in this reprint comprises Act No. 136, 1974 amended as indicated in the Tables below.

Table of Acts

Act	Number and year	Date of Assent	Date of commencement	Application, saving or transitional provisions
<i>Arbitration (Foreign Awards and Agreements) Act 1974</i>	136, 1974	9 Dec 1974	Ss. 1-4: Royal Assent Remainder: 24 June 1975 (see <i>Gazette</i> 1975, No. G24, p. 2)	
<i>Jurisdiction of Courts (Miscellaneous Amendments) Act 1979</i>	19, 1979	28 Mar 1979	Parts II-XVII (ss. 3-123): 15 May 1979 (see <i>Gazette</i> 1979, No. S86) Remainder: Royal Assent	S. 124
<i>Statute Law (Miscellaneous Provisions) Act 1987</i>	141, 1987	18 Dec 1987	S. 3: Royal Assent (a)	S. 5 (1)
<i>International Arbitration Amendment Act 1989</i>	25, 1989	15 May 1989	12 June 1989	—

- (a) The *International Arbitration Act 1974* was amended by section 3 only of the *Statute Law (Miscellaneous Provisions) Act 1987*, subsection 2 (1) of which provides as follows:

"(1) Subject to this section, this Act shall come into operation on the day on which it receives the Royal Assent."

Table of Amendments

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Title .....	rs. No. 25, 1989
Heading to Part I .....	ad. No. 25, 1989
S. 1 .....	am. No. 25, 1989
Ss. 2A-2C .....	ad. No. 25, 1989
Heading to Part II .....	ad. No. 25, 1989
S. 3 .....	am. No. 25, 1989
Ss. 5, 6 .....	rep. No. 25, 1989
Ss. 7 .....	am. No. 25, 1989
S. 8 .....	am. No. 19, 1979; No. 25, 1989
Ss. 9, 10 .....	am. No. 25, 1989
S. 10A .....	ad. No. 141, 1987
S. 11 .....	rep. No. 25, 1989
S. 12-14 .....	am. No. 25, 1989
Part III (ss. 15-30) .....	ad. No. 25, 1989

**NOTE**—continued  
**Table of Amendments**—continued

ad. = added or inserted am. = amended rep. = repealed rs. = repealed and substituted

Provision affected	How affected
Ss. 15-30 . . . . .	ad. No. 25, 1989
Heading to Schedule . . . . .	rep. No. 25, 1989
Heading to Schedule 1 . . . . .	ad. No. 25, 1989
Schedule 2 . . . . .	ad. No. 25, 1989

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## International Arbitration Amendment Act 1989

No. 25 of 1989

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### An Act to amend the *Arbitration (Foreign Awards and Agreements) Act 1974*

[Assented to 15 May 1989]

BE IT ENACTED by the Queen, and the Senate and the House of Representatives of the Commonwealth of Australia, as follows:

#### Short title etc.

5       1. (1) This Act may be cited as the *International Arbitration Amendment Act 1989*.

      (2) In this Act, "Principal Act" means the *Arbitration (Foreign Awards and Agreements) Act 1974*<sup>1</sup>.

#### Long title of Principal Act

10       2. The long title of the Principal Act is repealed and the following title is substituted:

      "An Act relating to the recognition and enforcement of foreign arbitral awards, and the conduct of international commercial arbitrations, in Australia, and for related purposes."

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**Heading**

3. Before section 1 of the Principal Act the following heading is inserted:

**"PART I—PRELIMINARY".**

**Short title of Principal Act**

4. Section 1 of the Principal Act is amended by omitting "*Arbitration (Foreign Awards and Agreements)*" and substituting "*International Arbitration*". 5

5. After section 2 of the Principal Act the following sections and heading are inserted:

**Territories** 10

"2A. This Act extends to all external Territories.

**Crown to be bound**

"2B. This Act binds the Crown in right of the Commonwealth, of each of the States, of the Northern Territory and of Norfolk Island.

**Effect on Sea-carriage of Goods Act** 15

"2C. Nothing in this Act affects the operation of section 9 of the *Sea-carriage of Goods Act 1924*.

**"PART II—ENFORCEMENT OF FOREIGN AWARDS".**

**Repeal of sections 5, 6 and 11**

6. Sections 5, 6 and 11 of the Principal Act are repealed. 20

7. After section 14 of the Principal Act the following Part is inserted:

**"PART III—INTERNATIONAL COMMERCIAL ARBITRATION**

***"Division 1—Preliminary***

**Interpretation**

"15. (1) In this Part: 25

'Model Law' means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, the English text of which is set out in Schedule 2.

"(2) Except so far as the contrary intention appears, a word or expression that is used both in this Part and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in this Part, the same meaning as it has in the Model Law. 30

**“Division 2—Model Law**

**Model Law to have force of law**

“16. (1) Subject to this Part, the Model Law has the force of law in Australia.

5 “(2) In the Model Law:

‘State’ means Australia (including the external Territories) and any foreign country;

‘this State’ means Australia (including the external Territories).

**Interpretation of Model Law—use of extrinsic material**

10 “17. (1) For the purposes of interpreting the Model Law, reference may be made to the documents of:

(a) the United Nations Commission on International Trade Law; and

(b) its working group for the preparation of the Model Law; relating to the Model Law.

15 “(2) Subsection (1) does not affect the application of section 15AB of the *Acts Interpretation Act 1901* for the purposes of interpreting this Part.

**Courts specified for purposes of Article 6 of Model Law**

20 “18. The following courts shall be taken to have been specified in Article 6 of the Model Law as courts competent to perform the functions referred to in that article:

(a) if the place of arbitration is, or is to be, in a State—the Supreme Court of that State;

(b) if the place of arbitration is, or is to be, in a Territory:

(i) the Supreme Court of that Territory; or

25 (ii) if there is no Supreme Court established in that Territory—the Supreme Court of the State or Territory that has jurisdiction in relation to that Territory.

**Articles 34 and 36 of Model Law—public policy**

30 “19. Without limiting the generality of subparagraphs 34 (2) (b) (ii) and 36 (1) (b) (ii) of the Model Law, it is hereby declared, for the avoidance of any doubt, that, for the purposes of those subparagraphs, an award is in conflict with the public policy of Australia if:

(a) the making of the award was induced or affected by fraud or corruption; or

35 (b) a breach of the rules of natural justice occurred in connection with the making of the award.

**Chapter VIII of Model Law not to apply in certain cases**

40 “20. Where, but for this section, both Chapter VIII of the Model Law and Part II of this Act would apply in relation to an award, Chapter VIII of the Model Law does not apply in relation to the award.

**Settlement of dispute otherwise than in accordance with Model Law**

"21. If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that any dispute that has arisen or may arise between them is to be settled otherwise than in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute. 5

**"Division 3—Optional provisions****Application of optional provisions**

"22. If the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) agreed that the other provisions, or any of the other provisions, of this Division are to apply in relation to the settlement of any dispute (being a dispute that is to be settled in accordance with the Model Law) that has arisen or may arise between them, those provisions apply in relation to the settlement of that dispute. 10  
15

**Orders under Article 17 of the Model Law**

"23. Chapter VIII of the Model Law applies to orders by an arbitral tribunal under Article 17 of the Model Law requiring a party:

- (a) to take an interim measure of protection; or
- (b) to provide security in connection with such a measure; 20

as if any reference in that chapter to an arbitral award or an award were a reference to such an order.

**Consolidation of arbitral proceedings**

"24. (1) A party to arbitral proceedings before an arbitral tribunal may apply to the tribunal for an order under this section in relation to those proceedings and other arbitral proceedings (whether before that tribunal or another tribunal or other tribunals) on the ground that: 25

- (a) a common question of law or fact arises in all those proceedings;
- (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or 30
- (c) for some other reason specified in the application, it is desirable that an order be made under this section.

"(2) The following orders may be made under this section in relation to 2 or more arbitral proceedings:

- (a) that the proceedings be consolidated on terms specified in the order; 35
- (b) that the proceedings be heard at the same time or in a sequence specified in the order;
- (c) that any of the proceedings be stayed pending the determination of any other of the proceedings.

“(3) Where an application has been made under subsection (1) in relation to 2 or more arbitral proceedings (in this section called the ‘related proceedings’), the following provisions have effect.

5       “(4) If all the related proceedings are being heard by the same tribunal, the tribunal may make such order under this section as it thinks fit in relation to those proceedings and, if such an order is made, the proceedings shall be dealt with in accordance with the order.

10       “(5) If 2 or more arbitral tribunals are hearing the related proceedings:  
      (a) the tribunal that received the application shall communicate the substance of the application to the other tribunals concerned; and  
      (b) the tribunals shall, as soon as practicable, deliberate jointly on the application.

15       “(6) Where the tribunals agree, after deliberation on the application, that a particular order under this section should be made in relation to the related proceedings:  
      (a) the tribunals shall jointly make the order;  
      (b) the related proceedings shall be dealt with in accordance with the order; and  
20       (c) if the order is that the related proceedings be consolidated—the arbitrator or arbitrators for the purposes of the consolidated proceedings shall be appointed, in accordance with Articles 10 and 11 of the Model Law, from the members of the tribunals.

25       “(7) If the tribunals are unable to make an order under subsection (6), the related proceedings shall proceed as if no application has been made under subsection (1).

      “(8) This section does not prevent the parties to related proceedings from agreeing to consolidate them and taking such steps as are necessary to effect that consolidation.

**Interest up to making of award**

30       “25. (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where an arbitral tribunal determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the tribunal may, subject to subsection (2), include in the sum for which  
35       the award is made interest, at such reasonable rate as the tribunal determines on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

40       “(2) Subsection (1) does not:  
      (a) authorise the awarding of interest upon interest;  
      (b) apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise; or  
      (c) affect the damages recoverable for the dishonour of a bill of exchange.

**Interest on debt under award**

"26. Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where an arbitral tribunal makes an award for the payment of money, the tribunal may direct that interest, at such reasonable rate as the tribunal determines, is payable, from the day of the making of the award or such later day as the tribunal specifies, on so much of the money as is from time to time unpaid and any interest that so accrues shall be deemed to form part of the award. 5

**Costs**

"27. (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the costs of an arbitration (including the fees and expenses of the arbitrator or arbitrators) shall be in the discretion of the arbitral tribunal. 10

"(2) An arbitral tribunal may in making an award: 15

- (a) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid;
- (b) tax or settle the amount of costs to be so paid or any part of those costs; and
- (c) award costs to be taxed or settled as between party and party or as between solicitor and client. 20

"(3) Any costs of an arbitration (other than the fees or expenses of an arbitrator) that are directed to be paid by an award are, to the extent that they have not been taxed or settled by the arbitral tribunal, taxable in the Court having jurisdiction under Article 34 of the Model Law to hear applications for setting aside the award. 25

"(4) If no provision is made by an award with respect to the costs of the arbitration, a party to the arbitration agreement may, within 14 days after receiving the award, apply to the arbitral tribunal for directions as to the payment of those costs, and thereupon the tribunal shall, after hearing any party who wishes to be heard, amend the award by adding to it such directions as the tribunal thinks proper with respect to the payment of the costs of the arbitration. 30

***"Division 4—Miscellaneous*****Liability of arbitrator 35**

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

**Representation in proceedings**

5 “29. (1) Where, in accordance with the Model Law, with the agreement of the parties or at the request of a party, as the case may be, the arbitral tribunal holds oral hearings for the presentation of evidence or for oral argument, or conducts proceedings on the basis of documents or other materials, the following provisions shall, without prejudice to the Model Law, apply.

“(2) A party may appear in person before an arbitral tribunal and may be represented:

- 10 (a) by himself or herself;  
(b) by a duly qualified legal practitioner from any legal jurisdiction of that party’s choice; or  
(c) by any other person of that party’s choice.

15 “(3) A legal practitioner or a person, referred to in paragraphs (2) (b) or (c) respectively, while acting on behalf of a party to an arbitral proceeding to which Part III applies, including appearing before an arbitral tribunal, shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within the legal jurisdiction in which the arbitral proceedings are conducted.

20 “(4) Where, subject to the agreement of the parties, an arbitral tribunal conducts proceedings on the basis of documents and other materials, such documents and materials may be prepared and submitted by any legal practitioner or person who would, under subsection (2), be entitled to appear before the tribunal, and, in such a case, subsection (3) shall apply  
25 with the same force and effect to such a legal practitioner or person.

**Application of Part**

30 “30. This Part does not apply in relation to an international commercial arbitration between parties to an arbitration agreement that was concluded before the commencement of this Part unless the parties have (whether in the agreement or in any other document in writing) otherwise agreed.”.

**New Schedule**

8. The Principal Act is amended by adding at the end the Schedule set out in Schedule 1 to this Act.

**Further Amendments**

35 9. The Principal Act is further amended as set out in Schedule 2.

## SCHEDULE 1

Section 8

## SCHEDULE TO BE INSERTED IN THE PRINCIPAL ACT

## SCHEDULE 2

Subsection 15 (1)

*UNCITRAL Model Law on International Commercial Arbitration*

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

## CHAPTER I. GENERAL PROVISIONS

Article 1. *Scope of application\**

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

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

(3) An arbitration is international if:

- (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
- (b) one of the following places is situated outside the State in which the parties have their places of business:
  - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
  - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or

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

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



**SCHEDULE 1—continued**

- (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.
- (4) For the purposes of paragraph (3) of this article:
  - (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;
  - (b) if a party does not have a place of business, reference is to be made to his habitual residence.
- (5) This Law shall not affect any other law of this State by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

**Article 2. *Definitions and rules of interpretation***

For the purposes of this Law:

- (a) “arbitration” means any arbitration whether or not administered by a permanent arbitral institution;
- (b) “arbitral tribunal” means a sole arbitrator or a panel of arbitrators;
- (c) “court” means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;
- (e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (f) where a provision of this Law, other than in articles 25 (a) and 32 (2) (a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

**Article 3. *Receipt of written communications***

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

**SCHEDULE 1—continued**

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

**Article 4. *Waiver of right to object***

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

**Article 5. *Extent of court intervention***

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

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

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

**CHAPTER II. ARBITRATION AGREEMENT****Article 7. *Definition and form of arbitration agreement***

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

(2) The arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

**Article 8. *Arbitration agreement and substantive claim before court***

(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute,

**SCHEDULE 1—continued**

refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

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

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

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

**CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL**

*Article 10. Number of arbitrators*

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

*Article 11. Appointment of arbitrators*

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

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

- (3) Failing such agreement,
  - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
  - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
  - (a) a party fails to act as required under such procedure, or
  - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or
  - (c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

**SCHEDULE 1—continued**

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

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

**Article 12. *Grounds for challenge***

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

(2) An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or independence, or if he does not possess qualifications agreed to by the parties. A party may challenge an arbitrator appointed by him, or in whose appointment he has participated, only for reasons of which he becomes aware after the appointment has been made.

**Article 13. *Challenge procedure***

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

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

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

**SCHEDULE 1—continued**

**Article 14. *Failure or impossibility to act***

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.

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

**Article 15. *Appointment of substitute arbitrator***

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

**CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL**

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

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

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

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

**SCHEDULE 1—continued**

the arbitral tribunal may continue the arbitral proceedings and make an award.

**Article 17. *Power of arbitral tribunal to order interim measures***

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

**CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS****Article 18. *Equal treatment of parties***

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

**Article 19. *Determination of rules of procedure***

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

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

**Article 20. *Place of arbitration***

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

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

**Article 21. *Commencement of arbitral proceedings***

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

**SCHEDULE 1—continued**

**Article 22. *Language***

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

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

**Article 23. *Statements of claim and defence***

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

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

**Article 24. *Hearings and written proceedings***

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

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

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

## SCHEDULE 1—continued

Article 25. *Default of a party*

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

- (a) the claimant fails to communicate his statement of claim in accordance with article 23 (1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate his statement of defence in accordance with article 23 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award on the evidence before it.

Article 26. *Expert appointed by arbitral tribunal*

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

- (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
- (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.

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

Article 27. *Court assistance in taking evidence*

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

## CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. *Rules applicable to substance of dispute*

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



**SCHEDULE 1—continued**

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

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

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

**Article 29. Decision-making by panel of arbitrators**

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

**Article 30. Settlement**

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

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

**Article 31. Form and contents of award**

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

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

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

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

**Article 32. Termination of proceedings**

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

## SCHEDULE 1—continued

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

- (a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;
- (b) the parties agree on the termination of the proceedings;
- (c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

Article 33. *Correction and interpretation of award; additional award*

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

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

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

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

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

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

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

**SCHEDULE 1—continued**

**CHAPTER VII. RECOURSE AGAINST AWARD**

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

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

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

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

- (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this State; or
- (ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
- (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside; or
- (iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

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

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

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

## SCHEDULE 1—continued

as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

## CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. *Recognition and enforcement*

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

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

Article 36. *Grounds for refusing recognition or enforcement*

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

- (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that:
  - (i) a party to the arbitration agreement referred to in article 7 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
  - (ii) the party against whom the award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or
  - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

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\*\*\* 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.

**SCHEDULE 1—continued**

- (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.

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**SCHEDULE 2**

Section 9

**AMENDMENTS OF THE PRINCIPAL ACT**

1. The following provisions are amended by omitting "Act" and substituting "Part":

Subsections 3 (1), (2) and (3), 7 (2), 8 (1) and (2), paragraph 8 (4) (a), subsections 8 (5), (7) and (8), 9 (1), 10 (1) and (2), 12 (1) and (2) and sections 13 and 14.

2. The following provisions are amended by omitting "other than Papua New Guinea":

Subsection 3 (1) (definition of "Australia") and subsection 12 (1).

3. Section 3 is amended by omitting from the definition of "Convention" in subsection (1) "the Schedule" and substituting "Schedule 1".

4. The Schedule is amended by omitting "SCHEDULE" and substituting "SCHEDULE 1".

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**NOTE**

1. No. 136, 1974, as amended. For previous amendments, see No. 37, 1976; No. 19, 1979; and No. 141, 1987.

## ADDITIONAL NOTE

On the commencement of this Act, the headings to sections 12 and 14 of the *Arbitration (Foreign Awards and Agreements) Act 1974* are altered by omitting "Act" and substituting "Part".

[*Minister's second reading speech made in—  
House of Representatives on 3 November 1988  
Senate on 24 November 1988*]

**APPENDIX C: List of State members and of participants  
at the 18th Session of UNCITRAL, 3 June 1985**





**Appendix C: List of State members and of participants at the 18th Session of UNCITRAL, 3 June 1985**

UNCITRAL commenced its eighteenth session on 3 June 1985. There were then 36 State members. They were -

Algeria, Australia, Austria, Brazil, Central African Republic, China, Cuba, Cyprus, Czechoslovakia, Egypt, France, German Democratic Republic, Germany (Federal Republic of), Guatemala, Hungary, India, Iraq, 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.

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

The session was also attended by observers from the following States -

Argentina, Bulgaria, Byelorussian Soviet Socialist Republic, Canada, Chile, Colombia, Democratic People's Republic of Korea, Dominican Republic, Finland, Greece, Guinea, Holy See, Indonesia, Iran (Islamic Republic of), Ivory Coast, Kuwait, Lebanon, Netherlands, Norway, Oman, Panama, Poland, Portugal, Republic of Korea, Romania, Switzerland, Thailand, Ukrainian Soviet Socialist Republic, Venezuela and Zaire.

The following international organisations were represented by observers:

(a) United Nations bodies

Economic Commission for Europe  
United Nations Conference on Trade and Development  
United Nations Industrial Development Organization  
  
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 and International Law  
International Institute for the Unification of Private Law

(c) Other international organisations

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

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8. The Hague Convention on the Taking of Evidence Abroad
9. The UN Convention on the Law of the Sea, 1982: Book 1 - General Introduction (first of a series of four books)
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