award. If, before the award is made, the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason, the arbitrators shall inform the parties of their intention to issue an order for the discontinuance of the proceedings. The arbitrators shall have the power to issue such an order unless a party objects to the discontinuance.

2. The arbitrators shall, in the order for the discontinuance of the arbitral proceedings or in the arbitral award on agreed terms, fix the costs of arbitration as specified under article 33. Unless otherwise agreed to by the parties, the arbitrators shall appportion the costs between the parties as they consider appropriate.

3. Copies of the order for discontinuance of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitrators to the parties. Where an arbitral award on agreed terms is made, the provisions of article 27, paragraph 7, shall apply.

INTERPRETATION OF THE AWARD

Article 30

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request that the arbitrators give an interpretation of the award. Such interpretation shall be binding on the parties.

2. The interpretation shall be given in writing within 45 days after the receipt of the request, and the provisions of article 27, paragraphs 3 to 7, shall apply.

CORRECTION OF THE AWARD

Article 31

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to correct in the award any errors in computation, any clerical or typographical errors, or any errors of similar nature. The arbitrators may within 30 days after the communication of the award make such corrections on their own initiative.

2. Such corrections shall be in writing, and the provisions of article 27, paragraphs 6 and 7, shall apply.

ADDITIONAL AWARD

Article 32

1. Within 30 days after the receipt of the award, either party, with notice to the other party, may request the arbitrators to make an additional award as to claims presented in the arbitral proceedings but omitted from the award.

2. If the arbitrators consider the request for an additional award to be justified and consider that the omission can be rectified without any further hearing or evidence, they shall complete their award within 60 days after the receipt of the request.

3. When an additional award is made, the provisions of article 27, paragraphs 2 to 7, shall apply.

COSTS

Article 33

1. The arbitrators shall fix the costs of arbitration in their award. The term "costs" includes:

(*a*) The fee of the arbitrators, to be stated separately and to be fixed by the arbitrators themselves;

(*b*) The travel and other expenses incurred by the arbitrators;

(*c*) The costs of expert advice and of other assistance required by the arbitrators;

(*d*) The travel expenses of witnesses, to the extent such expenses are approved by the arbitrators;

(*e*) The compensation for legal assistance of the successful party if such compensation was claimed during the arbitral proceedings, and only to the extent that the compensation is deemed reasonable and appropriate by the arbitrators;

(*f*) Any fees charged by the appointing authority for its services.

2. The costs of arbitration shall in principle be borne by the unsuccessful party. The arbitrators may, however, apportion the costs between the parties if they consider that apportionment is reasonable.

DEPOSIT OF COSTS

Article 34

1. The arbitrators, on their appointment, may require each party to deposit an equal amount as an advance for the costs of the arbitration.

2. During the course of the arbitral proceedings the arbitrators may require supplementary deposits from the parties.

3. If the required deposits are not paid in full within 30 days after the communication of the request, the arbitrators shall notify the parties of the default and give to either party an opportunity to make the required payment.

4. The arbitrators shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

2. Report of the Secretary General: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules) (addendum): commentary on the draft UNCITRAL Arbitration Rules (A/CN.9/112/Add.1)*

SECTION I

Commentary on article 1

Introduction

1. The purpose of the UNCITRAL Arbitration Rules is to facilitate arbitration of disputes arising out of international trade transactions. This object is made clear in the title: "International commercial arbitration rules", and from certain provisions of the Rules appropriate to international arbitration, such as the provisions that a sole arbitrator and a presiding arbitrator shall be of a nationality, other than that of the parties (article 7, para. 1, and article 8, para. 2).

* 12 December 1975.

2. The Rules, however, do not include a provision limiting their scope of application to the settlement of disputes arising out of international trade transactions. An attempt to so limit the scope of application of the Rules by a provision in the Rules would present the difficult problem of defining the term "international trade transactions", and might open up new grounds for challenges to arbitration.

3. Furthermore, it does not appear necessary to have such a limiting provision. In the case of a uniform law or convention which is applicable despite the absence of specific agreement between the parties as to its applicability, the need to define the scope of application is imperative. In contrast, since the Rules become applicable only when the parties have entered into a written agreement making them applicable, a clear indication of the intended scope of application of the Rules is sufficient. The parties can then make the Rules applicable to cases they consider appropriate.

4. The Rules also do not require that the arbitration clause or separate arbitration agreement referring to these Rules have an international character in that the parties, when concluding it, must have their habitual residence or their principal places of business in different countries. Such a requirement would also give rise to problems of interpretation and create additional grounds for challenge to arbitration.

5. Another reason for the absence of a provision in the Rules restricting their scope of application to "international trade transactions" is the fact that the Rules permit the parties, by written agreement, to modify any provision in the Rules (article 2). When the parties are given this option, a provision restricting the scope of applicability of the Rules ceases to be mandatory, since the parties can give to the Rules a wider scope of application whenever they so desire.

6. These considerations have led to the result that the scope of application of the Rules is not restricted to the arbitration of disputes arising out of international trade transactions. The parties can therefore also apply the Rules in purely domestic cases, although the Rules have been prepared with international trade transactions in mind.

Paragraphs 1 and 4

7. Under paragraph 1, the Rules become applicable by virtue of an agreement in writing which expressly refers to the Rules. Writing is required in order to avoid uncertainty as to whether the Rules have been made applicable. The agreement may be concluded after a dispute has arisen, or—the normal case—long beforehand by an arbitration clause in a contract. Under paragraph 4, the class of disputes that can be settled in accordance with the Rules is defined in very wide terms. The language of this paragraph is modelled on that of article 1, paragraph 1, of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

Paragraph 2

8. This paragraph makes it clear that a Government, State agency, or State organization may be party to an arbitration clause or agreement which refers to the Rules. The paragraph is modelled on article II, paragraph 1, of the 1961 European Convention on International Commercial Arbitration, which similarly recognizes the right of legal persons, considered by the law applicable to them as "legal persons of public law", to conclude valid arbitration agreements.

Paragraph 3

9. This paragraph is substantially based on article II, paragraph 2, of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitratal Awards. However, in recognition of modern business practices, provision has been made for an exchange of telexes as a possible method of entering into an arbitration clause or arbitration agreement. A similar provision is found in article I, paragraph 2 (*a*) of the 1961 European Convention on International Commercial Arbitration.

Commentary on article 2

1. Under this article the parties may regulate the course of the arbitral proceedings in the manner they consider appropriate. The requirement that a modification of the Rules must be in writing is intended to create certainty as to the ambit of such a modification.

2. It may be noted that, under article 26, the Rules can be modified by the behaviour of one party if the other party does not promptly object to such behaviour (implied waiver).

Commentary on article 3

Paragraph 1

1. The Rules provide for the giving of notices, notifications, communications or proposals by one party to the other at various stages in the arbitral proceedings, within periods of time established under the Rules. This paragraph specifies when such notices, notifications, communications or proposals are deemed to have been received. The paragraph supplements the rule contained in the first sentence of paragraph 2 of this article with regard to the date on which a period of time prescribed under the Rules commences to run. The rule contained in paragraph 1 is modelled on article 14, paragraph 2 of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

Paragraph 2

2. Several provisions in the Rules state that actions described in such provisions shall or may be taken by the parties or the arbitrators within a specified period of time after the receipt of a notice, proposal, notification or communication (e.g., article 6—after receipt of notice; article 7, paragraphs 2 and 3—after receipt of proposal; article 8, paragraph 3—after receipt of notification; article 10, paragraph 1—after receipt of communication). The first sentence of this paragraph specifies the day on which such period shall begin to run, while the other sentences concern the effect of official holidays and non-business days on the running of the period.

Commentary on article 4

Paragraphs 1 and 3

1. The notice to be given under paragraph 1 is intended to inform the respondent of the fact that arbitration proceedings have been initiated for the purpose of asserting a claim against him. Similar provisions appear in article 3 of the ECE Arbitration Rules, article II, paragraph 3 of the ECAFE Arbitration Rules, section 7 of the Commercial Arbitration Rules of the American Arbitration Association, and section 7 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission.

2. The information required to be included in the notice under subparagraphs (*b*), (*c*), (*d*) and (*e*) of paragraph 3 will acquaint the respondent with the particulars of the claim and enable him to decide on his future course of action, e.g., whether the claim should be contested, and if contested, the identity of the person he should choose or appoint as arbitrator. Subparagraph (*f*) enables the claimant to take at this stage a step which may be necessary to carry forward the arbitral proceedings, i.e., to suggest whether the arbitral tribunal should be composed of one or three arbitrators.

Paragraph 2

3. The time of commencement of arbitral proceedings may have relevance to the question whether provisions on prescription of rights or limitation of actions under national law are operative in relation to the dispute or disputes submitted to arbitration. This paragraph lays down a rule as to the time arbitral proceedings are deemed to commence. This rule is modelled on that contained in article 14, paragraph 2, of the Convention on the Limitation Period in the International Sale of Goods, New York, 1974.

Commentary on article 5

1. This article gives a party the right to be represented by a counsel or agent upon the communication of the name and address of such person to the other party. The right to be represented by an agent is also recognized in article 30 of the ECE Arbitration Rules, article VI, paragraph 8 of the ECAFE Arbitration Rules, section 21 of the Commercial Arbitration Rules of the American Arbitration Association, section 20 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, and article 15, paragraph 5 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce.

2. Such representation may take place at any stage of the arbitral proceedings, including any hearing called by the arbitrators (e.g., under article 14, para. 2) or any meeting convened by the arbitrators for the inspection of goods (under article 15, para. 3). The communication of the name of the counsel or agent is necessary so as to assure the other party that such counsel or agent possesses the requisite authority to act on behalf of the party whom he claims to represent.

3. The second sentence of this article has been added in recognition of the fact that, in arbitration practice, the requisite authority always exists and need not be expressly communicated when a counsel or agent acts in the manner described therein. A similar provision appears in section 21 of the Commercial Arbitration Rules of the American Arbitration Association.

SECTION II

Commentary on article 6

1. Early agreement by the parties to an arbitration clause or arbitration agreement on the number of arbitrators will accelerate the arbitral proceedings by eliminating the period of time specified under this article within which parties must endeavour to reach agreement on such number. The introduction to the Rules (A/CN.9/112, para. 16) recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented, whenever possible, by an agreement as to the number of arbitrators.

2. Since it is normal practice to have three arbitrators in the arbitration of disputes arising out of international trade transactions, this article specifies that there shall be three arbitrators if the parties fail to reach agreement on this question. A similar provision as to the number of arbitrators is contained in section 8 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce, and article 4 of the ECE Arbitration Rules.

3. The 15-day period specified in the article is considered to be sufficient to allow the parties to communicate with each other and reach agreement as to the desired number of arbitrators.

4. The question has been examined as to whether this article should contain a provision stating that, even where parties fail to reach agreement on the number of arbitrators within the 15-day period specified in this article and the arbitral tribunal, therefore, is to consist of three members, the parties have the right to agree subsequently that there shall be a single arbitrator. It is considered that no express provision to this effect is needed, since the desired result may be obtained by the parties agreeing in writing to modify this article in accordance with article 2.

Commentary on article 7

Paragraph 1

1. The requirement that a sole arbitrator shall be of a nationality other than that of the parties is designed to further a desired objective, namely, that the sole arbitrator shall be impartial in the performance of his duties. A similar requirement is contained in article 2, paragraph 6 of the Rules of Conciliation and Arbitration of the International Chamber of Commerce. Cases may arise, however, where both parties have complete confidence in the impartiality of a proposed sole arbitrator of the nationality of one or both parties. In such cases the parties can appoint that person as the sole arbitrator, after agreeing in writing to modify this paragraph in accordance with article 2.

Paragraph 2

2. The provision within this paragraph requiring the claimant to make his proposal by telegram or telex is imposed with a view to accelerating the arbitral proceedings. It is considered that 30 days is a period of time of sufficient length for the parties to communicate with each other and endeavour to reach agreement on the identity of the sole arbitrator.

Paragraph 3

3. If, before the expiration of the 30 days specified in paragraph 2 of this article, the parties conclude that they cannot agree on the identity of the sole arbitrator, there would be an unwarranted delay in the arbitral proceedings if the parties were nevertheless compelled to await the expiration of the comparatively long period of 30 days before applying to a previously designated appointing authority, or before endeavouring to reach agreement on an appointing authority in cases where there has been no previous designation. This paragraph therefore provides that the appropriate step can be taken immediately after the parties have concluded that they cannot agree.

4. Since a previous designation by the parties of an appointing authority will accelerate arbitral proceedings which reach the stage covered by this paragraph, the introduction to the Rules (A/CN.9/112, para. 15),* recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented by an agreement between the parties designating an appointing authority.

5. Although the parties may not have sufficient confidence in the same individual whom they could choose as the sole arbitrator, they may have sufficient confidence in the ability of an impartial appointing authority to make a suitable appointment. This paragraph, therefore, requires the parties, when they have not previously designated an appointing authority, to endeavour to reach agreement on the choice of such an authority. The specified period of time within which they must endeavour to reach agreement is 15 days, in contrast to the period of 30 days specified in paragraph 2 of this article for reaching agreement on the choice of a sole arbitrator. It is considered that this shorter period is justified by the fact that the number of possibilities which are likely to be examined by the parties when endeavouring to reach agreement on the choice of an appointing authority is likely to be smaller than would be the case when they are endeavouring to reach agreement on the choice of a sole arbitrator.

Paragraph 4

6. If, in the circumstances described in paragraph 3 of this article, the parties have not succeeded in designating an appointing authority who would appoint the sole arbitrator, the claimant can under this paragraph apply to one of the institutions mentioned in subparagraphs (*a*) and (*b*) in order to secure the designation of an appointing authority.

Paragraph 5

7. The obligation to send to the appointing authority the documents described in this paragraph is imposed on the claimant in order to ensure that the appointing authority will have the information necessary to enable it to select an arbitrator qualified to deal with the dispute in question.

Paragraph 6

8. The list-procedure to be followed under this paragraph is contained in the arbitral rules of certain arbitral institutions, e.g., section 12 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission; section 12 of the Commercial Arbitration Rules of the American Arbitration Association; and article 9 of the Rules of the Netherlands Arbitration Institute. The advantage of this procedure is that it gives the parties, who failed to agree on the appontment of the sole arbitrator, some indirect influence over the ultimate appointment by permitting them to express their preferences and objections with regard to the names communicated by the appointing authority.

9. Examples of cases in which the penultimate sentence of this paragraph becomes applicable because the list-procedure fails to produce the desired result are: the failure of one or both parties to return a list; objections by one or both parties to all the names on the list; and failure by the parties to reach common agreement with regard to any person on the list.

Commentary on article 8

Paragraph 1

1. This paragraph specifies the usual procedure for the appointment of arbitrators where the arbitral tribunal is to consist of three arbitrators. Under this paragraph, read together with paragraph 4 of this article, the right to choose the presiding arbitrator is given in the first instance to the arbitrators, and not to the parties. This solution is in conformity with current practice in the arbitration of commercial disputes. Similar provision are contained in article II, paragraph 3 (*b*) of the ESCAP (formerly ECAFE) Arbitration Rules, and article 3 (*b*) of the ECE Arbitration Rules.

Paragraph 2

2. The impartiality of the presiding arbitrator is of special importance in an arbitral tribunal consisting of three arbitrators since the other two arbitrators are normally appointed directly by the parties. The requirement that the presiding arbitrator be of a nationality other than the nationality of the parties is intended to further the objective that the presiding arbitrator be impartial. A similar provision is contained in article 2, paragraph 6, of the Rules of Conciliation and Arbitration of the ICC. Cases may arise, however, where the two party-appointed arbitrators, or the parties, have complete confidence in the impartiality of a proposed presiding arbitrator of the nationality of one or both parties. In such cases that person may be appointed as the presiding arbitrator after the parties have agreed in writing to modify the requirement of nationality, in accordance with article 2.

Paragraph 3

3. This paragraph provides a procedure whereby the arbitral proceedings can be continued despite the failure of the respondent to appoint his arbitrator. In such a case, the appointing authority, at the request of the claimant, appoints the second arbitrator in the place of the respondent, and does so at its discretion.

4. Since a previous designation by the parties of an appointing authority will accelerate the arbitral proceedings in the circumstances under consideration, the introduction to the Rules (A/CN.9/112, para. 115),* recommends that an arbitration clause or separate arbitration agreement concluded by the parties should be supplemented by an agreement between the parties designating an appointing authority.

*Reproduced in this volume, part two, III, 1, *supra*.

* Reproduced in this volume, part two, III, 1, *supra*.

Paragraph 4

5. The provision in this paragraph requiring the claimant to make his proposal by telegram or telex is intended to secure the acceleration of the arbitral proceedings. It is considered that 30 days is a period of time of sufficient length for the parties to communicate with each other and endeavour to reach agreement on the identity of the presiding arbitrator.

Paragraph 5

6. This paragraph is identical with paragraph 3 of article 7, except that that paragraph applies to the choice of a sole arbitrator, while this paragraph applies to the choice of a presiding arbitrator. Subject to this difference in the scope of application of this paragraph, the comments made in relation to paragraph 3 of article 7 also apply to this paragraph.

Paragraph 6

7. The comments made in relation to paragraph 4 of article 7 are also applicable to this paragraph.

Paragraph 7

8. This paragraph is identical with paragraph 5 of article 7, and the comments made in relation to paragraph 5 of article 7 are also applicable to this paragraph.

Paragraph 8

9. The comments made in relation to paragraph 6 of article 7 are applicable to this paragraph, i.e., the appointing authority shall appoint the presiding arbitrator by following the list-procedure provided for in that paragraph.

Commentary on article 9

1. Although this article specifies the categories of arbitrators who can be challenged, and the grounds for challenge, it should be noted that the provisions contained in this article are subject to the mandatory rules relating to these issues contained in the applicable national law.

Paragraph 1

2. Under this paragraph, either party may challenge any arbitrator who was chosen or appointed under these Rules, irrespective of the method of choice or appointment. The paragraph also lays down a single ground for challenge of all categories of arbitrators. Since this ground for challenge has general application, it may be noted that a party-appointed arbitrator on a 3-member arbitral tribunal can be challenged on the ground that circumstances exist that give rise to justifiable doubts as to such arbitrator's impartiality or independence, even if such doubts are due to his relationship to the party who appointed him. The provisions contained in this paragraph are modelled on similar provisions contained in article 6 of the ECE Arbitration Rules, and article III, paragraph 1, of the ESCAP (formerly ECAFE) Arbitration Rules.

Paragraph 2

3. This paragraph sets forth a list, which is not exhaustive, of circumstances constituting grounds for challenge under paragraph 1. Proof of the existence of a circumstance would disqualify an arbitrator, even though no doubt in fact existed as to the impartiality and independence of the arbitrator concerned. This list also serves to draw the attention of the parties to typical cases which fall within the general ground of challenge specified in paragraph 1. Paragraph 11 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission, and section 18 of the Commercial Arbitration Rules of the American Arbitration Association also contain provisions specifying that the financial or personal interest of an arbitrator is a ground for his disqualification.

Paragraph 3

4. Since no one knows better than a prospective arbitrator himself whether circumstances exist which are likely to disqualify him, this paragraph imposes an obligation on him to disclose such circumstances at the earliest stage at which disclosure is possible. Such disclosure is likely to prevent the appointment of arbitrators who may later be challenged successfully Thus the interruption of the course of arbitral proceedings resulting from a challenge is avoided.

5. This provision is modelled on similar provisions contained in paragraph 17 of the Rules of Procedure of the Inter-American Commercial Arbitration Commission and section 18 of the Commercial Arbitration Rules of the American Arbitration Association. As an appointment may take place despite such disclosure by a prospective arbitrator, an obligation is also imposed on an arbitrator upon appointment to disclose circumstances likely to disqualify him to parties to whom there had been no prior disclosure. The result of the latter rule, combined with the time-limit for a challenge imposed by paragraph 1 of article 10, is that most challenges are likely to be made at an early stage of the arbitral proceedings, when they will cause less disruption of the course of the arbitral proceedings.

Commentary on Article 10

Paragraph 1

1. Challenge of an arbitrator results in an interruption of the course of arbitral proceedings, and a successful challenge will result in a serious interruption arising from the need to appoint a substitute arbitrator and the possible need to repeat hearings held prior to such challenge (para. 3 of article 12). It is therefore desirable that challenges, if any, should be made at the earliest possible stage in the arbitral proceedings. The time-limit of 30 days imposed by this paragraph seeks to achieve this objective.

2. The first 30-day period mentioned in this paragraph will apply when the ground for the challenge was already known to the challenging party at the time notice of the appointment of the arbitrator who may be challenged was communicated to such party. The 30-day period mentioned thereafter applies if the ground for the challenge becomes known to the challenging party subsequent to such communication.

3. A party who has a right of challenge may waive such right. A waiver will take place automatically when no challenge is made within the applicable 30-day period specified in this paragraph.

Paragraph 2

4. The notice of the challenge required under this paragraph enables, *inter alia*, the other party to decide whether he is to agree to the challenge, and the challenged arbitrator to decide whether he is to withdraw

from his office, as provided in paragraph 3 of this article.

Paragraph 3

5. If the other party agrees to the challenge, the challenged arbitrator is removed from office, irrespective of the view of the challenged arbitrator, or of the view of the appointing authority who may have appointed such arbitrator, as to the validity of the challenge.

6. When an arbitrator loses his office under the circumstances described in this paragraph, the application of the provisions contained therein will result in a substitute arbitrator being appointed or chosen pursuant to the procedures applicable under article 7 or 8 to the appointment or choice of the particular type of arbitrator (i.e., sole, presiding or party-appointed) who has lost his office.

Commentary on article 11

Paragraph 1

Subparagraph (a)

1. An appointing authority which has appointed an arbitrator in accordance with the provisions of article 7 or 8 of the Rules is a neutral third party. Such authority is therefore an appropriate tribunal to decide on the challenge of the arbitrator it had appointed.

Subparagraph (b)

2. An appointing authority designated by the parties would have been so designated because the parties considered that such authority was impartial. Such authority is therefore an appropriate tribunal to decide on the challenge of an arbitrator, although it had not appointed the arbitrator concerned.

Subparagraph (c)

3. When subparagraphs (*a*) and (*b*) do not apply, subparagraph (*c*) provides for the designation of an appointing authority in accordance with the provisions of article 7 or 8 to decide on the challenge. The provisions of article 7 will apply to such designation if the challenged arbitrator is a sole arbitrator; the provisions of article 8, paragraph 3 will apply if the challenged arbitrator is a party-appointed arbitrator; and the provisions of article 8, paragraphs 5 and 6 will apply if the challenged arbitrator is a presiding arbitrator.

Paragraph 2

4. When an arbitrator loses his office by reason of a challenge being sustained, the application of the provisions contained in this paragraph will result in a substitute arbitrator being appointed or chosen pursuant to the procedures applicable under article 7 or 8 to the appointment or choice of the particular type of arbitrator (i.e., sole, presiding, or party-appointed) who has lost his office. With the object of preventing delay in the course of the arbitral proceedings, this paragraph modifies the procedures applicable under article 7 or 8 by providing that, where such procedures would require the designation of an appointing authority for the appointment of an arbitrator, the appointing authority which decided on the challenge under paragraph 1 shall make the appointment.

Commentary on article 12

1. Rules governing arbitral proceedings generally provide for the replacement of arbitrators on the following grounds: death of an arbitrator; inability of an arbitrator to perform his functions due to his physical or mental incapacity; unwillingness to perform the functions required of an arbitrator; or resignation by an arbitrator from his office.

Paragraph 1

2. Under paragraph 1, on the death or resignation from office of an arbitrator, the substitute arbitrator is selected according to the procedure that, under these Rules, applies to the appointment or choice of the arbitrator who is to be replaced. Therefore, if a sole arbitrator is to be replaced, the provisions of article 7 apply, and the relevant provisions of article 8 govern the replacement of a party-appointed arbitrator or of a presiding arbitrator.

Paragraph 2

3. This paragraph applies to the challenge and replacement of arbitrators on the ground of incapacity or failure to perform the functions of an arbitrator, the procedures governing the challenge and replacement of arbitrators under articles 10 and 11 of these Rules. Consequently, the party who alleges that an arbitrator is incapacitated or has failed to act must notify the arbitrator concerned and the other pary of this challenge. Upon receipt of this notification, the other party may agree to the removal of the challenged arbitrator or the arbitrator may decide to withdraw from his office; in all other cases, pursuant to the procedures laid down in article 11, the appropriate appointing authority will have to decide on the validity of the challenge made against the arbitrator.

4. When an arbitrator loses his office on the ground of incapacity or of failure to act, regardless of whether such loss of office resulted from the agreement of the other party to the charge, the withdrawal of the arbitrator from his office, or the decision of an appointing authority, a sole arbitrator shall be replaced in accordance with the provisions of article 7 of these Rules, and a party-appointed or presiding arbitrator in accordance with the relevant provisions of article 8.

Paragraph 3

5. In recognition of the special role that is played in arbitral proceedings by the sole or presiding arbitrator, this paragraph provides that when such an arbitrator is replaced, all hearings that were held previously must be repeated. When a party-appointed arbitrator is replaced, following the appointment of the substitute arbitrator, the arbitral tribunal has discretion to decide whether any or all prior hearings shall be repeated.

Commentary on article 13

1. This article applies to all instances where the names of persons who may be appointed as arbitrators are proposed by one party to the other party, or by an appointing authority to both parties. Such proposals may concern the appointment of the sole arbitrator (article 7, paras. 2 and 6) or the appointment of the presiding arbitrator (article 8, paras. 4 and 8).

2. This article is designed to ensure that, when these Rules provide that a party may be involved in the process of selecting an arbitrator, he will be provided with information as to the name, nationality and

qualifications of persons proposed as arbitrators by the other party or by an appointing authority.

SECTION III

Commentary on article 14

Paragraph 1

1. Article 14 contains provisions concerning the conduct of the arbitral proceedings by the arbitrators. Since flexibility during the proceedings and reliance on the expertise of the arbitrators are two of the hallmarks of arbitration, paragraph 1 gives the arbitrators the power to regulate the conduct of the proceedings, provided that both parties "are treated with equality and with fairness".

Paragraph 2

2. Under this paragraph the arbitrators must, if either party so requests, hold hearings for the presentation of evidence by witnesses or for oral argument by the parties or their counsel. If neither party requests the holding of hearings, the arbitrators may nevertheless decide to hold hearings to hear the presentation of evidence by witnesses or to hear oral argument by the parties or their counsel.

3. Under this paragraph, the arbitrators are not given the power to refuse to hear evidence that a party wishes to present by witnesses, on the ground that such evidence would be immaterial or irrelevant to the resolution of the dispute. Even in a case where the arbitrators decide to conduct the proceedings "solely on the basis of documents and other written materials", they may, under paragraph 3 of article 15, arrange for the inspection of goods, other property or documents.

4. It may be noted that on the question of hearings, article 14, paragraph 2, adopts a middle course between the differing approaches taken in the ECE Arbitration Rules and the ECAFE Arbitration Rules. Under the ECE Arbitration Rules (article 23), hearings will be held unless the parties agree that the arbitrators may render an award based solely on documentary evidence. Under the ECAFE Arbitration Rules (article VI, paragraph 5), normally proceedings are to be conducted solely on the basis of documents, subject to an agreement to the contrary by the parties or a decision to the contrary by the arbitrators. Under these rules, the arbitrators determine in principle how to conduct the arbitration, but they must hold hearings if one party so requests.

Paragraph 3

5. This paragraph, based on the rule found in article VI, paragraph 2, of the ECAFE Arbitration Rules, is intended to ensure that each party is fully informed, at the same time as the arbitrators, of the contents of documents and information furnished by the other party to the arbitrators during the arbitral proceedings.

Commentary on article 15

Paragraph 1

1. Following closely the wording of article 14 in the ECE Arbitration Rules, this paragraph provides that in the absence of an agreement by the parties on the place of arbitration, such place shall be determined by the arbitrators. The agreement of the parties as to the place of arbitration may be contained in the arbitration clause (e.g., the model arbitration clause at paragraph 20 of the introduction to these Rules (A/CN.9 112)* and the ECE model form of arbitration clause make provision for an agreement by the parties as to the place of arbitration), in the separate arbitration agreement, or in a later agreement by the parties. If the agreement by the parties as to the place of arbitration is arrived at on a later date, it need not be in writing, but must be communicated to the arbitrators.

Paragraphs 2 and 3

2. These paragraphs preserve some freedom for the arbitrators in determining the locale of arbitral proceedings, even in cases where the parties have agreed upon the country or city that will be the place of arbitration. This limited flexibility is necessary so that the arbitrators can perform certain functions, e.g. hear witnesses or inspect goods, at locales that are appropriate, having regard to the exigencies of the particular arbitration.

Paragraph 4

3. Paragraph 4 of this article is useful, since, when issues arise concerning the enforceability of arbitral awards or the requirements as to the form of such awards, reference is on some occasions made to the national law of the "place of arbitration" and on other occasions to the national law of the "country where the award was made" (see e.g. article V, paragraph 1, subparagraphs (*a*), (*d*) and (*e*) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).

Commentary on article 16

1. This article resolves the problems of language that may arise in international arbitrations, where the parties, arbitrators and witnesses often have differing language backgrounds. It is desirable that the agreement of the parties, or in its absence the determination by the arbitrators, as to the language or languages to be used should be arrived at as early as possible.

Paragraph 1[1]

2. Under this paragraph, the parties may agree on the language or languages that will be used in a particular arbitral proceeding. This agreement may be contained in the arbitral clause or separate arbitration agreement, or may be reached at some time before or even after the commencement of the arbitral proceedings. (See article 4, para. 2, as to the date on which arbitral proceedings are deemed to commence.) However, this faculty can no longer be exercised if the arbitrators have been appointed and, despite a request by the arbitrators, the parties fail to reach an agreement on the language or languages to be used. In the absence of an agreement by the parties, the arbitrators will determine the language or languages to be used

* Reproduced in this volume, part two, III, 1, *supra*.

[1] It is suggested that the following revised text should replace the text of article 16, para. 1, reproduced in A/CN.9/112. The revision consists of the addition of the words in italics:

"1. Subject to a *prior* agreement by the parties, the arbitrators shall, promptly after their appointment, determine, *after consultation with the parties*, the language or languages to be used in the proceedings".

in the proceedings, taking into account the exigencies of the arbitration.

Paragraph 2

3. Under paragraph 1, the agreement of the parties or the determination by the arbitrators governs the language to be used at any oral hearings, as well as the language in which written communications and statements are to be made. Where documents are submitted in a language that is not the language agreed to by the parties or determined by the arbitrators, the arbitrators, under paragraph 2, may order the party concerned to accompany such documents by a translation in the language or languages of the arbitration.

Commentary on article 17

1. The "statement of claim", which is dealt with in this article, must be distinguished from the "notice of arbitration" governed by article 4 of these Rules. The "notice of arbitration" serves the function of informing the respondent that the claimant is submitting to arbitration a dispute arising out of a contract between them. The date of delivery of this notice marks the commencement of the arbitral proceedings and sets in motion the machinery for the choice or appointment of the arbitrators. This notice also sets forth, *inter alia*, the general nature of the claim, an indication of the amount involved, and the relief or remedy sought by the claimant. The information contained in the "notice of arbitration" will help the parties, or the appointing authority, as the case may be, in the selection of arbitrators. On the other hand, the "statement of claim" is communicated only after the arbitrators have been chosen or appointed. It is the first written statement in a possible series of such statements by which the parties endeavour to state and substantiate their positions regarding the dispute (see articles 18 and 20).

2. The arbitrators may, in some cases, have received a copy of the notice of arbitration before their appointment(e.g. if they asked to see it before deciding whether or not to agree to serve as arbitrators), or soon after their appointment. However, article 4 contains no requirement that the "notice of arbitration" be sent to the arbitrators upon their appointment.

Paragraph 1

3. The first document that the claimant must communicate to the arbitrators is the "statement of claim" governed by this article. Paragraph 1 provides that the claimant must communicate his statement of claim, in writing, to the respondent and to each of the arbitrators. In order to apprise the arbitrators of the scope of their jurisdiction and of the frame of reference for the dispute, this paragraph requires that a copy of the contract and of any separate arbitration agreement be annexed to the statement of claim.

4. It should be noted that, while article 17, paragraph 1, requires that the statement of claim shall be communicated "within a period of time to be determined by the arbitrators", article 21 provides that normally this period of time should not exceed 15 days.

Paragraph 2

5. This paragraph describes the information that must be contained in the statement of claim. Although in his statement of claim the claimant is obliged to include "a statement of the facts supporting the claim", he is not required to annex the documents which he deems relevant and on which he intends to rely. Paragraph 2, however, states that, should he wish to do so, a claimant may annex to his statement of claim a list of the documents he intends to submit in support of his claim or he may even annex the relevant documents themselves. It is believed that, since claimants are generally interested in the resolution of the dispute submitted to arbitration as quickly as possible, they will in a large number of cases annex to their statements of claim the documents or copies of the documents on which they intend to rely. In cases where the claimant does annex a list of such documents or copies of the documents themselves, he is not precluded from submitting additional or substitute documents at a later stage in the arbitral proceedings, in the light of the position taken by the respondent in his statement of defence.

Paragraph 3

6. Under this paragraph, the statement of claim may be supplemented or altered by the claimant, provided that the arbitrators in their discretion permit the change to be made and, further, that the respondent is given an opportunity to reply to the claim as modified.

Commentary on article 18

Paragraph 1

1. Under the provisions of this paragraph, the statement of defence must be communicated by the respondent to the claimant and to each of the arbitrators "within a period of time to be determined by the arbitrators". It should be noted that under article 21 of these rules, the time-limits established by arbitrators for the communication of written statements should normally not exceed 45 days.

Paragraph 2

2. This paragraph is designed to ensure that the statement of defence responds to the information that is required to be included in the statement of claim under the provisions of subparagraphs (*b*), (c) and (*d*) of paragraph 2 of article 17. In addition, the respondent has the option (similar to the option given to the claimant under article 17, para. 2) of annexing the documents or copies of the documents on which he intends to rely for his defence or of including a reference to such documents, without prejudice to his right to present additional or substitute documents at a later stage in the arbitral proceedings.

Paragraph 3

3. This paragraph permits the respondent to assert in his statement of defence claims arising out of the same contract as the one on which the claim made in the statement of claim was based. Such claims may be asserted either as counterclaims or as set-off.

4. Although, under this paragraph, a claim asserted as a counterclaim or set-off must arise out of the same contract as the claim made in the statement of claim, the parties may agree, under special circumstances, that the respondent may assert as a counterclaim or

set-off a claim that did not arise out of the same contract as the claim raised in the statement of claim, such as where disputes arising out of other contracts are also referred to arbitration under these Rules. Pursuant to article 2 of these Rules, such agreement of the parties would have to be in writing.

Paragraph 4

5. This paragraph makes it clear that the provisions of article 17 relating to the required contents of the statement of claim and to the possibility of supplementing or altering claims apply also to counterclaims and to claims relied on as set-off.

Commentary on article 19

1. This article empowers the arbitrators to rule on objections to their jurisdiction to decide the particular dispute that is before them. Similar provisions may be found, e.g., in article V, paragraph 3 of the 1961 European Convention on International Commercial Arbitration; article 41, paragraph 1 of the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States; article 18, paragraph 1 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration; article VI, paragraph 3 of the ECAFE Arbitration Rules; and article 18 of the ECE Arbitration Rules.

2. It should be noted that, although article 19 does not state expressly that rulings by the arbitrators as to their jurisdiction are subject to judicial supervision and control, it is clear that these rulings are subject to such supervision and control, exercised in accordance with the mandatory provisions of the applicable national law.

Paragraph 1

3. This paragraph gives the arbitrators power to rule on objections to their jurisdiction and provides specifically that objections based on a denial of the existence or validity of the arbitration clause or separate arbitration agreement are included among the objections to their jurisdiction on which the arbitrators are empowered to rule. Objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement may be based, amongst others, on any of the following grounds: non-existence or lapsing; nullity, including nullity resulting from the fact that under the applicable arbitration law the subject-matter of the dispute may not be submitted to settlement by arbitration; and claims that the particular dispute does not fall within the scope of the parties' agreement to submit certain specified disputes to arbitration.

4. Objections as to the existence or validity of the arbitration clause or of the separate arbitration agreement constitute allegations that the arbitrators were not validly authorized to function as arbitrators. Other objections, e.g. that the arbitrators exceed their terms of reference at some point during the arbitral proceedings or that they failed to comply with a material provision in the arbitration clause or in the separate arbitration agreement, are only allegations that the arbitrators lacked jurisdiction to take some particular action and do not involve allegations to the effect that the arbitrators could not serve at all in that capacity. Paragraph 1 of article 19 is designed to cover all objections to the jurisdiction of the arbitrators, irrespective of the grounds for, and extent of, such objections.

Paragraph 2

5. This paragraph establishes the separability of the arbitration clause from the contract of which the arbitration clause forms a part. It authorizes the arbitrators to determine the existence or validity of such a contract, but makes it clear that the invalidity of the arbitration clause does not necessarily follow from a finding that the main contract is invalid. A similar provision may be found in article 18 of the Uniform Law annexed to the 1966 European Convention Providing a Uniform Law on Arbitration. Paragraph 2 reflects the view that the arbitration clause, although contained in, and forming a part of, the contract, is in reality an agreement distinct from the contract itself, having as its object the submission to arbitration of disputes arising from or relating to the contractual relationship.

Paragraph 3

6. Under the provisions of this paragraph, pleas alleging the lack of jurisdiction of the arbitrators must normally be raised in the statement of defence or, with respect to a counterclaim, in the reply to the counterclaim. However, the arbitrators may admit a plea that is made only at a later stage in the arbitral proceedings if the delay was justified under the circumstances. An example of a plea raised with justified delay would be a plea based on facts newly discovered by the objecting party.

Paragraph 4

7. Since objections as to the jurisdiction of the arbitrators involve procedural matters, this paragraph authorizes the arbitrators to either rule on such objections as preliminary questions or to decide these issues only in their final award. This solution is in conformity with the discretion granted to arbitrators by article 14, paragraph 1 of these Rules to conduct the arbitral proceedings "in such manner as they consider appropriate" and with paragraph 2 of article 41 of the 1965 Washington Convention on the Settlement of Investment Disputes: "Any objection by a party to the dispute that that dispute is not within the jurisdiction of the centre . . . , shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute".

Commentary on article 20

1. Under these Rules, the claimant must communicate his statement of claim to the respondent and to each of the arbitrators (article 17). Article 25, paragraph 1 provides the sanction for non-compliance: "the arbitrators shall issue an order for the discontinuance of the arbitral proceedings". The respondent is then given an opportunity to respond to the statement of claim (article 18). Article 25, paragraph 2 provides that if the respondent fails to submit a statement of defence, nevertheless "the arbitrators may proceed with the arbitration". Thus, normally, the arbitrators will receive a statement of claim and a statement of defence.

Paragraph 1

2. Under this paragraph, the arbitrators may require that the parties submit written statements in addition to the statement of claim and the statement of defence. Also, the parties themselves may agree on a further exchange of written statements. This paragraph provides the arbitrators and the parties with an opportunity to insist on an exchange of further written statements, in recognition of the custom under several national arbitration laws, especially in countries with a civil law system, to call for a second statement by the claimant (rejoinder or réplique) and a second response by the respondent (reply to the rejoinder, or duplique).

Paragraph 2

3. Since a claim raised by the respondent in his statement of defence as a counterclaim is a novel claim as far as the claimant is concerned (although article 18, para. 3 requires that the counterclaim must have arisen out of the same contract as the original claim by the claimant), paragraph 2 of article 20 provides that the arbitrators must permit the claimant to present a written reply to the counterclaim.

Paragraph 3

4. This paragraph is based closely on a provision in article 24 of the ECE Arbitration Rules. Although incorporated as a guide to the arbitrators and the parties, this provision may be viewed as a specific example of the general rule in article 14, paragraph 1 to the effect that "the arbitrators may conduct the arbitration in such manner as they consider appropriate".

Commentary on article 21

1. Disputes submitted to arbitration should be settled as quickly as possible. It is, however, not possible to prescribe in these Rules rigidly fixed time-limits within which the various required written statements must be communicated. It has been found that rigid time-limits cannot be imposed in domestic commercial arbitrations and of course this holds true even more for international commercial arbitrations. The 45-day period mentioned in this article as the usual time-limit for the communication of written statements is merely intended to serve as a general guideline from which the arbitrators may deviate whenever warranted by the particular circumstances.

2. Under this article, the claimant should normally be given only 15 days to communicate his statement of claim to the other party and to the arbitrators. The reason for this is that already at the time he initiates the arbitral proceedings by sending the notice of arbitration (article 4), the claimant should start the preparation of his statement of claim (article 17). During the time period that elapses between the sending of the notice of arbitration and the appointment of the arbitrators (who then establish the time-limit for the communication of the statement of claim, under article 17), the claimant can continue to prepare his statement of claim.

3. Under this article, the arbitrators retain the discretion to extend any time-limits that they had fixed, if such extension is warranted under the circumstances.

4. It should be noted that, pursuant to article 2 of these Rules, the parties may, by an agreement in writing, modify any provision in these Rules pursuant to which the arbitrators are to determine the period of time within which a particular written statement is to be communicated; the parties can accomplish this by a written agreement in which they themselves set the time-limit for the communication of a particular written statement, and they should thereafter inform the arbitrators accordingly.

Commentary on article 22

1. This article sets forth a number of general provisions which are considered useful for the regulation of hearings that may be held in the course of the arbitral proceedings. In addition, the article deals with the presentation of evidence of witnesses by means of their written statements (para. 5) and establishes that the arbitrators have the duty to weigh and evaluate the evidence offered by the parties (para. 6).

Paragraph 1

2. This paragraph requires that the arbitrators "give the parties adequate advance notice" of each hearing. Such notice must specify the date, time and place of the hearing. In most cases hearings will be held at the place of arbitration. However, pursuant to article 15, paragraph 2, the arbitrators may hear witnesses "at any place they deem appropriate, having regard to the exigencies of the arbitration".

Paragraph 2

3. Under this paragraph, each party must disclose, at least 15 days before the hearing, the identity of the witnesses he intends to present. This information will give some idea to the other party of the evidence that will be presented at the hearing and will enable that party to prepare his response to that evidence.

Paragraph 3

4. This paragraph deals with certain preparatory measures for hearings that the arbitrators must take in order to ensure that the hearings will run smoothly. The basic rule is that the arbitrators have full discretion regarding possible arrangements for the interpretation of oral statements and for a verbatim record of the hearing, in keeping with the general rule contained in article 14, paragraph 1, that "subject to these Rules, the arbitrators may conduct the arbitration in such manner as they consider appropriate". However, the arbitrators have to arrange for interpretation or a verbatim record of they receive a timely request from both parties to this effect.

Paragraph 4

5. This paragraph provides that, as a rule, hearings shall be held *in camera*, in conformity with the principle of privacy that is customary in commercial arbitration. The parties, however, may agree that some or all the hearings should be open.

6. The manner in which witnesses are to be interrogated is left to the discretion of the arbitrators. Thus, the arbitrators may decide whether cross-examination of the witnesses is or is not to be permitted. Cross-examination is a technique that is customarily

employed in many areas of the world and cannot therefore be prescribed for international arbitration. Consequently, in cases where both parties or their counsel are accustomed to the technique of cross-examination, the arbitrators may in their discretion permit it, while in cases where one or both parties are unacquainted with this technique the arbitrators may find it inappropriate to permit it.

Paragraph 5

7. This paragraph gives a desired latitude in the manner of presenting evidence at arbitral hearings, by permitting the presentation of evidence in the form of written statements signed by the witnesses. However, it is not required under this paragraph that the witnesses signing such statements also swear to their veracity.

Paragraph 6

8. This paragraph makes it clear that the arbitrators have discretion to decide on the admissibility, relevance and materiality of the evidence offered, and to determine the probative weight that is to be given to such evidence. A similar provision is contained in article 24 of the ECE Arbitration Rules.

Commentary on article 23

1. This article deals with the possibility that during the course of the arbitral proceedings a party will request that interim measures be taken in order to protect the subject-matter of the dispute. Under some national laws such measures may be taken only by the competent judicial authorities, while under other national laws the arbitrators have the discretion to take appropriate interim protective measures. However, if there is a need for the immediate enforcement of protective measures, the assistance of the judicial authorities may be essential in all cases.

Paragraphs 1 and 2

2. These paragraphs concern those cases where under the applicable national law the arbitrators are empowered to take interim measures of protection regarding the subject-matter of the dispute. Under paragraph 1, the arbitrators have the discretion to take such measures, but only if requested by one or both parties.

This paragraph is based on article VI, paragraph 6 of the ECAFE Arbitration Rules, and article 27 of the ECE Arbitration Rules.

3. In order to facilitate the enforcement of interim measures taken by the arbitrators pursuant to paragraph 1 of this article, paragraph 2 authorizes the arbitrators to establish these measures in the form of interim awards. Since the taking of interim measures may entail "costs of arbitration" (article 33), paragraph 2 gives arbitrators the power to require security for such costs.

Paragraph 3[2]

4. This paragraph makes it clear that a party to the arbitral proceedings may, if he so wishes, request an appropriate judicial authority to take interim protective measures, without thereby violating the agreement to arbitration contained in the arbitration clause or separate arbitration agreement under which the arbitral proceedings arose. This provision is based on article VI, paragraph 4 of the 1961 European Convention on International Commercial Arbitration.

Commentary on article 24

1. In cases involving matters of a technical nature, or where the existence and scope of particular commercial usages is at issue, the arbitrators may wish to have the benefit of expert opinion before they make their award. In some cases, the arbitrators may also want to receive expert advice on questions of law, although the actual resolution of such questions must be made by the arbitrators themselves.

Paragraph 1

2. This paragraph authorizes the arbitrators to appoint experts who will report to the arbitrators on specific issues arising during the arbitral proceedings. The terms of reference for such experts are established by the arbitrators; however, a copy of the terms of reference must be communicated to the parties. The paragraph is modelled on similar provisions found in the rules of several arbitral institutions, e.g. section 23 of the Rules of Procedure of the Foreign Trade Arbitration Commission at the USSR Chamber of Commerce; article 14, paragraph 2 of the Rules of Conciliation and Arbitration of the ICC; and article 21, paragraph 2 of the Rules of the Netherlands Arbitration Institute.

Paragraphs 2, 3 and 4

3. The provisions contained in these paragraphs enable the expert to perform his functions and, at the same time, safeguard the interests of both parties to the arbitration.

Commentary on article 25

1. This article deals with the consequences of a party's failure to submit his statement of claim, statement of defence or other required documentary evidence, and with the effect of a party's failure to appear at a hearing that had been duly called.

Paragraph 1

2. The "statement of claim" is the first document that, pursuant to article 17, must be communicated by the claimant to the arbitrators. Without the statement of claim the arbitrators cannot commence consideration of the dispute, since it is only through that statement that the arbitrators become fully informed about the points at issue and about the facts that in the view of the claimant support his claim. Nor can the respondent prepare his statement of defence without having the statement of claim. For these reasons, paragraph 1 of article 25 provides specifically that if a claimant fails

[2] It is suggested that the following revised text should replace the text or article 23, paragraph 3, reproduced in A/CN.9/112. This revised text is identical with the text reproduced in A/CN.9/112, except that the words in italics have been added:

"A request for interim measures may also be addressed to a judicial authority. Such a request shall not be deemed incompatible with the arbitration *clause or separate arbitration* agreement, or as a waiver of that *arbitration clause or separate arbitration* agreement."

The commentary to this paragraph considers the revised text.

to communicate his statement of claim within the period of time set by the arbitrators, the arbitrators have the discretion of granting him an extension of time. Such an initial extension of time will usually be granted by the arbitrators as a matter of course, and may be granted even if the failure to communicate the statement of claim was not justified under the circumstances. It may be noted, on the other hand, that under the general provisions in article 21 of these Rules, the arbitrators may extend any time-limits fixed by them "if they conclude that an extension is justified".

3. However, should the claimant fail to communicate his statement of claim by the date the initial extension granted by the arbitrators for its submission has expired, then under this paragraph the arbitrators are obliged to "issue an order for the discontinuance of the arbitral proceedings", unless the claimant shows "sufficient cause for this failure".

4. Paragraph 1, as a whole, reflects the view that once the claimant has initiated the arbitral proceedings by sending his notice of arbitration to the other party (pursuant to article 4), he should within a reasonable time communicate his statement of claim to the other party and to the arbitrators or face the discontinuance of the arbitral proceedings; in this way the claimant is prevented from threatening the institution of arbitral proceedings regarding a particular dispute without in fact formally going forward with his claim in earnest.

Paragraph 2

5. This paragraph is designed to prevent the possibility that the respondent would try to frustrate the arbitral proceedings by failing to submit his statement of defence. Accordingly, paragraph 2 of article 25 provides that in such a case the arbitrators may go forward with the arbitration, disregarding the fact that no statement of defence was submitted. If, however, the respondent shows that he had justification for failing to submit his statement of defence within the established time-limit, then the arbitrators, pursuant to the provisions of article 21, have the discretion to grant him an extension of time.

6. Where the respondent does not communicate his statement of defence, when proceeding with the arbitration the arbitrators may still convene oral hearings and/or require further documentary evidence from one or both parties. Should the respondent then fail to appear at a duly called hearing or fail to submit further required documentation, the provisions of paragraphs 3 or 4 of this article will apply, respectively.

Paragraph 3

This paragraph assures that a party cannot frustrate the arbitral proceedings by the expedient of not appearing at a hearing that was duly called. It provides, following similar provisions contained in article 31, paragraph 1 of the ECE Arbitration Rules, and article 15, paragraph 2 of the Rules of Conciliation and Arbitration of ICC, that the arbitrators may proceed with the arbitration and that all the parties will be deemed to have been present at the hearing in such a case.

Paragraph 4

8. Under this paragraph, based on article 31, paragraph 2 of the ECE Arbitration Rules, if a party fails to submit any documentary evidence required by the arbitrators, the arbitrators may nevertheless proceed, and make their award on the evidence that had been presented to them during the arbitral proceedings.

Commentary on article 26

1. Under this article, a party to an arbitral proceeding who knows that a provision of, or requirements under, these Rules was not complied with is deemed to waive his right to object if he does not promptly raise an objection thereto. It should be noted that without a knowledge of the contents of these Rules there can be no knowledge of any non-compliance with them.

2. However, where a party has submitted to arbitration under these Rules, it will be very difficult for him to allege during the arbitral proceedings that he lacks knowledge of the contents of one or more of the provisions of these Rules. Such an allegation would be even more difficult to sustain if the parties had adopted the text of the model arbitration clause or separate arbitration agreement recommended in the introduction to these Rules (A/CN.9/122, para. 12),* since that text contains an express declaration by the parties that the Rules are known to them.

3. It may be noted that this article and article 2 (modification of the Rules by written agreement of the parties) are in some respects interrelated. A waiver pursuant to the provisions of article 26 may be regarded as a modification of these Rules by a tacit, informal agreement of the parties, manifested by the action of one party derogating from the Rules and the knowing acquiescence by the other party to such action.

4. In practice, a waiver under article 26 of the right to object will normally take place only in respect of provisions and requirements in the Rules that are of minor importance. The effect of such a waiver would be that, when an award resulting from the arbitral proceedings is sought to be enforced, the objection to recognition and enforcement of the award specified in article V, paragraph 1 (*d*) of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, (i.e., that "the arbitral procedure was not in accordance with the agreement of the parties") could not be raised as to the non-compliance that was the subject-matter of the waiver.

5. This article is based on similar provisions found in section 37 of the Commercial Arbitration Rules of the American Arbitration Association and article 37 of the Inter-American Commercial Arbitration Rules.

SECTION IV

Commentary on article 27

1. This article deals with a number of technical questions regarding the manner in which arbitrators are to make their award and with the legal effect of arbitral awards. The provisions contained in this article are, however, subject to the mandatory provisions of the applicable national law.

Paragraph 1

2. This paragraph, similarly to article 36 of the ECE Arbitration Rules and article VII, paragraph 2

* Reproduced in this volume, part two, III, 1, *supra*.

of the ECAFE Arbitration Rules, authorizes the arbitrators to make interim, interlocutory or partial awards whenever justified under the circumstances of the particular dispute that is before them. The arbitrators may make such awards at any time during the arbitral proceedings.

Paragraph 2

3. The rule in this paragraph, to the effect that awards must contain the reasons upon which they are based, unless the parties have expressly agreed to the contrary, corresponds to article 40 of the ECE Arbitration Rules. This provision reflects the law in many jurisdictions, particularly countries with a civil law system, to require that arbitral awards incorporate the reasons for the decision reached by the arbitrators. At the same time, paragraph 2 permits the parties to agree that the award should not contain reasons in cases where the place of arbitration is in a jurisdiction in which an award need not contain reasons in order to be valid.

Paragraph 3

4. This paragraph requires that an award be made by a majority of the arbitrators in cases where there is a three-member arbitral tribunal. Thus, at least two of the three arbitrators must concur in the award for it to become valid; however, it is not required that the presiding arbitrator be one of the two arbitrators who agree on the award.

5. If a majority of the arbitrators fail to agree on an award, the arbitral tribunal must resolve the deadlock in accordance with the relevant law and practice at the place of arbitration, which is the place where according to article 15, paragraph 4 of these Rules the award must be made. Under the law and practice in many jurisdictions, arbitrators must continue their deliberations until they arrive at a majority decision.

Paragraph 4[8]

6. This paragraph deals with two matters of a technical nature concerning the form and content of arbitral awards; the requirement that the arbitrators sign their award, and the requirement that the award contain the date and place at which the award was made. As a general rule, all the arbitrators must sign the award, in order to make it clear that all the arbitrators participated in the arbitral proceedings and in the making of the award.

7. An award must contain an indication of the date on which it was made, since that date is of great importance on account of the time-limits that are established by national laws for the filing or registration of arbitral awards, and for the enforcement of arbitral awards. Similarly, an award must clearly show the place where it was made, since the arbitral proceedings must have been conducted in conformity with the mandatory rules of the law applicable at the place of arbitration, and under article 15, paragraph 4 of these Rules, "the award shall be made at the place of arbitration".

8. Paragraph 4 provides further that the validity of an award is not impaired by the failure of any one arbitrator on a three-member arbitral tribunal to sign the award; however, pursuant to this paragraph, the award must state the reason for the absence of that arbitrator's signature. Thus, where two of the three arbitrators agree on an award, the third arbitrator cannot prevent the making of the award by a refusal to sign the award.

9. It should be noted that in some jurisdictions the applicable arbitration law may require that an arbitral award be signed by all the arbitrators before it becomes valid and enforceable; in such a case the applicable national law would prevail over the provision in paragraph 4 of article 27.

10. Paragraph 4 of article 27 does not deal with the possibility that an arbitrator dissenting from the award agreed on by the other two arbitrators may wish to append his dissenting opinion to the award. Consequently, the question of whether an arbitrator may add his dissenting opinion to the award is left for decision to the law applicable at the place of arbitration.

Paragraph 5

11. This paragraph establishes that an award may only be published with the consent of both parties. When publication of an award does take place, the names of the parties are usually omitted and other measures are also taken to avoid disclosure of their identity.

Paragraphs 6 and 7

12. These paragraphs are designed to ensure that both parties will promptly receive copies of the award and that the arbitrators comply with any requirement at the place of arbitration that the award be filed or registered.

Commentary on article 28

Paragraph 1

1. This paragraph is based on the principle of party autonomy for the choice of the law applicable to the substance of a dispute that is referred to arbitration. The wording of this paragraph is modelled on article 2 of the Hague Convention on the Law Applicable to International Sale of Goods of 15 June 1955.

2. The parties' choice of the applicable law may be contained in an express provision in the contract, in the separate arbitration agreement or in a subsequent written agreement between the parties on this point. Alternatively, the choice of law may be an implied one, resulting "unambiguously" from the terms of the contract.

3. It should be noted that in some jurisdictions parties may only choose as the law applicable to the substance of their dispute the law of a jurisdiction having some real connexion with the transaction.

[8] It is suggested that the following revised text should replace the text of the first sentence of article 27, paragraph 4, reproduced in A/CN.9/112. This revised text is identical with that reproduced in A/CN.9/112, except that the words in italics have been added:

"4. An award shall be signed by the arbitrators *and it shall contain the date on which and the place where the award was made* . . .".

The commentary on this paragraph considers the revised text.

Paragraph 2

4. This paragraph applies where there was no choice of the applicable substantive law under paragraph 1 of article 28, whether by an express clause or resulting from the terms of the contract. In such cases, the law applicable to the substance of the dispute must be chosen by the arbitrators; under paragraph 2 they "shall apply the law determined by the conflict of laws rules that the arbitrators deem applicable". This approach, also found in article VII, paragraph 1, of the 1961 European Convention on International Commercial Arbitration and article 38 of the ECE Arbitration Rules, permits the arbitrators to exercise their discretion in choosing the applicable conflict of laws rules in the light of the particular circumstances of the dispute.

Paragraph 3

5. This paragraph deals with cases where the parties expressly authorize the arbitrators to decide the substance of their dispute *ex aequo et bono* or as *amiables compositeurs*, i.e., based not on the substantive law of any particular jurisdiction but on general principles of law and trade practices. In many jurisdictions arbitrators are permitted to decide on these bases, and provisions similar to paragraph 3 may be found in article VII, paragraph 2, of the 1961 European Convention on International Commercial Arbitration, article 39 of the ECE Arbitration Rules, and article VII, paragraph 4 (*b*) of the ECAFE Arbitration Rules.

6. Paragraph 3, however, contains an explicit proviso making it clear that arbitrators may decide *ex aequo et bono* or as *amiables compositeurs* only if the arbitration law at the place of arbitration permits such arbitration. Even where such arbitration is permitted, it is generally accepted that the arbitrators remain bound by fundamental principles of public policy (*ordre public*) at the place of arbitration.

Paragraph 4

7. This paragraph provides that "in any case", i.e., regardless of whether the law applicable to the substance of the dispute was determined according to paragraph 1 or 2 of this article, or whether the arbitrators were authorized by the parties to decide the dispute *ex aequo et bono* or as *amiables compositeurs*, the arbitrators throughout the arbitral proceedings and particularly in the making of their award "shall take into account the terms of the contract and the usages of the trade". This gives the arbitrators considerable latitude in arriving at their decision. Similar provisions are contained in article VII, paragraph 4 (*a*) of the ECAFE Arbitration Rules, article 24 of the ECE Arbitration Rules, and article 13, paragraph 5 of the Rules of Conciliation and Arbitration of the ICC. Furthermore, in the sphere of international commercial arbitration for which these Rules were designed, this result corresponds with the intentions and expectations of the parties.

Commentary on article 29

1. This article applies if, before the award is made, the parties agree to a settlement of their dispute, or if the continuance of the arbitral proceedings becomes unnecessary or impossible for any other reason. It governs the manner in which the arbitral proceedings are to be concluded in such cases and deals with the apportionment of the costs of arbitration between the parties.

Paragraph 1

2. Where the parties agree to a settlement of their dispute during the course of the arbitral proceedings, this paragraph makes provision for an "order for the discontinuance of the arbitral proceedings" as well as for "an arbitral award on agreed terms". A settlement recorded in the form of an award on agreed terms acquires the legal force of an award. Rule 43 of the Rules of Procedure for Arbitration Proceedings of the International Centre for the Settlement of Investment Disputes similarly distinguishes between an "order of discontinuance" and a "settlement in the form of an arbitral award", while provisions in other arbitration rules, such as paragraph 1 of article VIII of the ECAFE Arbitration Rules, and paragraph 43 of the Rules of Procedure of the Inter-American Arbitration Commission, mention only the latter possibility.

3. Under paragraph 1, to have a settlement reached by the parties recorded as an arbitral award on agreed terms it is not required that the parties submit to the arbitrators the full text of their settlement in such a form that it can be embodied in an award. In practice, the settlement may often be reached orally during the course of a hearing, possibly with the assistance of the arbitrators, and the parties may request the arbitrators to draft an award on agreed terms that corresponds to the settlement reached.

4. The arbitrators, however, are not obligated to record a settlement as an award on agreed terms, even if requested by both parties. Thus, exercising their discretion, arbitrators may be expected to refuse to record as awards those settlements that they deem unlawful or against public policy (*ordre public*) at the place of arbitration.

5. Where the parties reached a settlement and did not request the arbitrators to embody the settlement in an award or where, although requested, the arbitrators in their discretion refused to do so, the arbitrators will issue an order for the discontinuance of the arbitral proceedings.

6. Paragraph 1 also deals with instances where, before an award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible even though the parties have not agreed to a settlement of their dispute. In such cases the arbitrators must notify the parties of their intention to discontinue the arbitral proceedings and may then issue an order of discontinuance. If one or both parties object, however, the arbitrators must proceed with the arbitration and make an award.

Paragraphs 2 and 3

7. These paragraphs have been added to resolve certain technical problems that arise in practice when the arbitral proceedings are for any reason discontinued pursuant to the provisions of paragraph 1 of this article. Unter paragraph 2, the apportionment of the costs of arbitration in such cases is left to the discretion of the arbitrators. Under the particular circumstances covered by article 29, the basic principle of article 33, para-

graph 2 to the effect that the "costs of arbitration shall in principle be borne by the unsuccessful party" cannot be applied. It may be expected that, in the absence of any special circumstances, the arbitrators will divide the costs of arbitration equally between the parties in such cases. In addition, any agreement by the parties as to the apportionment of the costs of arbitration would bind the arbitrators.

Commentary on article 30

Paragraph 1

1. After the award has been made, one or both parties may wish that the arbitrators provide an interpretation of the award they have rendered, in order to clarify for the parties its exact meaning and scope. This paragraph permits either party to request that the arbitrators interpret their award. Similar provisions, authorizing the arbitrators to interpret their award, are found in article VIII, paragraph 2 of the ECAFE Arbitration Rules and article 50 of the 1965 Washington Convention on the Settlement of Investment Disputes.

Paragraph 2

2. Under this paragraph, whenever an interpretation is requested by a party and is given by the arbitrators, it must comply with the formal requirements for awards contained in article 27 of these Rules.

3. Article 30 is considered useful in that it provides a vehicle for one or both parties to secure clarification of the award where necessary. Furthermore, in some jurisdictions the competence of the arbitrators is deemed to end with the making of the award, unless the parties had expressly agreed that the arbitrators are to retain a certain limited competence even after the making of their award. Articles 30-32 of these Rules embody express agreements of the parties whereby they authorize the arbitrators to interpret or correct their award and to rectify an omission in their award.

Commentary on article 31

1. This article authorizes the arbitrators to correct certain mistakes in the award, such as errors in computation or those of a clerical nature. A similar provision is contained in article VIII, paragraph 3 of the ECAFE Arbitration Rules.

2. Under that paragraph, the arbitrators may make corrections in their award within a defined period of time, either at the request of a party or on their own initiative. Even in cases where the arbitrators receive a timely request from one or both parties that an error in the award is corrected, the arbitrators have full discretion to decide whether or not they wish to issue such a correction (e.g., the arbitrators may decide that the alleged error whose correction was requested was not an error at all).

Paragraph 2[4]

3. This paragraph provides that any correction of an award issued by the arbitrators must be signed by the arbitrators, communicated by them to the parties and that the requirements at the place of arbitration for the filing or registration of awards must be complied with by the arbitrators. However, in the case of an arbitral tribunal composed of three arbitrators, it is sufficient if the correction of the award is signed by the presiding arbitrator, provided he consulted the other arbitrators prior to his issuing the correction. This latter provision was added to this paragraph in recognition of the fact that in international arbitrations it is likely that the members of a three-member arbitral tribunal reside far from each other and that consequently it may be difficult and time-consuming to obtain the signatures of all the arbitrators.

Commentary on article 32

1. This article is designed to prevent the invalidation of awards on the ground that in their award the arbitrators failed to deal with and decide upon one or more claims presented by either party during the arbitral proceedings. Most national arbitration laws provide that the arbitrators' failure or omission to deal with all the claims raised in the arbitration is sufficient reason for setting aside or refusing to enforce an award. In the absence of a provision such as article 32, a lengthy, costly arbitration might be totally invalidated because the arbitrators inadvertently failed to rule in their award on each part of every claim raised during the arbitral proceedings. To permit, after an award has been made, the making of an additional award as to claims or parts of claims presented during the arbitral proceedings but not dealt with in the original award would contribute to the efficient and effective resolution of the dispute between the parties that had been referred to arbitration.

2. By their adoption of the UNCITRAL Arbitration Rules the parties agree to an extension of the authority of the arbitrators in a number of respects, subject to the mandatory provisions of the law applicable at the place of arbitration. Under article 30 of these Rules the arbitrators may give a binding, written interpretation of the award they have made, and under article 31 the arbitrators may correct errors of a clerical or similar nature in their award. The present article empowers the arbitrators, upon the request of either party, to complete an award they have made by issuing "an additional award as to claims presented in the arbitral proceedings but omitted from the award".

Paragraph 1

3. This paragraph permits a party to request the arbitrators to make an additional award only as to claims that were formally presented during the course of the arbitral proceedings. It therefore applies to matters such as an unintentional failure to fix or apportion the costs of arbitration (article 33), to rule on a claim for interest payments, or to adjudicate in the award a counter-claim that was asserted without substantial supportive evidence.

[4] It is suggested that the following revised text should replace the text of article 31, para. 2, reproduced in A/CN.9/112. This revised text is identical with that reproduced in A/CN.9/112, except that the words in italics have been added:

"2. Such corrections shall be in writing and *shall be signed by the sole arbitrator or if there was an arbitral tribunal of three members, by the presiding arbitrator after consultation with the other arbitrators.* The provisions of article 27, paras. 5, 6 and 7, shall apply."

Paragraph 2

4. Under this paragraph, the arbitrators have full discretion, upon receipt of the request of a party for an additional award, to decide whether or not to make such an award. In addition, the arbitrators may make an additional award only if the omission in the award "can be rectified without any further hearing or evidence". Thus, the additional award would have to be based on the evidence that the arbitrators had before them at the time that they made their original, incomplete award.

Paragraph 3

5. In recognition of the fact that an "additional award" is an "award" within the meaning of these Rules, this paragraph applies the provisions of paragraphs 2 to 7 of article 27 to an additional award.

Commentary on article 33

Paragraph 1

1. This paragraph contains a non-exhaustive enumeration of items that are included in the "costs of arbitration". Pursuant to this paragraph, the costs of arbitration are to be fixed in the award and the fee charged by the arbitrators for their services, which forms part of such costs, must be stated separately.

2. Because of the great differences in the nature of disputes that may be referred to arbitration, in the length of arbitral proceedings, and in the demands made on and efforts required of the arbitrators as a consequence, it was not believed possible to develop a uniform schedule of fees for arbitrators.[5] However, arbitrators, who were selected by the parties or by an appointing authority based on faith in their expertise and in their readiness to adjudicate the dispute with impartiality and fairness, may be expected to act reasonably in setting their own fees.

3. While, under subparagraph (*a*) of paragraph 1, the fee of the arbitrators must be stated separately in the award, all the other costs of arbitration may be combined into one figure. In cases where arbitrators were named by an appointing authority, the arbitrators may consult with that authority before setting their fees.

Paragraph 2

4. Similarly to provisions appearing in article 43 of the ECE Arbitration Rules and article VII, paragraph 7 of the ECAFE Arbitration Rules, paragraph 2 of this article lays down as the general rule that the costs of arbitration should be borne by the unsuccessful party, but authorizes the arbitrators to apportion these costs in a different manner whenever justified by the particular circumstances.

Commentary on article 34

Paragraphs 1 and 2

1. In *ad hoc* arbitration, it is customary for arbitrators to require an advance payment to cover the costs that will be incurred during the course of the arbitral proceedings. Paragraph 1 provides that each party is to make one half of such advance payment. Paragraph 2 authorizes the arbitrators to require supplementary deposits from the parties, in the light of developments during the arbitral proceedings, e.g., if the proceedings take longer than anticipated or the arbitrators decide that they will need the testimony of experts reporting to them on particular issues (article 24). Similar provisions are contained in article VI, paragraph 7 of the ECAFE Arbitration Rules, and article 28 of the ECE Arbitration Rules.

Paragraph 3

2. Under this paragraph, if a deposit required pursuant to paragraph 1 or 2 of this article is not paid in full within a specified period of time, the arbitrators must notify both parties and give to each party the opportunity to make the required payment. The rule in this paragraph is motivated by the practical consideration that a party who has fulfilled his own obligation by paying one half of the required deposit may have a strong interest in seeing that the arbitration proceeds to a conclusion and may therefore be willing to make the payment required of the other party. If the required payment is still not forthcoming, the arbitrators may either suspend or discontinue the arbitral proceedings.

[5] A note concerning a schedule of fees for arbitrators is contained in document A/CN.9/114, reproduced in this volume, part two, III, 4, *infra*.

3. Working paper prepared by the Secretariat: revised draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade (UNCITRAL Arbitration Rules); alternative draft provisions for the draft UNCITRAL Arbitration Rules (A/CN.9/113)

INTRODUCTION

Terms of reference

1. At its eighth session (1-17 April 1975) the United Nations Commission on International Trade Law considered a "Preliminary draft set of arbitration rules for optional use in *ad hoc* arbitration relating to international trade" (A/CN.9/97; UNCITRAL Yearbook, Vol. VI: 1975, part two, III, 1). A summary of the Commission's deliberations at that session is set forth in the report of the Commission on the work of its eighth session (A/10017, annex I; UNCITRAL Yearbook, Vol. VI: 1975, part one, II, 1). At the conclusion of its deliberations, the Commission decided to request the Secretary-General:

(*a*) To prepare a revised draft of these rules, taking into account the observations made on the preliminary draft in the course of its eighth session;

(*b*) To submit the revised draft arbitration rules to the Commission at its ninth session.

2. In response to that request the Secretariat has prepared two documents: