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INTERNATIONAL COMMERCIAL ARBITRATION

Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration

Report of the Secretary-General

CONTENTS

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INTRODUCTION

1. The United Nations Commission on International Trade Law, at its fourteenth session, decided to entrust its Working Group on International Contract Practices with the task of preparing a draft model law on international commercial arbitration. 1/ The Working Group commenced its work, at its third session, by discussing a series of questions designed to establish the basic features of a draft model law. 2/ At its fourth session, 3/ it considered draft articles prepared by the Secretariat and reviewed, at its fifth and sixth sessions, redrafted and revised articles of a model law. 4/ The Working Group, at its seventh session, considered a composite draft text and, after a drafting group had established corresponding language versions in the six languages of the Commission, adopted the draft text of a model law as annexed to its report. 5/

2. The Commission, at its seventeenth session, requested the Secretary-General to transmit this draft text of a model law on international commercial arbitration to all Governments and interested international organizations for their comments and requested the Secretariat to prepare for the eighteenth session of the Commission an analytical compilation of the comments received. 6/ The present report is submitted pursuant to that request.

3. As at 31 January 1985, 7/ the Secretariat had received replies from the following States and international organizations:

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

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

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

4/ Reports of the Working Group on International Contract Practices on the work of its fifth session (A/CN.9/233) and of its sixth session (A/CN.9/245).

5/ Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN.9/246).

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

7/ Any comments received after that date will be presented, in summary form, in a separate document (A/CN.9/263/Add.1).

States: Argentina, Austria, Burkina Faso, 8/ Chile, 8/ Cyprus, Czechoslovakia, Finland, German Democratic Republic, Germany, Federal Republic of, India, Italy, Japan, Mexico, Norway, Poland, Qatar, Republic of Korea, Sweden, Union of Soviet Socialist Republics, 9/ United States of America and Venezuela;

International organizations: 10/ Commission of the European Communities (CEC), International Bar Association (IBA), 11/ International Law Association (ILA), 12/ Secretariat of the United Nations Conference on Trade and Development (UNCTAD) and United Nations Industrial Development Organization (UNIDO). 8/ (In the text below the acronyms are used).

4. The analytical compilation is structured in the following way. The first part contains general comments, the second part contains specific comments on individual articles and the third part contains comments on some additional points to be considered by the Commission. Any comments which concern the chapter as a whole or article as a whole are presented under the heading "Chapter as a whole" or "Article as a whole". Where a comment refers to a session of the Working Group on International Contract Practices (hereinafter referred to as the Working Group), the compilation indicates the symbol of the respective report. 13/

5. Comments which concern only the drafting or linguistic style of one of the language versions of the model law are not reflected in this report. Such comments will be presented to a drafting group which will be convened concurrently with the session of the Commission.

8/ Burkina Faso, Chile and UNIDO indicated that they had no specific comments to make.

9/ The Government of the Union of Soviet Socialist Republics transmitted comments by Soviet experts. For ease of reference, these will be hereinafter referred to as the comments by the Soviet Union.

10/ It may be noted that the International Council for Commercial Arbitration (ICCA) devoted its Interim Meeting (Lausanne, 9-12 May 1984) exclusively to the discussion of the draft text of the model law; the reports presented to the Interim Meeting and the report on the proceedings are contained in UNCITRAL's Project for a Model Law on International Commercial Arbitration, International Council for Commercial Arbitration, Congress series no. 2, General editor: Pieter Sanders (Deventer, Kluwer 1984).

11/ The International Bar Association, Section on Business Law, Committee D on Procedures for Settling Disputes, points out that its membership comes from many different countries, and it is not possible to formulate a consensus view of the Association on the model law, except that it is clear that the overwhelming majority of its members welcomes the aims of the project, and wishes it every success.

12/ ILA considered that in view of the participation of its representative in the Working Group sessions elaborating the text it was not necessary to submit any additional comments.

13/ The symbols of the reports of the relevant sessions of the Working Group are set forth in footnotes 2-5, above.

6. In many comments reference is made to the following two international Conventions which in this compilation are referred to as indicated;

Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 10 June 1958. (United Nations, Treaty Series, vol. 330, p. 38 No. 4739 (1959); UNCITRAL Register of Texts of Conventions and Other Instruments Concerning International Trade Law, vol. II, chap. I)	1958 New York Convention
European Convention on International Commercial Arbitration, Geneva, 21 April 1961. (United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963-1964); UNCITRAL Register of Texts of Conventions and Other Instruments Concerning International Trade Law, vol. II, chap. I)	1961 Geneva Convention

ANALYTICAL COMPILATION OF COMMENTS

A. General comments on the draft text

1. Appreciation for the work done by the Working Group is expressly stated by the Federal Republic of Germany, Italy, Poland, Venezuela and United States. All those respondents who make general observations on the value of the model law express support for it (Argentina, Finland, German Democratic Republic, Germany, Federal Republic of, Italy, Japan, Norway, Poland, Qatar, Republic of Korea, Sweden, Soviet Union, United States, Venezuela). The observations of these States and the reasons given for their general approval of the draft text may be summarized as follows:

Form of model law

(a) The model law is a notable achievement in the technique of unification of rules on international commercial arbitration (Argentina). It constitutes a sound basis for achieving improved harmonization of international arbitral procedures (Sweden).

(b) There is support for the idea of attaining unification through adoption of a model law (Finland, Japan, Norway, Poland, United States), since, as experience shows, a convention would probably not be easily accepted by a great number of States unless it provided for a possibility of important reservations, which would result in diminishing its value as a uniform instrument (Finland). The model law is considered to be an appropriate means to promote international commercial arbitration as instrument for the settling of disputes preferred in international economic relations (German Democratic Republic, suggesting, at the same time, that the model law be oriented more directly to the possibility of agreeing to submit cases to the existing permanent arbitral tribunals and to apply their rules of procedure).

(c) The model law reflects a realistic approach to the present divergencies among municipal laws and various conventions on arbitration in force (Poland).

(d) The goal of harmonization should be particularly aided by the model law, as lex specialis, which would prevail over any other municipal law on arbitration (United States).

Usefulness of model law

(a) The model law will be of use to many countries (Sweden); it will be of value not only in countries which would benefit from modernization, but also in countries which may be adopting arbitration laws for the first time (United States).

(b) The model law is an appropriate means to give assistance in the codification of international commercial arbitration particularly to those States which do not yet have relevant legal regulations (German Democratic Republic, Germany, Federal Republic of); the model law will doubtless be of use to a considerable number of industrialized countries whose legislation is antiquated in this area and has been made obsolete by the practices of modern international commercial arbitration (Federal Republic of Germany).

(c) The model law corresponds to the aspirations of the international community and will serve the purpose which had been a guide during the elaboration of the text, namely that the States, in particular developing ones, be able to incorporate it in their legal systems (Venezuela).

Acceptability of substance

(a) The model law seems to embody an acceptable regulation of international commercial arbitration (Norway). The present text is in principle acceptable (Republic of Korea). The model law, as regards its technique, systematics and content, is considered to be a valuable result of the deliberations of the Working Group (Italy).

(b) Considering that the model law is in accord with the 1958 New York Convention and the UNCITRAL Arbitration Rules, it is basically acceptable (Japan).

(c) The model law is based on the principle of adequate balance of interests of the parties in all aspects of arbitral procedure (Argentina).

(d) The model law is in accordance with modern trends in international commercial arbitration; the policy that most of the provisions be non-mandatory and the principle that court intervention should be avoided as far as possible deserve full support (Finland).

(e) While a degree of compromise is inevitable in a multi-national effort, the draft text adopted by the Working Group is considered to be generally reflective of modern arbitration practice and one which should serve to streamline and make more certain the arbitral resolution of international commercial disputes (United States).

Acceptability of underlying principles

(a) The leading underlying principles of the model law (i.e. party autonomy, equality, completeness, compatibility of the model law with the 1958 New York Convention, lex specialis rule) are a good foundation for international regulation (Poland).

(b) Among the advantages of the model law is the use of concepts and forms derived from international legislation which has already been adopted and generally accepted, such as the UNCITRAL Arbitration Rules and the United Nations Convention on Contracts for the International Sale of Goods (Qatar).

(c) All main essentials of the principles of international arbitral procedure propounded by the model law are acceptable; it is especially important that the model law provides great scope for party autonomy in arbitral proceedings and that it limits control by the courts to a level which appears appropriate for meeting the requirements of speed and security in the proceedings (Sweden).

(d) While certain key policy issues still remain to be resolved by the Commission, the model law is generally approved since it provides a comprehensive procedural framework for the arbitral resolution of disputes arising from a broad range of international commercial transactions. It provides for party autonomy in fashioning the arbitration process, reflects principles of fairness and equality of treatment of the parties, includes basic provisions for the functioning of arbitration proceedings where parties have not made necessary provisions, and is faithful to the precepts of the 1958 New York Convention and is in general harmony with the UNCITRAL Arbitration Rules. In international arbitration involving parties of differing nationalities or from different countries with differing legal systems it is particularly important that parties have freedom to agree to arbitral procedures that best suit their specific needs. The model law provides such freedom through consistent application of the principle of party autonomy in fashioning the arbitration process to be used in particular cases. The model law also strikes a proper balance in the relationship between arbitration and the courts. The role of the courts in general is one of assistance supportive of the arbitral process and not one of interference with it. Basic considerations of procedural due process, indispensable to any system of justice, are generally well protected by the model law. The right of each party to be informed of all claims, evidence and arguments presented against it and to receive an adequate opportunity to present its case are safeguarded (United States).

2. The Soviet Union expresses the view that the draft text of a model law on international commercial arbitration is a good basis for the forthcoming discussion on this matter at the eighteenth session of the Commission. Considering that the content of the draft text will in fact be discussed by the Commission for the first time, it would seem expedient first of all to discuss and determine at the session the principled approach to those problems which are important also for the formulation of specific rules, including problems pertaining to interference of a court with arbitration proceedings, territorial criteria of application of the text to be adopted, and its legal form (model law or convention).

B. Specific comments on individual articles

CHAPTER I. GENERAL PROVISIONS

Article 1. Scope of application

1. Territorial scope of application 14/

1. Finland and Norway support the prevailing view expressed in the Working Group that the place of arbitration should be the exclusive determining factor for the applicability of the model law. 15/ Finland considers that this approach best corresponds to the practice of most countries. Norway observes that this view is reflected in article 36(1)(a)(iv) where "the law of the country where the arbitration took place" is referred to. This scope, which should be expressed in a separate paragraph or article of the model law, would apply to the bulk of the provisions of the model law, in particular to those in chapters III to VII, while some of the provisions of the model law are intended to have a broader, in fact global, scope of application (e.g. articles 8, 9, 35 and 36, and by implication also articles 1, 2, 4 and 7). Norway emphasizes, however, that the issue of the territorial scope of application of the model law needs a further, careful examination which should take into account all the different aspects and related questions.

2. The German Democratic Republic notes that the model law does not give a conclusive answer as to the possibility of the choice of procedural law. It is thought that the model law, in conformity with the territorial principle, should not have an escape clause pursuant to which the parties may preclude the law on arbitration existing in the respective territory of the country in favour of the law of another State.

2. Model law as "lex specialis"

3. The United States suggests expressing in the text the principle of lex specialis. This would also help to make clear that there are special aspects of arbitration which are not regulated in the model law. Such aspects include, inter alia, definitions of arbitrability, the capacity of parties to conclude an arbitration agreement, concepts of sovereign immunity, consolidation of arbitration proceedings, the enforcement of interim measures of protection granted by arbitrators, and the manner in which arbitration awards are enforced. Suitable wording in article 1(1) to the effect that the model law is not a self-contained and self-sufficient system should also serve to clarify the parameters of article 5 dealing with the scope of court intervention.

14/ Other comments concerning the territorial scope of application of the model law or of particular provisions are reflected, in particular, in paragraphs 2-4 of the compilation of comments on article 34, and also in paragraphs 2, 5 and 6 of the compilation of comments on article 6, paragraph 11 of the compilation of comments on article 13, paragraphs 1 and 3 of the compilation of comments on article 27, and paragraphs 2-8 of the compilation of comments on chapter VIII of the model law (Recognition and enforcement of awards).

15/ A/CN.9/246, para. 167.

3. Model law yields to treaty law

4. The Soviet Union suggests making the wording of paragraph (1) more precise by using, instead of the language "subject to any multilateral or bilateral agreement which has effect in this State" (i.e. in the State that has adopted the model law), the following language: "subject to any international multilateral or bilateral treaty to which this State is a party".

5. In the view of CEC it would be desirable to provide a commentary on paragraph (1) of this article, in particular on the phrase "subject to any multilateral or bilateral agreement which has effect in this State". It appears very important that there be an indication that the adoption of the model law by a State that would be a party to the future Convention of Lomé would not modify the provisions on arbitration to be contained in that Convention.

4. Substantive scope of application: "international commercial arbitration"

6. Norway expresses its assumption that a State in adopting the model law is not prevented from extending its scope to cover, in addition to international commercial arbitration, national and non-commercial arbitration. On the basis of this assumption Norway accepts the limitation of the scope of application of the model law to international commercial arbitration.

7. Sweden questions the approach of the model law to confine itself to international commercial arbitration. It observes that States, like Sweden, already having well functioning arbitration legislation may hesitate to introduce additional legislation based on the model law. Noting the possible view that these States would be free to adopt legislation based on the model law applicable also to purely national and non-commercial arbitrations, Sweden points out a risk that such States may choose not to make the model law the basis for amendments of their internal legislation or may do so only partly. In such case the striving for harmonization would be negatively affected.

8. Argentina remarks that the wording "this Law applies to international commercial arbitration" should be understood as a criterion which is sufficiently flexible and adequate to the commercial nature of international arbitration.

9. The Soviet Union, noting that under paragraph (2) the model law may apply to arbitrations between parties having their places of business in the same State, observes that paragraph (2) might be interpreted as enabling the parties to submit their dispute to arbitration even if under the law of the State where the parties have their places of business the dispute is within the exclusive competence of a judicial, administrative or other authority. Such interpretation would mean, in effect, that the parties could circumvent the rules on arbitrability of disputes. Accordingly, it is proposed to provide in article 1 that the model law does not affect the legislation of that State which may declare certain categories of disputes to be within the exclusive competence of a judicial or other authority. It is remarked in this context that article II(1) of the 1958 New York Convention solves the question of arbitrability in a general way and that, although a similar consequence

could obtain indirectly on the basis of article 34(2)(b)(i) of the model law, it would be expedient to provide a clear answer to this question in the text of article 1.

10. The United States in a general comment points out that a proper definition of "commercial" and "international" is particularly important since the usefulness of the model law will depend on a wording that will ensure, without undue controversy, application of the law to business transactions which, while carried out in a particular country, involve the interests of international trade.

(a) "Arbitration"

11. Poland agrees with the approach that no definition of the term "arbitration" be provided in the model law, and expresses its understanding that this indicates that the model law covers ad hoc arbitrations as well as arbitrations administered by a permanent arbitral institution regardless of the degree of "institutionalization".

(b) "Commercial"

12. Mexico and UNCTAD suggest restricting the scope of the term "commercial". UNCTAD notes that the term "commercial" could be interpreted to mean that one could submit to arbitration matters which fall within the competence of governments and involve public law issues and hence should not be submitted to arbitration. It is observed that the statement in the text of the footnote that the term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature could lead a party to believe, for example, that there could be arbitration concerning practices which may be forbidden under the law of one of the parties. Mexico makes specific comments on how to restrict the scope of the model law. It proposes, firstly, to exclude cases of direct foreign investments, which in Mexico are dealt with by specific legislation. Secondly, it remarks that the financial transactions executed by the Mexican Government, whether directly or by way of a guarantee, are considered to form part of public debt and also should not be submitted to international arbitration. Thirdly, it is observed that in the sphere of the international flow of capital the Mexican law distinguishes transactions of a financial nature which are not subject to international arbitration from transactions of a commercial nature. In making these comments Mexico remarks that it made similar comments to the 13th session of the General Assembly of the Organisation of American States in November 1983 which discussed a draft Convention having contents similar to the model law and containing a provision identical to the one being commented on here.

13. While Japan does not object to the presentation of the rule of interpretation on "commercial" in the footnote to article 1 and to the suggestion contained in the rule that the term be given a wide interpretation, it is of the opinion that the term "commercial" would not be necessary when a State incorporates the model law in its domestic law. In such case it would suffice to provide a clarification to the effect that the law deals with disputes of a private nature.

14. The Federal Republic of Germany and the United States comment on the need to make clear in the model law that it applies irrespective of whether the parties are commercial persons. The Federal Republic of Germany, noting that such clarification was contained in a previous draft and deleted by the Working Group, 16/ proposes reinstating the clarification and suggests the following text with a somewhat shorter list of examples of commercial transactions than are contained in the present text:

> "An arbitration is commercial if the matter of arbitration is in the widest sense of a commercial nature, irrespective of whether the parties are 'commercial persons' (merchants) under any given national law, e.g. any transaction for the supply or exchange of goods, factoring, leasing, construction of works, financing, banking, insurance, carriage of goods or passengers ...etc."

The proposal of the United States is to add the words "regardless of the nature or character of the parties" at the end of the first sentence of the present text.

15. Some respondents propose additions to the rule of interpretation on "commercial" to make it wider or clearer. Czechoslovakia proposes to add "inspection contracts to verify the quality or quantity of goods". The German Democratic Republic proposes to add a reference to typical cases related to the law of the sea in addition to carriage of goods by sea and, with respect to the clarity of the definition, raises the question whether the present text indicates clearly enough that a commercial relationship may be of a contractual or non-contractual nature. The United States proposes the addition of the words "or services" after the word "goods" in the second sentence of the footnote.

16. Sweden states that the interpretation of the term "commercial" may raise problems and that this term, if it is to be retained at all, should be interpreted as broadly as possible.

17. The Federal Republic of Germany, Poland, Sweden and the United States observe that the rule of interpretation on "commercial" may not be understood in a certain and uniform way, particularly in view of the fact that it is contained in a footnote which is likely to be given different weight and effect in the various legal systems. For this reason, the Federal Republic of Germany, Sweden and the United States suggest the inclusion of the text of the footnote into the body of the text of the model law. In support of this suggestion the United States notes past difficulties stemming from the rather narrow meaning given to the term "commercial" in some countries and the resulting importance of providing guidance with regard to its interpretation.

(c) "International"

Width and certainty of the test of internationality

18. India, Norway, Poland, United States and IBA express the view that the objective should be to achieve more clarity and certainty in delimiting the

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16/ A/CN.9/245, para. 163.

notion of "international". The United States and IBA point out that it is important that the parties should know from the beginning whether an arbitration will be governed by the model law or by some other regulations if the State has such other regulations on domestic arbitration. The United States and IBA suggest reconsidering the proposal discussed at the fifth, sixth and seventh sessions of the Working Group according to which the present concept should be coupled with the agreement of the parties to define the arbitration as international. 17/ The United States draws attention to the many forms in which international commerce is conducted. One form, for example, is when a corporation which is doing business in another country opens an office in the foreign country. As a business matter, it is suggested, the transaction is international regardless of whether the office is in the form of a branch or an entity organized under local law. It is believed that in such a situation contracts made by an office formed as a corporation would come within the definition of sub-paragraph (c) because those contracts are related to more than one State. However, to remove any doubt or later argument concerning this point, the United States proposes the addition to sub-paragraph (c) of a new sentence which would provide that, if the parties to an arbitration agreement have written into their contract a statement that it involves interests in more than one State, they shall thereafter be precluded from denying that it does. Parties would not need to add such a statement to their contract to have the contract be within sub-paragraph (c), but if they did include such a statement a party could not later contend that the contract was not "international" within the meaning of the model law.

19. Japan states that the definition of the term "international" is acceptable.

20. Under the assumption that there may exist a national regulation, different from the model law, for national or non-commercial arbitration, Norway suggests that the model law ought not to preclude the parties from agreeing that the arbitration will be in accordance with such regulation even if their relationship is international and commercial. Furthermore, as the criteria for defining an arbitration as international and commercial are vague, the parties to the arbitration agreement may wish to make provision for the choice of law on arbitration in the arbitration agreement. Norway therefore suggests including a new provision in article 1 enabling the parties, subject to the territorial scope of application of the model law, to stipulate whether the model law or another law applies.

Parties' places of business in different States
(article 1, paragraph 2(a))

21. Sweden states that the interpretation of the term "international" may raise problems and that this term, if it is to be retained at all, should be interpreted as broadly as possible. Thus, a dispute should be considered international even when it has arisen in an operation conducted between the parties having their places of business in one State if one party is a subsidiary company of a foreign company, and that according to the present

17/ A/CN.9/233, para. 60; A/CN.9/245, para. 166; A/CN.9/246, para. 162.

wording of paragraph (2)(a) and (b) such dispute would not be considered international. It is proposed to delete paragraph (3) and modify paragraph (2)(a) so that, for an arbitration to be considered international, it would suffice that the parties have their principal places of business in different States.

Places, other than place of business, determining international character of arbitration (article 1, paragraph 2(b))

22. Czechoslovakia suggests deleting the text of paragraph (2)(b) in order to avoid submitting disputes between parties from one State to an international arbitration.

23. The Federal Republic of Germany, noting that the Working Group at its last session decided to include in paragraph (2)(b)(i) the words "or pursuant to", 18/ raises the question whether these words are directly related to the possibility envisaged under article 20(1) that the place of arbitration, failing agreement by the parties, is to be determined by the arbitral tribunal. If this is so, the arbitral tribunal would have the option of making international arbitration proceedings out of proceedings that would otherwise have no international connection, solely by determining the place of arbitration. In the view of the Federal Republic of Germany this is not intended to be the case; thus, the expression "or pursuant to" should probably be interpreted to mean that, even though the place of arbitration is not expressly defined in the arbitration agreement, the place of arbitration desired by the parties can still be derived from the contents of the agreement.

24. The Federal Republic of Germany observes that "a substantial part of the obligations of the commercial relationship" as referred to in paragraph 2(b)(ii) need not be connected with the subject-matter of the dispute or even be a subject of the arbitration agreement; the international character of an arbitration should depend solely on the test of the second part of paragraph 2(b)(ii), i.e. the connection between the subject-matter of the dispute and a place outside the State in which the parties have their places of business. Thus, it is proposed to delete the first part of the sentence in paragraph 2(b)(ii) given the fact that other provisions of article 1(2) seem to guarantee that virtually any dispute with any kind of international connection is covered by the model law.

Yet other international link (article 1, paragraph 2(c))

25. The United States is of the view that the provision of paragraph 2(c) is helpful in achieving a definition that is broad and comprehensive. It is noted that this provision speaks of "subject-matter ... related to more than one State" and that it might be argued that this means something related to the State itself, i.e. its government. The United States, suggesting that it should be made clear that the provision also relates to private interests in a State, recommends that it be amended to refer to "subject-matter ... related to commercial interests in more than one State".

18/ A/CN.9/246, para. 157.

6. Poland is of the opinion that the wording of paragraph (2)(c) is too general and might lead to divergent interpretations. Consequently, it is proposed to replace the provision by a more precise one.

Determination of place of business (article 1, paragraph (3))

27. Cyprus suggests deleting the word "relevant" in paragraph (3). It notes that paragraph (2)(a) defines an arbitration as "international" if the parties to an arbitration agreement have, at the time of the conclusion of that agreement, "their places of business" in different States; therefore, if a party has more than one place of business, the "place of business" - and not the relevant place of business - for the purposes of paragraph (2), is that which has the closest relationship to the arbitration agreement.

28. The Federal Republic of Germany suggests deleting the word "habitual" in the second sentence of paragraph (3). In relation to its suggestion (noted in paragraph 14, above) that the model law should apply both to businessmen and non-businessmen it further suggests that, in principle, the place of residence should have the same significance as the place of business. To be precise, it would be necessary to include a reference to the place of residence each time the place of business is referred to in paragraph (2). However, to avoid repetitive references there should be a general provision equalizing both terms; it is remarked that the present formulation of the second sentence of paragraph (3) expressing such equality between the place of business and the place of residence may not be appropriate since it could be understood as referring only to the case covered by the first sentence of paragraph (3), i.e. where a party has more than one place of business or place of residence. The following formulation of paragraph (3) is proposed:

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

29. As noted in paragraph 21, above, Sweden proposes the deletion of paragraph (3) in connection with its suggestion for the modification of paragraph (2)(a).

Article 2. Definitions and rules of interpretation

Article 2, sub-paragraph (a)

1. Czechoslovakia suggests that the text of this sub-paragraph should mention that the parties may refer the dispute to a permanent arbitration institution or to an ad hoc arbitral tribunal.

Article 2, sub-paragraph (b)

2. Cyprus expresses the view that the definition of "court" is wider than it should be since it extends to bodies or organs which are not courts or courts of justice. It suggests a definition according to which "court" means a body or organ which is a court according to the law of a country.

Article 2, sub-paragraph (c)

3. Cyprus states that the meaning of the word "institution" in sub-paragraph (c) is limited and that perhaps the intention of the draftsmen was to include any association of persons.

Article 2, sub-paragraph (e)

4. Czechoslovakia proposes to add the following text at the end of the first sentence of sub-paragraph (e): "in such a case the mailing by registered letter is sufficient".

5. The German Democratic Republic proposes to make clear that the last-known place of business, habitual residence or mailing address is the one last-known to the sender.

6. Norway observes that according to sub-paragraph (e) a written communication would in some cases be deemed to have been received if it has been delivered to the addressee's last-known place of business, habitual residence or mailing address even if the communication has never reached the addressee. While recognizing the need for such a provision, it is also observed that articles 11(3)(a), 11(4)(a) and 25 create the possibility of an arbitral award being rendered against a defendant who has not been aware of the proceedings. On the basis of these observations, it is suggested that the defendant be given a right of recourse or appeal which could be exercised in such cases, or that the defendant be allowed to challenge the award on the merits of the case as a defence to an action of recognition or enforcement. In the opinion of Norway, these questions need closer examination.

Proposed additions to article 2

7. Comments containing proposals for additional definitions to be placed in article 2 or elsewhere, are reflected in part C (Comments on additional points), paragraphs 1 to 7.

Article 4. Waiver of right to object

1. Cyprus states that, as this article is drafted, waiver of the right to object is restricted to non-compliance with a requirement under the arbitration agreement, although it is apparent that the intention was to extend it to failure to derogate from any provision of the law from which a party knows or ought to know that he may derogate.

2. India and Sweden are of the opinion that the waiver rule contained in this article should not be restricted to the non-compliance with non-mandatory provisions of the model law. By way of example, Sweden remarks that it does not appear appropriate to allow a party who has taken part in the arbitral proceedings without objecting to a deficiency in the form of the arbitration agreement to raise such objection later when the award is made against him.

3. Sweden, while agreeing with the view adopted by the Working Group that it is desirable to express the non-mandatory character in all provisions of the final text which are intended to be non-mandatory, 19/ suggests that it is hardly possible fully to determine in the model law such character in respect of each rule. In the view of Sweden there are rules of arbitral procedure from which the parties should not be able to derogate before the commencement or before a certain stage of the arbitral proceedings, or should be able to do so only under special conditions, whereas at a later stage the derogation should be possible. As a consequence, Sweden proposes that, to some extent, the question whether a provision of the model law is mandatory or non-mandatory should be left to the decision of the arbitral tribunal or a court.

4. Poland supports the restriction of the waiver rule to the non-compliance with non-mandatory rules; however, for reasons of easier application of this rule, it is considered useful to provide a clearer distinction between mandatory and non-mandatory provisions of the model law.

5. Finland is of the view that it should be made clear that the rule has effect not only during the arbitration proceedings but also in the post-award stage, i.e. in the setting aside and recognition or enforcement proceedings. Similarly, Japan expresses the view that the effect of a waiver of the right to object (under article 4) should extend to subsequent judicial proceedings.

6. UNCTAD is of the view that the expression "without delay" may give rise to ambiguity or different interpretations as to the time limit for stating an objection.

Article 5. Scope of court intervention

1. Norway is strongly in favour of the principle that the model law itself positively and exhaustively mentions the instances in which the courts may intervene. Furthermore, it is important to limit the possibility of intervention by the courts to a minimum.

2. The Republic of Korea points out that the wording of this article is too narrow in that it does not cover those matters of international commercial arbitration which are not governed by the model law. It is proposed to broaden the scope of the article by redrafting it as follows:

> "Article 5. Co-operation of the Court
>
> (1) The Court shall extend co-operation for arbitral proceedings in accordance with the provisions of this Law.
>
> (2) When the arbitral tribunal is incapable to perform an act which it deems essential to the arbitration, the Court may extend co-operation at the request of the tribunal, in accordance with the provisions of the Civil Procedure Code, mutatis mutandis."

19/ A/CN.9/246, paras. 176-177.

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

Comments relating to the jurisdiction of the Court

1. Italy raises the question of how to determine, at least for the cases dealt with in articles 11(3), 11(4) and 13(3), the country whose courts are competent, where the parties have not agreed on a place of arbitration. It proposes to consider a solution like the one contained in article 810(2) of the Italian Code of Civil Procedure which provides for the competence of the court of the place where the arbitration agreement or the contract containing the arbitration clause has been concluded.

2. Poland supports the idea of specifying in article 6 the competence of a State court for certain functions of arbitration assistance and supervision. It is pointed out, however, that article 6 does not settle the competence of State courts in matters not governed by the model law; Poland lists as example of such matters: arbitrability, capacity of parties to conclude an arbitration agreement, jurisdictional immunity of foreign States, competence of an arbitral tribunal to adapt contracts to changed circumstances, fixing of fees for arbitrators or deposits for costs. It is thought that by limiting the scope of article 6 only to matters governed by the model law, the advantage of this article is substantially diminished.

3. Qatar considers that article 6 may be construed as conferring an original jurisdiction of first instance to the Court specified in this article and that it could induce parties to select the law of a State they consider advantageous to them by agreeing on the Court of that State even if that State has no connection with the subject-matter of the arbitration. To avoid this undesirable "forum shopping", Qatar proposes the following formulation of the introductory words:

> "In the event that the international legal jurisdiction of the courts of this State is established, the court with jurisdiction to perform the functions referred to ...".

4. Sweden considers that a clarification may be useful as to whether the intention of article 6 is that a single court in each State shall be competent or whether a State can decide, for example, that the competent court shall be the court of the place where either party is domiciled. Another question in need of clarification is whether there is a recourse against the court decision on an application for setting aside an award under article 34.

5. It is proposed to clarify, in respect of all court functions mentioned in article 6 (German Democratic Republic) or in respect of the functions under articles 11, 13 and 14 (Soviet Union), whether the place of arbitration determines the jurisdiction of the Court specified in article 6, or whether it is, for example, the court in the country of the claimant or the country of the respondent. The Soviet Union notes that, in contrast to articles 27(1) and 34(1), no specific territorial or other criterion is provided for the jurisdiction of the organ designated in article 6, apart from the very general provision of article 1 on the scope of application of the model law; as a result, it is thought probable that a situation will arise where the parties would address, for example for the purpose of appointing an arbitrator, the courts in different States both of which have adopted the model law, and where

each of the courts would consider itself competent to make the appointment. Since such possibility of concurrent jurisdiction would create difficulties in the functioning of international commercial arbitration, it is proposed by the Soviet Union that in providing specific criteria for the competence of the body designated to perform the functions under articles 11, 13 and 14, regard should be had, for example, to the case where the parties agree that the arbitration be conducted under the model law or the case where the arbitration is to be conducted in the territory of the State which has adopted the model law and the parties have not agreed to submit the arbitration to the law of another State.

6. Czechoslovakia proposes that article 20 should provide that the place of arbitration is decisive for the determination of the court having the jurisdiction to perform the functions of arbitration assistance and supervision and to set aside the award.

Comments relating to the designation of organs entrusted with functions of assistance and supervision

7. Mexico observes that the Court specified in article 6 is one of the courts defined in article 2(b), and that the model law (for example in article 9) makes reference to other courts which may be different from the Court specified in article 6. It is suggested that this difference be made clear in article 6.

8. Japan suggests that the determination of the Court which is to perform the functions of arbitration assistance and supervision should be within the discretion of each State. A national law may provide, for instance, that the Court which performs such functions shall be the Court of the place of arbitration. Furthermore, the various functions enumerated in article 6 do not necessarily have to be performed by the same Court.

9. The Soviet Union raises the question whether it is obligatory to assign in all cases the functions of arbitration assistance and supervision to judicial organs to the exclusion of organs which are not part of the judicial system of the country. It is observed that not in all countries are such functions reserved only to judicial organs and that, from the practical point of view, it seems that a court is not necessarily the most appropriate organ to appoint most efficiently an arbitrator, as compared, for example, with a chamber of commerce that is in a better position in this respect since the matter relates to an international business relation. Although in the case of the challenge of an arbitrator or the termination of the arbitrator's mandate somewhat different considerations may apply, it is suggested that it would not be possible to consider the judicial procedure to be the most appropriate one for these purposes, taking into account particularly that arbitration proceedings are based on the will of the parties. Where a State by law assigns the functions dealt with in articles 11, 13 and 14 to an institution other than the State court, the State would guarantee proper performance of these functions. Accordingly, it is proposed to give the States adopting the model law a broader choice in assigning the functions mentioned in article 6, by referring to "the Court or another competent organ" rather than the Court only.

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

Article as a whole

1. As to the cases where the parties make use of a permanent arbitral institution which administers arbitrations in accordance with its procedural rules, the Federal Republic of Germany suggests making clear that these procedural rules take precedence over the pertinent provisions of the model law unless a rule is in conflict with an imperative provision of the model law in which case this imperative provision would prevail.

2. Norway, raising the question of whether an arbitration agreement is binding upon the estate in case of bankruptcy or a similar status arising from insolvency, presumes that it has not been the intention of the model law to deal with this question and that the answer will depend upon the legal system of the place where the bankruptcy or similar proceedings take place.

3. Poland, approving of the provisions of article 7, notes that the model law does not deal with the cases where a contract is concluded by an exchange of printed forms containing different arbitration clauses (the so called "battle of forms"). To avoid uncertainty in these cases, Poland suggests including in the model law a provision giving effect to the arbitration clauses proposed by the parties in so far as the clauses coincide. Normally it would follow from both clauses that any dispute should be settled by an arbitral tribunal to the exclusion of State courts. In such cases, it is suggested, the questions not agreed upon by the parties should be governed by the model law.

Article 7, paragraph (2)

4. The United States supports the provisions of article 7, particularly the definition that "an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement", believing that this definition has the necessary flexibility to take into account the wide variety of ways business in different trades is conducted and the modern means of communication utilized - now and in the future. The United States interprets the phrase "other means of telecommunication" to include all forms of electronic and computer techniques that provide a written record. While it is noted that the wording of the draft text is not identical to the definition in the 1958 New York Convention, it is believed that it is consistent with and expresses the purpose of the Convention.

5. Norway, while observing that paragraph (2) of this article suggests that an arbitration clause in a contract contained in a document signed by only one of the parties will not be recognized as binding, notes that arbitration clauses are frequently found in bills of lading which are usually not signed by the shipper. Nevertheless, such clauses are generally considered binding on the shipper and subsequent holders of the bill of lading, although the situation is somewhat more complicated if the bill of lading refers in general to conditions set out in a charter-party (e.g. article 22(2) of the United

Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules) 20/). It is suggested that some, but not all, such cases where the signature of one of the parties should suffice will be taken care of by the general provision of article 1(1) of the model law providing that the model law applies subject to any multilateral or bilateral agreement. Nevertheless, Norway proposes to add the following sentence at the end of paragraph (2):

> "If a bill of lading or another document, signed by only one of the parties, gives sufficient evidence of a contract, an arbitration clause in the document, or a reference in the document to another document containing an arbitration clause, shall be considered to be an agreement in writing."

6. Argentina is of the view that the last sentence of paragraph (2) according to which a reference to a document containing an arbitration clause should be such as to make that clause part of the contract, should contain a requirement, or at least be interpreted as containing a requirement, that the party against whom the arbitration clause is invoked has or ought to have been aware of the incorporation of the clause in the contract. The objective of this requirement or interpretation would be to protect the party from the application of an arbitration clause which is not usual in a particular trade if that party could not be expected to know the content of the document being referred to.

7. UNCTAD expresses concern that paragraph (2) of this article, by making possible the incorporation of an arbitration clause in a contract by reference to a document containing the clause, could give rise to difficulties in practice.

8. Austria considers that, in paragraph (2), there could be a provision according to which an arbitration clause providing for the dispute to be settled by a court of arbitration of a commodity exchange is also valid if the contract (letter) containing the arbitration clause has not been rejected.

9. The Republic of Korea proposes to redraft the second sentence of paragraph (2) as follows:

> "The reference in a contract to a document containing an arbitration clause as a part of the contract constitutes an arbitration agreement provided that the contract is in writing."

Article 8. Arbitration agreement and substantive claim before court

1. Argentina approves of the principle embodied in article 8(2) that the court should not intervene in the procedure or substance of the arbitration.

2. Cyprus expresses the view that the issue before the court, as dealt with in paragraph (1), is not "the issue of its jurisdiction", and paragraph (2) ought to be re-phrased accordingly.

20/ United Nations document A/CONF.89/13, annex I.

3. Czechoslovakia suggests adding at the end of paragraph (2) a sentence stating that the arbitral tribunal may make a decision regarding the substance of a dispute only after the decision of the court dealing with the issue of its jurisdiction is final.

4. Italy observes that this article presumes appearance of the defendant before the court and that there is no provision for the case where the defendant has not reacted to the claim before the court. In order to avoid compelling a party to incur expenses necessary for his appearance (where he has to appear in a foreign country) even in the presence of simple dilatory tactics of the claimant, it appears appropriate that, in case of non-appearance, the court may declare on its own motion that it is not competent.

5. Sweden observes that under its law a court in a matter which is the subject of an arbitration agreement does not refer the parties to arbitration, but merely dismisses the case. It is considered desirable to supplement article 8(1) so as to take that possibility into account as well.

6. The Soviet Union notes the following inconsistency between articles 8 and 16(3) of the draft text. On the one hand, the court mentioned in article 8(1) has the power to determine the validity of the arbitration agreement even if the action before that court is brought after the arbitral proceedings have commenced and even if the arbitral tribunal has meanwhile ruled on its jurisdiction since article 8(2) allows the arbitral tribunal to continue the arbitral proceedings which have already commenced "while the issue of its jurisdiction is pending with the court". On the other hand, according to article 16(3), a ruling by the arbitral tribunal that it has jurisdiction may be contested by any party only in an action for setting aside. The inconsistency arises where the arbitral tribunal has ruled on its jurisdiction but has not yet made the award, and a party has nevertheless brought an action before a court; in such a case the problem is whether preference should be given to article 8, empowering the court to decide on the arbitral tribunal's jurisdiction, or to article 16(3) according to which the arbitral tribunal's ruling on its jurisdiction could only be contested in an action for setting aside the award. Moreover, where a party, in spite of the existence of an arbitration agreement, has brought an action to a court before, and not after, the commencement of arbitral proceedings, it may be possible to interpret, a contrario, that the party is prevented from addressing the arbitral tribunal while the issue of the validity of the arbitration agreement is pending with the court since article 8(2) refers only to the continuation of the arbitral proceedings which "have already commenced" before bringing the action to the court. In view of these comments and in view of a need to ensure effectiveness of international commercial arbitration, the Soviet Union proposes to replace present paragraph (2) of this article by two new rules. One should provide that bringing an action by a party to a court does not prevent the other party from commencing arbitral proceedings while the issue of the arbitral tribunal's jurisdiction is pending with the court. The other rule should provide that if the arbitral proceedings have already commenced, the court must postpone the settlement of the question of the arbitral tribunal's jurisdiction until the arbitral award is made (reference is made to article VI(3) of the 1961 Geneva Convention). The Soviet Union is of the view that by adopting the above two provisions the last sentence of article 16(3) might be deleted as unnecessary.

7. The Republic of Korea suggests placing the text of article 8, since it actually deals with commencement or continuation of arbitral proceedings, and of article 9 after article 21, i.e. as articles 21 bis and 21 ter.

Article 9. Arbitration agreement and interim measures by court

1. The United States supports the policy of this article and the view expressed by the Working Group, namely that the range of measures covered by article 9 was a wide one and included, in particular, pre-award attachments. 21/ The United States believes that the wide range of interim measures permitted under this article include not only conservation of goods but also, under appropriate circumstances, the protection of trade secrets and proprietary information as being an appropriate subject-matter of interim relief available from a court. This is especially desirable in view of the increasingly complex nature of international commercial transactions giving rise to arbitrable disputes, which presently range from simple trade contracts to the most complicated long-term agreements. It also permits measures to conserve documents or other evidence which may assist the arbitral tribunal in reaching a just decision.

2. The Federal Republic of Germany notes that in the Working Group its delegation advocated mentioning the preservation of evidence as a primary example of an interim measure of protection provided by a State court. Given the fact that the majority in the Working Group did not consider this necessary, it is requested that a pertinent reference be included in the official report.

3. Cyprus favours, in respect of this article and of article 18, the use of the words "interim orders or injunctions" instead of "interim measures of protection".

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Chapter as a whole

1. Poland supports the fundamental principle of party autonomy underlying this chapter.

2. The German Democratic Republic is of the view that the periods of time provided in articles 11 and 13 are too short and should be extended.

3. The Federal Republic of Germany proposes to consider the appropriateness of inserting in chapter III a provision on the choice of an individual arbitrator or, in the case of more than one arbitrator, on the composition of the arbitral tribunal, with a view to guaranteeing an impartial decision.

21/ A/CN.9/246, para. 26.

Article 10. Number of arbitrators

India suggests that, failing agreement by the parties, arbitration should be conducted by a sole arbitrator for the sake of economy and expediency.

Article 11. Appointment of arbitrators

Article as a whole

1. Finland suggests adding to the provisions on the appointment of arbitrators the following provision:

> "If a party fails in his duty to appoint an arbitrator, and the other party prefers to bring the dispute before a court of law rather than insist on arbitration, then the arbitration agreement shall be no bar to the jurisdiction of the court over the dispute".

Finland proposes to further consider whether any other breach of the agreement by a party, for example a failure to pay his share of the advance to the arbitrators, should have the same effect.

Article 11, paragraph (3)

2. Japan, noting that the parties are free to determine the number of arbitrators (article 10(1)) and that paragraph (3) of this article provides only for the cases where three arbitrators or a sole arbitrator are to be appointed, proposes to deal in a more general way with the appointment of arbitrators when the parties fail to appoint them.

3. Qatar notes that in the model law there is no reference to the presidency of the arbitral tribunal if it is composed of three arbitrators and that, although article 29 provides that a presiding arbitrator may be authorized to decide questions of procedure, this provision is not preceded by any definition of the president of the arbitral tribunal or any identification of the arbitrator entrusted with this responsibility. Qatar proposes to provide in article 11(3) of the model law, in the light of article 7(1) of the UNCITRAL Arbitration Rules, that the arbitral tribunal is to be presided over by the third arbitrator chosen by the other two arbitrators each of whom is appointed by a party to the dispute.

4. The Soviet Union suggests, for reasons of certainty, replacing in paragraph (3)(a) of this article the words "within thirty days after having been requested to do so by the other party" by the words "within thirty days of receipt of such request from the other party".

Article 11, paragraph (5)

5. Regarding paragraph (5) providing that the decision of the Court shall be final, Norway has no objection to it as far as it concerns the purely discretionary aspect of the decision. However, the model law ought not to preclude a party from challenging the decision on the lower court's procedural handling of the case or the lower court's interpretation and application of the law; since a different solution would be unacceptable, at least to Norwegian law, the question is raised whether the word "final" is meant to preclude even such kind of challenge.

Article 12. Grounds for challenge

1. India is of the view that the grounds for challenge as expressed in this article are too vague to allow easy and uniform interpretation and application.

2. UNCTAD suggests that the last sentence of paragraph (1), providing for the continuous duty of disclosure of certain circumstances, may be inconsistent with the first sentence of paragraph (1) which rightly states that the arbitrator shall disclose any such circumstances on being approached. The duty of disclosure should not continue throughout the proceedings. UNCTAD further suggests that in paragraph (2) it seems appropriate to provide that an arbitrator may be challenged only "if there are reasons to believe that circumstances exist ..." since such circumstances need to be proved.

3. The United States agrees with the grounds for challenge set forth in article 12. Paragraph (2) properly establishes the fundamental grounds that an arbitrator may be challenged "if circumstances exist that give rise to justifiable doubts as to his impartiality or independence". In addition, parties may in their contracts agree that arbitrators must have certain professional or trade qualifications and that they are subject to challenge if they do not possess those qualifications. In order to ensure that the model law respect this aspect of party autonomy, the United States suggests adding the words "or on such additional grounds as the parties may agree" to the first sentence of article 12(2).

Article 13. Challenge procedure

Article 13, paragraph (1)

1. As to the proposal of the United States concerning the words in paragraph (1) "subject to the provisions of paragraph (3) of this article", see paragraph 8, below.

Article 13, paragraph (2)

2. While the Federal Republic of Germany expresses the view that the challenged arbitrator should not be involved in deciding on the challenge, Japan is of the view that it is desirable to state in paragraph (2) that the arbitral tribunal, which has the power to decide on the challenge, includes the challenged arbitrator. UNCTAD notes that this rule could only apply if there were three or more arbitrators.

3. The German Democratic Republic proposes to add to paragraph (2) of this article the following provision on the challenge of a sole arbitrator: "If a sole arbitrator is challenged, he may withdraw from his office. Otherwise his mandate will terminate on account of the challenge."

4. Norway is of the view that if a party does not raise an objection in the period of time provided for in paragraph (2), he should be precluded from raising it not only during the arbitral proceedings but also under articles 34(2)(a)(iv) and 36(1)(a)(iv) and that this should be clearly expressed either in article 13 or in articles 34 and 36.

5. Sweden observes that under this article the challenged arbitrator appears to have full freedom to withdraw and that as a result of such withdrawal, perhaps at an advanced stage of the proceedings, the party who appointed the arbitrator may be adversely affected by additional costs and delay. One approach to the problem may be to let the arbitral tribunal decide whether a question of challenge shall be decided immediately or whether the decision on the challenge should be left to the court before which the party may contest the award.

6. Norway expresses the opinion that the period of time of 15 days provided in paragraph (2) (and also in paragraph (3)) is too short to give the parties adequate opportunity to challenge an arbitrator. The reason is that, in international arbitration, a communication is often delivered to the addressee's solicitor at the place of arbitration and this solicitor communicates with the addressee's solicitor at the addressee's place of business who communicates with the addressee. A reply from the addressee will usually be transmitted in the same way, and at each link some time is needed for processing the communication. Taking into account the usual duration of an arbitration and the provision according to which a challenge does not prevent the arbitral tribunal from continuing the proceedings, Norway considers that it is not necessary to fix such a short period of time.

Article 13, paragraph (3)

7. The Federal Republic of Germany expresses the view that in cases, where under article 6 the parties have recourse to the State Court, such recourse is only justified if the parties have not agreed on another procedure which would lead to a conclusive and binding decision, with the exception of the recourse under article 34. Observing that under paragraphs (3) and (4) of article 11 on the appointment of arbitrators, recourse to the Court may be had only where the parties have not agreed on another procedure that would lead to a conclusive and binding decision, the Federal Republic of Germany suggests that the same reservation be made with respect to the court intervention under article 13(3). The same suggestion is made in respect of article 14 (see paragraph 2 of the compilation of comments on article 14).

8. Although paragraph (3) of article 13 contains certain safeguards against the dilatory tactics of a recalcitrant party, the United States is concerned that an interlocutory court challenge during the arbitration proceedings may serve to disrupt and unnecessarily add to the costs of the arbitral process. At the same time it shares the view of arbitration practitioners that the parties should have some ability to challenge an arbitrator and obtain a determination prior to the rendering of an award. It is believed that the best solution is for the parties to agree on a procedure for challenging an arbitrator and that a court challenge during the proceedings should be allowed only if the parties have not agreed on a procedure for challenges. The United States suggests replacing in paragraph (1) the words "subject to the provisions of paragraph (3) of this article" by the words "and the decision reached pursuant to that procedure shall be final".

9. In view of the need to secure an impartial and independent arbitral tribunal and in view of the faculty to continue the arbitral proceedings pending the court decision on the challenge, Norway considers that an appeal against the court decision should not be precluded, at least not in the case

where the Court did not agree with the challenge. As to the finality of the decision by the Court, Norway makes the same comment as that on article 11(5) (see paragraph 5 of the compilation of comments on article 11).

10. The Soviet Union expresses the view that article 13(3) admits an exceptionally wide judicial control over arbitral proceedings and that such control seems to be unjustified and is likely to cause considerable delay. The risk of delay is not diminished by the fact that the arbitral tribunal, including the challenged arbitrator, has the possibility to continue the proceedings since this is only a possibility, whereas in practice the arbitral tribunal will most likely refrain from continuing the proceedings until a decision is made by the Court. The Soviet Union proposes to discuss the expediency of deleting paragraph (3) or, at least, limiting it considerably in its scope so that it would apply, for example, to the rare cases where the sole arbitrator or a majority of the arbitrators are challenged, in which case the decision by the arbitral tribunal on the challenge, as provided in paragraph (2), might raise doubts. In other situations the judicial control concerning the impartiality and independence of arbitrators could, without prejudice to the rights of the parties, appropriately be performed after the termination of the arbitral proceedings.

11. The German Democratic Republic proposes to specify the Court which has jurisdiction under article 13(3) by adding the words "in the country where the arbitration takes place" between the words "the Court" and the words "specified in article 6". The same proposal is made in the context of article 14.

Article 14. Failure or impossibility to act

1. Austria proposes to insert the words "Unless otherwise agreed by the parties" in article 14 to show that the parties are free to agree on the application of a set of arbitration rules which provide a different solution to the situation envisaged in this article.

2. For reasons expressed in paragraph 7 of the compilation of comments on article 13, the Federal Republic of Germany suggests including a reservation in article 14 to the effect that a party would have recourse to the Court only where the parties have not agreed on another procedure that would lead to a conclusive and binding decision.

3. Italy proposes to insert after the words "fails to act" the words "with appropriate speed and efficiency".

4. As to the proposal by the German Democratic Republic to specify the Court which has jurisdiction under article 14, see paragraph 11 of the compilation of comments on article 13.

5. As to the finality of the decision by the Court, Norway makes the same comment as that on article 11(5) (see paragraph 5 of the compilation of comments on article 11).

6. In order to express more clearly the instances of impossibility to act, the Republic of Korea proposes to replace the words "if he withdraws" in the first sentence by the words "if he dies or withdraws".

Article 14 bis

No comments are made on this article.

Article 15. Appointment of substitute arbitrator

1. Cyprus interprets the words "according to the rules that were applicable" as referring to the procedure laid down in paragraphs (2) and (3) of article 11 and notes that this would be unsatisfactory because these rules provide for the initial appointment of all the arbitrators and not for the appointment of a substitute arbitrator. Its view is that the substitute arbitrator must be appointed by the same procedure by which the arbitrator to be replaced was appointed and that, perhaps, this was the intention of the draftsmen. Cyprus notes that one of the parties may not wish to perform an agreement, reached under article 11(2) for the initial appointment, when it comes to the appointment of a substitute arbitrator. It suggests that express provision ought to be made for such cases.

2. Norway observes that the intention of the Working Group was to cover in article 15 all cases in which the need for the appointment of a substitute arbitrator may arise, 22/ and that this intention allows the wording of

this article to be simplified by deleting the words "under article 13 or 14 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate".

3. Sweden, pointing out its understanding that according to article 14 an arbitrator may withdraw of his own accord without special cause, notes that according to article 15 a substitute arbitrator shall be appointed in the same way as was the arbitrator being replaced. It is observed that, as a consequence, a party may, in consultation with the arbitrator appointed by that party, replace him by another arbitrator; this may enable a party to prolong the proceedings and to substitute the arbitrator by one whose views are expected to be more favourable to the party. Sweden therefore suggests that a substitute arbitrator be appointed by an impartial body such as a court; one could also envisage a clause in article 14 which would provide that an arbitrator who withdraws without cause shall be liable to pay the additional costs incurred.

22/ A/CN.9/246, para. 48.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 16. Competence to rule on own jurisdiction

Article 16, paragraph (1)

1. Cyprus, noting that under its law an arbitration clause which forms part of a contract which is void is itself void, supports the provision in article 16 that a decision by the arbitral tribunal that the contract is null and void shall not entail ipso iure the invalidity of the arbitration clause. However, it is suggested that provision ought to be made for the matter to be decided by the court.

2. India suggests adding at the end of the first sentence of paragraph (1) of this article the words ", or the identity of any party to the arbitration agreement". This amendment is suggested to cover the problem of accountability of shipowners in the context of open-registry shipping.

Article 16, paragraph (2)

3. The Soviet Union is of the view that the intention of the arbitral tribunal to exceed the scope of its authority would normally only be clear once there is an award covering that matter and that the point of time for raising a plea that the arbitral tribunal is exceeding the scope of its authority should be defined with more precision. The provision would be more precise if the plea had to be raised by a party promptly as soon as the matter which is beyond the scope of the arbitral tribunal's authority is raised during the arbitral proceedings (as provided, for example, in article V(1) of the 1961 Geneva Convention).

4. In the view of Sweden, the meaning of the provision on the point of time for raising a plea that arbitrators are exceeding their authority is not entirely clear. The question of the arbitral tribunal's authority may have been discussed during the arbitral proceedings and at that time the arbitral tribunal may have indicated its intention to rule on the controversial issue. However, the arbitral tribunal can hardly be considered bound by such indication. Normally, it is only when the award is made that a party knows with certainty that the scope of the arbitral tribunal's authority has been exceeded. Therefore, the party should be able to raise the plea during the period of time for the application for setting aside the award.

5. Norway expresses the view that a party who fails to raise the plea regarding jurisdiction as required under article 16(2) should not be allowed to raise this plea in proceedings for setting aside or enforcement. Observing that this view was also expressed in the Working Group, 23/ Norway suggests that this should be explicitly provided either in article 16 or in articles 34 and 36.

6. Cyprus proposes the following modification of the first sentence of paragraph (2): " A plea that the tribunal does not have jurisdiction shall be raised not later than the statement of defence; such plea may be raised in the statement of defence."

23/ A/CN.9/246, para. 51.

Article 16, paragraph (3)

7. Austria, India, Norway, Poland and IBA object to the rule contained in the last sentence of paragraph (3) and express the view that a ruling by the arbitral tribunal that it has jurisdiction should be open to immediate court review.

(a) Austria notes that under the present text the parties are, in fact, forced to continue the proceedings, which sometimes causes considerable cost and loss of time before the parties are able to apply for setting aside the award on the ground of lack of jurisdiction of the arbitral tribunal. Therefore, Austria expresses the view that the arbitral tribunal should have the possibility to rule on its jurisdiction as a preliminary question in the form of an award. Such a ruling by the arbitral tribunal could then immediately be contested by any party in an action for setting aside under article 34. Austria observes that under article 13(3) the party who has not been successful in challenging an arbitrator may immediately request the Court to decide on the challenge and that a similar approach would be more appropriate in the more important case of contested jurisdiction of the arbitral tribunal.

(b) Norway, although agreeing with the prevailing view in the Working Group that there ought not to be a free hand for concurrent court control, 24/ suggests that in some cases there may be a genuine need for a court decision on the jurisdiction of the arbitral tribunal at an early stage and that the model law should allow for some flexibility. Norway proposes to replace paragraph (3) of article 16 by the following provisions:

> "(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the tribunal rules on the plea as a preliminary question, the tribunal may state its ruling in a preliminary award.
>
> (4) Unless otherwise agreed by the parties, a party may apply to a court for setting aside a preliminary award referred to in paragraph (3) of this article. Such an application shall be made within the time limit referred to in paragraph (3) of article 34.
>
> (5) Unless otherwise agreed by the parties, the arbitral tribunal decides whether the arbitral proceedings shall continue while the issue of its jurisdiction is pending with the court.
>
> (6) A ruling by the arbitral tribunal that it has jurisdiction may be contested only in an action referred to in paragraph (4) of this article, in an action for setting aside an award on the merits or as a defence against an action for recognition or enforcement of the award."

(c) Poland is of the view that article 16(3) is in contradiction with the leading rule of commercial arbitration directed to fast and non-expensive proceedings. It suggests that a plea that the arbitral tribunal does not

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24/ A/CN.9/246, para. 55.

have jurisdiction should be decided by the State court as soon as possible. For example, one could envisage an obligatory preliminary award of the arbitral tribunal which would be subject to instant contest before the State court.

(d) IBA accepts that the primary authority for the determination of jurisdiction issues, including questions of arbitrability, the validity of the arbitration agreement and so forth, should be the arbitral tribunal itself. However, since the arbitral tribunal's decisions on these matters are ultimately subject to court control, it seems sensible that the intervention of the courts on such issues should be permitted at an early stage, rather than only at the end of the arbitration. This would avoid unnecessary delay and costs. Accordingly, it is suggested that article 16(3) should be reconsidered, and that article 17, as it was discussed and deleted by the Working Group, 25/ might be reviewed with a view to reinstating it. It is observed that many practising lawyers feel that concurrent court control should also be available in a more general sense, in addition to the question of recourse of matters of the jurisdiction of the Court, in order to prevent arbitral tribunals from exceeding their authority, or failing to comply with the requirements of due process. Under the present text of article 16(3) (as explained in the report of the seventh session of the Working Group 26/), it seems that there can be no recourse against any interim award or decision of the Court. The policy of limiting court control to the minimum is, of course, well understood (and, it is said, probably accepted by the majority of IBA members) but it is suggested that a policy should not be applied so rigidly as to lead to extreme situations which may result in unnecessary disruption, delay and costs to the parties.

8. Norway and IBA suggest that it should be mentioned in article 16(3) that a ruling by an arbitral tribunal that it has jurisdiction could also be contested by way of defence against recognition or enforcement of the award. It is pointed out by IBA that under article 16(3) it appears that questions of jurisdiction may only be raised in an action for setting aside, and not by way of defence to an action for recognition or enforcement of the award. This could lead to an absurd result if the losing party is unable to take an action for setting aside simply because the winner stepped in first with an action for enforcement.

25/ A/CN.9/246, paras. 53-56. The text of article 17, as considered by the Working Group, was as follows:

"Article 17. Concurrent court control

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

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

26/ A/CN.9/246, para. 56.

9. Mexico suggests that it should be made clearer that the provisions of paragraph (3) apply not only to the plea that the arbitral tribunal does not have jurisdiction but also to the plea that the arbitral tribunal is exceeding the scope of its authority.

10. The Soviet Union, in the context of its proposal made in respect of article 8(2) (see paragraph 6 of the compilation of comments on article 8), is of the view that the last sentence of article 16(3) might be deleted as unnecessary.

Article 18. Power of arbitral tribunal to order interim measures

1. Austria proposes to delete this provision. Most of the national legislations relating to perishable goods contain regulations permitting an urgent sale of the goods, and there is no need for rules besides the existing ones. An interim measure ordered by the arbitral tribunal (e.g. to stop the construction of a building) could put the arbitrators in a difficult position and expose them to a claim for damages if the measure proves to be unjustified. Therefore, the power to order interim measures of protection should only lie with the ordinary courts.

2. India is of the view that an arbitral tribunal may be empowered to enforce interim measures of protection.

3. Mexico suggests providing that the security which the arbitral tribunal may require from a party, should cover, in addition to the costs for the interim measure of protection which the arbitral tribunal orders, possible damage suffered by the other party if that party wins the case.

4. Norway expresses its understanding that there has been no intention to deal in the model law with the question of the limitation of the kind of interim measures which an arbitral tribunal may order or the question of enforcement of the measures or the question of the consequences of non-compliance with the measures.

5. Sweden observes that, under the Swedish legislation, a court may decide on a measure at the request of a party who considers that he has a claim against another person and this applies also if the dispute is to be settled by arbitration and regardless of whether the arbitration proceedings have commenced or not. Sweden notes that article 18, if viewed in the light of article 5, appears to give the arbitral tribunal exclusive authority to order an interim measure of protection. The provision should be clarified so as to show what is really intended. It should also be made clear whether an interim measure ordered by an arbitral tribunal is mandatory or what the consequences are if a party does not comply with the order.

6. Norway proposes to use a different expression for the measures dealt with in this article in order to avoid confusion with the measures ordered by a court as dealt with in article 9.

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 19. Determination of rules of procedure

Article as whole

1. In the view of Sweden, it would be of value if the model law, in this article or at some other suitable place, induced the arbitral tribunal to a prompt conduct of the arbitration.

Article 19, paragraph (1)

2. In the view of Italy, it would be appropriate to permit the parties to determine the rules of procedure after the arbitrators have accepted their duties, to the extent the arbitrators agree.

3. The United States, noting that article 19(1) provides that "the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings", raises the related question whether the parties are in any way limited as to the time within which they can agree on such procedure. While the Working Group indicated that "the freedom of the parties to agree on the procedure should be a continuing one throughout the arbitral proceedings", 27/ the United States believes that this potentially important question should be clearly answered by the model law and proposes the inclusion in paragraph (1) of a statement that the parties may agree on procedure during as well as before the arbitral proceedings.

Article 19, paragraph (2)

4. Italy states that the questions pertaining to the admissibility and relevance of evidence are considered in many legal systems, including the Italian system, to be questions of substantive law and that, as a result, these questions are governed by the rules applicable to the substance of the dispute determined in accordance with article 28.

5. Mexico suggests indicating in paragraph (2) that the power of the arbitral tribunal to conduct the proceedings and to determine the admissibility, relevance, materiality and weight of evidence has to be exercised in a prudent and reasonable way and that the arbitral tribunal always has to give reasons for its decisions.

6. In connection with the provision of article 19(2) on the conduct of arbitral proceedings, Poland stresses that the arbitral tribunal should keep a proper balance between the interests of the parties and take into account the factors which facilitate the proceedings and enable mutual understanding (for example, the issue of the language of the proceedings).

27/ A/CN.9/246, para. 63.

Article 19, paragraph (3)

7. Norway, observing that according to paragraph (3) each party shall be given a "full" opportunity of presenting his case, notes that the arbitral tribunal's not complying with the provision constitutes a valid ground for setting aside the award (article 34(2)(a)(iv)) and for refusing recognition and enforcement (article 36(1)(a)(iv)), and that the provision may also be a basis for delaying tactics. It is therefore proposed to replace in paragraph (3) the word "full" by another word, for example, "adequate".

8. IBA suggests inserting, after the word "full" in paragraph (3), the words "and proper" since, in the English language, the word "full" is rarely used on its own in this sense and the words "full and proper" constitute an idiomatic expression which would be well understood in the context and would be capable of reasonably precise definition. By contrast, the word "full" is relatively imprecise on its own, and might be capable of being interpreted in an unduly restrictive sense. It is appreciated that the UNCITRAL Arbitration Rules use the abbreviated version, but this is considered to be less significant in arbitration rules than in national legislations.

Article 20. Place of arbitration

1. India is of the opinion that the freedom of the parties to agree on the place of arbitration may operate against a weaker party. A possible approach suggested is to hold the arbitration in the respondent's country. India is, however, not opposed to the inclusion of the test of objectivity as envisaged by the phrase "the place of arbitration shall be determined by the arbitral tribunal" in article 20(1).

2. In the understanding of Norway there need not be a genuine link between the place of arbitration as determined under paragraph (1) and any other places where, under paragraph (2), parts of the arbitral proceedings, including the making of the award, take place. Recalling the prevailing view expressed in the Working Group, namely that the exclusive determining factor for the applicability of the model law should be the place of arbitration, 28/ and recalling the provisions of article 31(3) according to which the award shall be deemed to have been made at the place as determined in accordance with article 20(1), Norway observes that the place of arbitration is, or ought to be, a decisive factor under articles 6, 27, 28(2), 34 and 36(1)(i), (iv) and (v). It proposes to make clear whether such "constructive" place of arbitration as determined in accordance with article 20 shall be pertinent in relation to every provision of the model law where the place of arbitration is referred to or is otherwise relevant. Appreciating the intention of paragraph (2) of this article, Norway proposes to insert a provision in the model law to the effect that a "constructive" place of arbitration shall not be relevant in respect of all, or some of the, provisions where the place of arbitration is the determining factor, if there is no genuine factual link between that place and the actual arbitral proceedings.

3. As to the proposal by Czechoslovakia to deal in article 20 with the issue of jurisdiction, see paragraph 6 of the compilation of comments on article 6.

28/ A/CN.9/246, para. 167.

Article 21. Commencement of arbitral proceedings

1. Czechoslovakia suggests adding at the end of this article the following text: "In case of delivery of the request by mail the arbitral proceedings commence on the date of the post-stamp of the dispatching post office."

2. Observing that the date of commencement of arbitral proceedings has great significance for the limitation or extinction of a claim, Czechoslovakia suggests adding the following provision after article 21:

> "(1) A request for the dispute to be referred to arbitration filed with arbitrators or with a permanent arbitral institution has the same legal effects as if a request in this matter were filed with a court.
>
> (2) Where the arbitral tribunal rules that it has no jurisdiction or where the award is set aside, and the party thereon files a new request with a court within thirty days following the receipt of the ruling rejecting the jurisdiction or the receipt of the judgement setting aside the award, neither limitation nor extinction of his claim by lapse of time may be pleaded against him."

3. Japan notes that under its law, and presumably also under the law of other countries, in the case of arbitration administered by a permanent arbitral instution a prescription period ceases to run at the time when a request for arbitration is submitted to such institution. Accordingly, Japan proposes the following addition to this article:

> "In the case of arbitration administered by an arbitral institution, the arbitral proceedings commence on the date on which a request for arbitration is received by the arbitral institution."

Article 22. Language

1. In the opinion of Austria, the detailed provision in the last sentence of paragraph (1) is unnecessary and should be deleted.

2. The Federal Republic of Germany is of the view that where the parties have not agreed on the language to be used in the arbitral proceedings there is a need to prevent an arbitrary determination of the language. This should be achieved by providing that, failing agreement by the parties, the language or languages to be used in the proceedings should be determined by the arbitral tribunal in accordance with the principle of article 19(3), i.e. that each party shall be given a full opportunity of presenting his case.

Article 23. Statements of claim and defence

Article 23, paragraph (1)

1. Italy expresses the view that it might be more appropriate to set in the model law itself a period of time for stating the claim and defence instead of leaving its determination to the parties or the arbitral tribunal.

2. The United States proposes, consistent with the concept of party autonomy, to make clear by appropriate wording that the provision of paragraph (1) is not mandatory. Uncertainty on this point in the model law could lead to difficulties for parties who regularly utilize arbitration rules or contract provisions which are not entirely consistent with this provision of the draft text.

Article 23, paragraph (2)

3. Cyprus is of the view that the phrase "any other circumstances" is too wide and uncertain. The practice with regard to amendments of pleadings has always been to give leave to amend, unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise. However negligent or careless the first omission may have been, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs. An amendment ought to be allowed if thereby "the real substantial question can be raised between the parties".

4. The Soviet Union considers that paragraph (2), envisaging that an amendment of or supplement to a claim or defence may not be allowed by the arbitral tribunal, depending on "the delay in making it or prejudice to the other party or any other circumstances", gives to the arbitral tribunal excessively broad freedom of discretion in the matter which is important for a comprehensive consideration and fair settlement of the dispute. Such freedom derives, in particular, from the phrase "other circumstances", and that phrase should be deleted. Moreover, the reference to "prejudice to the other party" is considered equivocal. It is logical to suppose that practically any amendment or supplement introduced by a party works to its benefit and, consequently, for "prejudice" of the other party. It appears that it would be more fair to provide for a right of a party to introduce amendments and supplements at any time before the arbitral tribunal announces the termination of the examination of the case, or, at least, to restrict the discretion of the arbitral tribunal, for example, by referring only to the character of and reasons for the delay.

Article 24. Hearings and written proceedings

Article 24, paragraphs (1) and (2)

1. Poland and the United States propose that paragraphs (1) and (2) of article 24 should be replaced by a single paragraph, based largely on article 15(2) of the UNCITRAL Arbitration Rules, as follows:

> "Unless the parties have agreed that no hearings shall be held, if either party so requests at any appropriate stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses or for oral argument. In the absence of such a request, the arbitral tribunal shall decide whether to hold such hearings or whether the proceedings shall be conducted on the basis of documents and other materials."

In connection with this proposal, Poland notes that the parties usually do not stipulate in the arbitration agreement that there must be a hearing, and that, where any negotiations on this point have not produced an agreement, the model law gives all powers to the arbitral tribunal; this solution is undesirable and is in conflict with the interest of the parties for whom the hearing constitutes a key element of the proceedings where they are able to put forward their full argumentation. The United States, concerned that under the present text of article 24 a party desirous of a hearing is not assured that there will be one, advances the following arguments in support of the proposed text. The right to a hearing, unless waived, is an important means of ensuring a just result. Unless the right is expressly waived, a party should have the right to introduce oral evidence by witnesses and to have the tribunal determine the credibility of any witness. A party also should have the right to communicate its legal and factual arguments as effectively as possible. This can often be done best by oral argument. The corresponding provision of the UNCITRAL Arbitration Rules, article 15(2), provides that "If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings ... ." There seems to be no reason to depart from this principle already adopted by the Commission. Inclusion of this principle in the model law would also eliminate a possible ground for the setting aside of an award on the theory that a party had been "otherwise unable to present his case" within the meaning of articles 34 and 36. The United States considers that the danger of possible abuse of the right to be heard as a delaying tactic should be avoided by application of the words "at any appropriate stage of the proceedings" already contained in the present draft of paragraph (2). Experience has shown that article 15(2) of the UNCITRAL Arbitration Rules on which the proposed text is modelled is effective and unambiguous. Furthermore, consistency between the model law and the UNCITRAL Arbitration Rules on the subject of hearings will promote uniformity in international arbitration procedure.

2. The German Democratic Republic suggests formulating the principle laid down in article 24(2) in clearer and more compelling terms, i.e. that oral hearings shall be held whenever so requested by a party (article 24(2)) or whenever there is doubt about the attitude of the parties in respect of holding an oral hearing.

3. Sweden suggests that in paragraph (2) the word "may" should be replaced by the word "shall".

4. IBA proposes to reconsider the wording of article 24(2). The present text suggests that the question of whether or not a hearing should be held is entirely within the discretion of the tribunal, even if a hearing has been requested by one of the parties. Such a result appears, prima facie, to be contrary to the prevailing view in the Working Group, namely that "the right of a party to request a hearing was of such importance that the parties should not be allowed to exclude it by agreement". 29/ The report of the Working Group highlights the divergence of view, but does not appear to resolve it. 30/

29/ A/CN.9/246, para.77.
30/ Ibid., para. 78.

5. The Soviet Union suggests providing in paragraph (2), for the sake of certainty, that, in all cases or at least in the case where the parties have failed to agree after the dispute has arisen on proceedings on the basis of documents only, the arbitral tribunal must, at the request of either party, hold oral hearings after having notified the parties about the hearing.

6. In the view of Norway, paragraph (1) seems to imply that the arbitral tribunal cannot decide that the proceedings shall be conducted partly on the basis of oral hearings and partly on the basis of documents. It is thought that the arbitral tribunal should have this opportunity and, consequently, it is suggested modifying paragraph (1) as follows:

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

7. Austria favours replacement of the opening phrase of paragraph (1) "subject to any contrary agreement by the parties" by the phrase "unless otherwise agreed by the parties", as the latter is frequently used in the model law.

Article 24, paragraph (3)

8. In the view of Cyprus, the model law should determine the period of time between the notice and the hearing or meeting since the word "sufficient" will give rise to problems.

9. The Soviet Union suggests, for the reasons of clarity, replacing the words "for inspection purposes" in paragraph (3) by the words "for the purposes of inspection, indicated in article 20(2)" or by the words "for the purposes of inspection of goods, other property, or documents".

Article 24, paragraph (4)

10. The Soviet Union considers the requirement in the second sentence of paragraph (4), that any "other document" on which the arbitral tribunal may rely in making its decision must be communicated to the parties, as too broad since it can be interpreted to apply, for example, to documents such as publications of laws, judicial precedents and legal studies. The requirement should refer only to documents of evidentiary nature, i.e. "documentary evidence" in the sense of article 22(2), and this should be clearly stated in paragraph (4) of article 24.

Article 25. Default of a party

Article 25, sub-paragraph (b)

1. The Federal Republic of Germany expresses the view that sub-paragraph (b) could be interpreted to mean that silence on the part of the respondent would not result in any disadvantage to him, and that this is not the intended meaning. The provision is meaningful only to the extent that the claim made by the claimant is not recognized as such. On the other hand, the arbitral tribunal should be able to come to this or a similar conclusion in individual cases. In other words, it should be left to the arbitral tribunal to draw those conclusions from the silence of the respondent that appear most probable.

Article 25, sub-paragraph (c)

2. Italy expresses the opinion that it might be appropriate to provide a sanction for the case of the default of a party dealt with in sub-paragraph (c); a minimum sanction could be that the failure to appear at a hearing or to produce documentary evidence is an element which the arbitral tribunal could take into account in deciding the case.

3. In the view of the Soviet Union, sub-paragraph (c), according to which the arbitral tribunal "may" continue the proceedings, also empowers the arbitral tribunal not to continue the proceedings; it would be more appropriate to provide that the arbitral tribunal "may, and at the request of the other party must, continue the proceedings".

Article 26. Expert appointed by arbitral tribunal

Article 26, paragraph (1)

1. Mexico notes that article 26(1)(b) empowers the arbitral tribunal to require "one of the parties" to give information to the expert. Mexico suggests making clear that each of the parties, and not only one of them, could be so required. (Note by the Secretariat: in article 26(1)(b), the English words "may require a party" were translated in the Spanish language as "podrá solicitar a una de las partes".)

2. The Soviet Union is of the opinion that the freedom of the parties to restrict the right of the arbitral tribunal to appoint an expert should be limited to the time before the appointment of the arbitrators, with the consequence that the arbitrators would know of the restriction when accepting their appointment.

Article 26, paragraph (2)

3. Cyprus suggests that paragraph (2) should provide for a right of the arbitral tribunal to put questions to the expert regardless of any agreement to the contrary between the parties.

Article 27. Court assistance in taking evidence

Comments relating to territorial scope of application of article 27

1. Austria, Japan and the Soviet Union are of the view that the scope of article 27 should be limited to arbitral proceedings "held in this State" and that, therefore, the words "under this Law" should be deleted. Austria emphasizes that this limitation would be in conformity with the approach that the place of arbitration should be the exclusive determining factor for the application of the model law.

2. Japan expresses its support for the decision of the Working Group that this article should deal only with court assistance to arbitrations taking place in the State of the court giving assistance, 31/ but stresses that this should not mean denial of assistance in obtaining evidence pursuant to the rules of international judicial assistance or co-operation.

3. The United States notes that article 27(1) reflects the decision of the Working Group to limit article 27 to obtaining evidence within the State in which the arbitration takes place and not to extend it internationally, and that it was the understanding of the Working Group that this decision was subject to later review in the context of the general deliberation on the territorial scope of application of the model law. 32/ It is believed that it would serve the effectiveness of international commercial arbitration to include in the model law, as an addition to article 27, provisions which would empower courts in the State in which the arbitration is held (a) to transmit to a court in a foreign State a request for assistance in obtaining evidence for use in arbitration (United States, also Norway), and (b) to respond to any such request transmitted by a foreign court in the same manner as if the request had been made by the foreign court itself for assistance in obtaining evidence for the use in a court proceeding (United States).

Article 27, paragraph (1)

4. Austria suggests that the model law should provide that the arbitral tribunal's approval of the party's request for court assistance should be given in writing. Austria further suggests that the provisions of paragraph 1(a), (b) and (c) on the contents of a request for court assistance are not necessary and should be deleted.

5. The Soviet Union considers that it is hardly appropriate to have a rule on court assistance as regards the taking of evidence not only from a witness, but also from an expert witness, since the participation in the arbitration proceedings of expert witnesses is ensured by the party concerned (article 26(2)).

Proposed addition to article 27

6. Sweden suggests that differences among legal systems in procedures for court assistance in obtaining evidence, and the difficulties arising therefrom, may warrant the inclusion of a provision for the cases where evidence is possessed by a party; under such provision, the arbitral tribunal, in addition to the possibilities laid down in article 27, should have the power to order the party who is in possession of evidence to produce it, and, in the event of refusal to comply with such order, the arbitral tribunal should be expressly empowered to interpret the refusal to that party's disadvantage.

31/ A/CN.9/246, para. 96.
32/ Ibid., para. 97.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Chapter as a whole

Poland expresses support for the provisions of this chapter since they are drafted in a progressive and flexible way, reflecting the present tendencies in international commercial arbitration. Poland notes as special example thereof article 28(1) on the choice of the substantive law.

Article 28. Rules applicable to substance of dispute

Article as a whole

1. The Republic of Korea considers remarkable that the model law refers to such a critical question as the conflict of laws rules applicable to the substance of international commercial disputes.

2. Sweden suggests that the rules on the choice of law reflect a rather traditonal view of the question. If the rules are adopted in their present form, there is a risk that the trend towards a free judgement of the question of choice of law that has been noticeable in international arbitration practice will be adversely affected. Such a consequence would be regrettable.

Article 28, paragraph (1)

3. The Federal Republic of Germany and the United States express their support for paragraph (1) of article 28 on the understanding, also expressed by the Working Group, 33/ that it provides parties with a wider range of options and that it would, for example, allow them to designate as applicable to their case rules of more than one legal system, including rules of law which have been elaborated on the international level. The Federal Republic of Germany notes that this would provide the parties with more room for manoeuvre as regards the extent to which they desire a decision in accordance with the rules of law or a decision ex aequo et bono. While, in general, decisions in accordance with the rules of law are desired in arbitral proceedings as well, businessmen often want a decision not according to the letter of the law, but a decision based on practical economic factors. The term "rules of law" must be interpreted in a broad sense so as to allow deviating from the provisions of law in accordance with the declared or presumed will of the parties.

4. It is the understanding of Argentina that the rules of law chosen by the parties do not necessarily have to be the rules of a national law but can be, in a hierarchical order, the rules set forth in the contract, the trade usages and the rules of an international convention such as the 1980 United Nations Convention on Contracts for the International Sale of Goods. It is observed that in the case of such choice of rules of law the parties are not prevented from designating a national law to govern, in a subsidiary way, the questions not resolved by the rules of law chosen by the parties. Argentina points out that in making any of these choices account should be taken of the rules of exclusive application of the law of the State where the arbitration takes place or of other States where the award may have to be recognized or enforced, or of the rules of public policy which the parties may not exclude by agreement.

33/ A/CN.9/245, para.94.

5. The Soviet Union proposes to replace in paragraph (1) the words "rules of law" by the word "law", since the term "rules of law" introduces a new and ambiguous notion that may cause considerable difficulties in practice. The traditional notion of "law" should be retained in the present rules designed for universal application, in spite of the views, mainly doctrinal ones, that the arbitators may use not only the law of a State but also "extra-national" or "non-national" principles and rules. In this connection reference is made to the following rules which reflect the traditional approach: article VII of the 1961 Geneva Convention, article 33 of the UNCITRAL Arbitration Rules and article VII of the 1966 Rules for International Commercial Arbitration and Standards for Conciliation of the United Nations Economic Commission for Asia and the Far East.

6. Cyprus states that, perhaps, the word "law" (not "rules of law") is the appropriate word.

Article 28, paragraph (2)

7. Italy proposes to redraft present paragraph (2) as follows:

> "Failing any designation by the parties, the arbitral tribunal shall apply the rules of law which it considers appropriate, taking into account the provisions contained in existing international conventions or uniform laws, whether already in force or not, and, in the absence of such conventions or uniform laws, the laws of the State where the parties have their place of business."

8. The Federal Republic of Germany and Norway express the view that paragraph (2) allows too much discretion to the arbitral tribunal in finding the applicable conflict of laws rules. The Federal Republic of Germany points out that such a broad rule may, on the one hand, put an arbitral tribunal in a difficult position when determining the appropriate conflicts rule and, on the other hand, give rise to additional controversy protracting the proceedings.

9. Consequently, the Federal Republic of Germany proposes that, failing agreement of the parties on the applicable rules of law, the applicable law should be determined in accordance with the conflict of laws rules of the place of arbitration, provided that the place has been agreed upon by the parties; it is thought that, if the place of arbitration has been determined by the arbitral tribunal, the conflict of laws rules of that place would not be appropriate because the arbitral tribunal may be guided in deciding on that place by considerations unrelated to the case at issue. If the parties have not agreed upon a place of arbitration, it is proposed to rely on the conflict of laws rules most closely connected with the subject-matter of the dispute.

10. Norway puts forth two variants of paragraph (2) for consideration. The first one is the following:

> "(2) Failing any designation by the parties and provided that they have agreed on a place of arbitration, the arbitral tribunal shall apply the law determined by the rules of conflict of laws established in the jurisdiction where that place is situated. If the parties have not agreed on the place of arbitration but have their relevant places of business within the territory of the same legal system, the arbitral tribunal shall apply the law determined by the conflict rules of that

system. Otherwise, the tribunal shall apply the law of the jurisdiction [to which the dispute is most closely related] [with which the dispute is most properly connected]."

With respect to the first variant it is said that the present paragraph (2) seems to give the arbitral tribunal too wide a discretion in applying conflict of laws rules and thereby, by implication, in deciding on the applicable law. If the parties have agreed on a place of arbitration, they will often expect the conflicts rules of that place to be applicable; if, however, the parties have not agreed on such place but happen to have their relevant places of business in the same State, they will often expect the conflicts rules of that State to apply even if the arbitral tribunal decides to conduct the proceedings in another State. However, since Norway is not convinced that the indirect approach of the suggested paragraph (2) to the choice of law question is the most suitable one, and since the model law probably ought to address the question directly and also provide some criteria for the choice, the following wording is proposed as a second variant:

"(2) Failing any designation by the parties, the arbitral tribunal shall apply the law of the jurisdiction with which the dispute is most [closely related] [properly connected]. If the dispute is not most [closely related to] [properly connected with] any particular jurisdiction, the tribunal shall apply the law determined by the rules of conflict of laws in the jurisdiction where the arbitration takes place as determined in article 20 paragraph (1)."

Article 28, paragraph (3)

11. Italy proposes to add to the text of paragraph (3) the following provision:

"Notwithstanding such an authorization, the arbitral tribunal, in taking its decision, shall, to the largest possible extent, ensure the enforceability of the award within the States with which the dispute has a significant connection."

Proposed addition to article 28

12. The United States, recalling the decision of the Working Group to delete from article 28 the requirement that the arbitral tribunal decide in accordance with the terms of the contract and take into account the usages of the trade applicable to the transaction, 34/ advocates the restoration of such requirement. Reference by the arbitral tribunal to contract terms as well as trade usages is required by article 33(3) of the UNCITRAL Arbitration Rules which were unanimously recommended by the General Assembly in its resolution 31/98 of 15 December 1976 as being acceptable in countries with different legal, social and economic systems; in recommending these Rules, the member States of the United Nations approved the important policy of recognizing the applicability of contract terms and trade usages when deciding particular disputes. It is noted that a provision such as the one proposed is also

34/ A/CN.9/245, paras. 98-99.

contained in article VII of the 1961 Geneva Convention and in article 38 of the 1966 Arbitration Rules of the United Nations Economic Commission for Europe. Further, it has been recognized that "the Law applicable to the contract is, in international business relations, a delicate subject on which, at the end of lengthy negotiations, it may be difficult to reach agreement. Each party will prefer to have its own law be declared applicable, afraid of surprises the law of the other party may present. The question remains therefore often outstanding. It may even be a stimulant for insertion of an arbitration clause into the contract as the parties, not without good reasons, expect from the arbitrators that they will above all base their decisions on the wording and history of the contract and the usages of trade." 35/ In accordance with the above arguments the United States proposes the inclusion in this article of a new paragraph, based largely on article 33(3) of the UNCITRAL Arbitration Rules, as follows:

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

Article 29. Decision making by panel of arbitrators

1. Finland, Sweden and (with regard to awards) IBA express the view that in the case where a majority of the members of the arbitral tribunal cannot be obtained, the presiding arbitrator should decide as if he were a sole arbitrator. In support of this view Sweden points out that, according to experience with the "majority rule", there is a risk that, in the event of three different opinions, the presiding arbitrator may be tempted to agree to a juridically dubious solution in order to attain the necessary majority. IBA recognizes that any change of the text regarding the method of decision-making would involve a change of policy which has already been settled, and it would also lead to a difference from the provisions of the UNCITRAL Arbitration Rules; nonetheless, it is suggested that this can give rise to a real problem, and that the parties can suffer a total waste of time and expense if the arbitration ends without any award being issued. It is believed that most practising lawyers would prefer to see the proposed solution.

2. For the cases where no majority can be obtained, the Republic of Korea proposes to redraft the second sentence of article 29 as follows:

> "Except as otherwise stipulated in an arbitration agreement, in case the ayes and nays are equal, where there are several arbitrators, the arbitration agreement in question shall forfeit its effect."

3. Italy suggests allowing decisions to be made by correspondence; at least it would be necessary to provide that where an arbitrator fails to come to the agreed place without just cause the other arbitrators could proceed with the deliberations.

35/ Pieter Sanders, Model rules for international commercial arbitration: UNCITRAL Arbitration Rules, Proceedings of the fifth international arbitration congress, New Delhi 1975, Part C., p. C Ia 13.

4. Norway, appreciating the intention of the provision contained in the last sentence of this article, suggests that the word "presiding" is unclear. It is proposed either to explain this word in the model law or, perhaps better, to delete it.

5. As to the proposal by Qatar to provide in article 11 of the model law a definition of the presiding arbitrator, see paragraph 3 of the compilation of comments on article 11.

Article 30. Settlement

Austria and Mexico propose the deletion of the words "and not objected to by the arbitral tribunal" in article 30(1). Austria considers that these words restrict the autonomy of the parties in an unjustified way since, if the subject-matter of the dispute is capable of being submitted to arbitration, the parties are free to settle the dispute without any restrictions by the arbitral tribunal. In the view of Mexico, the arbitral tribunal should not be able to oppose the recording in the form of an award of the settlement which the parties have reached.

Article 31. Form and contents of award

1. Czechoslovakia suggests stating expressly that the award must be definite in order to exclude any uncertainty as regards the decision on the disputed claim. It further suggests adding a paragraph to article 31 as follows: "An award meeting all requisites in accordance with this article has the force of res iudicata and shall be enforceable in courts."

2. Norway expresses the opinion that the award ought to state whether any arbitrator has dissented. The dissenting arbitrator should be allowed to state in the award itself his reasons for dissenting. The proposal is to include in article 31 the following new paragraph:

> "(3 bis) The award shall state whether it has been rendered unanimously. If the award has been rendered under dissent, it shall state the issue of the dissent and which arbitrator dissented. Any dissenting arbitrator is entitled to state in the award the reasons upon which his dissent was based."

Article 32. Termination of proceedings

Article 32, paragraphs (1) and (2)

1. The Soviet Union states that from the juridical and technical point of view arbitral proceedings may be terminated by an award or by an order of the arbitral tribunal, but not directly by an agreement of the parties. Such agreement by the parties rather serves as a ground for an order for the termination of proceedings. For this reason it is proposed to move the reference to the agreement of the parties from paragraph (1) to paragraph (2)(a) of article 32.

Article 32, paragraph (2)

2. Austria suggests specifying in article 32(2)(a) criteria for the withdrawal of a claim, in order to avoid uncertainty about the termination of arbitral proceedings. The following rewording of paragraph (2)(a) is proposed:

> "(a) shall issue an order for the termination of the arbitral proceedings when the claimant withdraws his claim either before the communication of the statement of defence by the respondent or with the consent of the respondent if the latter has already communicated his statement of defence or by waiver of the claimant's rights to the subject-matter;".

3. In the view of the Soviet Union, the reference in paragraph (2)(b) to the case where the continuation of proceedings becomes unnecessary or inappropriate is unclear. It is proposed to replace the word "inappropriate", which gives too much discretion to an arbitral tribunal, by the word "impossible" (following the example of article 34(2) of the UNCITRAL Arbitration Rules) or by the word "pointless" or any similar word.

Article 33. Correction and interpretation of awards and additional awards

1. Czechoslovakia proposes to restrict the provisions on the interpretation of the award to interpretation of the reasons upon which the award is based.

2. The German Democratic Republic proposes not to deal in the model law with the possibility of the interpretation of an award.

3. Sweden and the United States propose to reconsider this article with a view to establishing an obligation of the arbitral tribunal, which has received a request from a party under this article, to give the other party an opportunity to respond to the request. While the suggestion of Sweden does not refer expressly to the making of an additional award, the proposal of the United States relates to all three cases of actions which may be requested from the arbitral tribunal under this article, i.e. correction and interpretation of awards and making of additional awards. As to the period of time to be allowed for a response to a request under this article and for the ensuing action by the arbitral tribunal, Sweden regards a period of 30 days as too short; the United States proposes to provide that, unless the parties have agreed otherwise, the time for the arbitral tribunal to dispose of the request should commence to run after either objection to the correction, interpretation or additional award has been served on the arbitral tribunal or the time for serving said objection has expired.

CHAPTER VII. RECOURSE AGAINST AWARD

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

Article as a whole

1. The United States supports the policy of article 34 which provides a single remedy, to be exercised within three months after receipt of the award,

for setting aside an award on the same grounds as those of article V(1)(a)(b)(c) and (d) and (2) of the 1958 New York Convention. It is considered appropriate to include among the grounds for setting aside the non-arbitrability of the dispute as the Working Group has done. The present wording has the salutary effect of providing a single remedy of setting aside the award in the country in which it was made and, should the combined territorial-autonomy principle be adopted by the Commission, in the country whose arbitration law the parties have adopted. It also serves to align the grounds for setting aside with those for refusing recognition and enforcement.

Article 34, paragraph (1)

2. Austria, Finland, Germany, Federal Republic of, Japan, Norway and Venezuela suggest the deletion of the words "under this Law" placed between the second pair of square brackets. In making this suggestion, Finland and Norway refer to their views on the territorial scope of application of the model law (paragraph 1 of the compilation of comments on article 1), and Austria refers to its view on the scope of application of article 27 (paragraph 1 of the compilation of comments on article 27). In the context of this suggestion, the following is stated: the place of arbitration should be the exclusive determining factor for the applicability of the model law (Austria, Finland); the territorial criterion best corresponds to the practice of most countries (Finland); the place-related criterion is more practicable due to its specific nature (Federal Republic of Germany); doubts may arise with regard to the connection with the applied law when the conflict of laws rules of one State and the substantive law of another State or the substantive law of several States have been applied (Federal Republic of Germany); since it is probably in the interest of the States that the model law be complied with, and since the words "under this Law" open the possibility of proceeding with an arbitration in a manner different from the one envisaged in the model law, preference should be given to the words "in the territory of this State"; these latter words would make the model law more effective because it would govern the arbitrations which are started in the State which has adopted the model law (Venezuela); the main reason for the suggestion is to make the criterion for the application of article 34 clearer to the court (Japan). Japan, however, expresses its understanding that the adoption of the suggested provision would not restrict the freedom of the parties to make arbitral proceedings governed by the arbitration law of a State other than the State where the arbitration takes place, and that the law which the court applies in setting aside an award rendered under the foreign arbitration law of the parties' choice may be that foreign arbitration law.

3. Of the two options presented in the square brackets, Mexico suggests the retention of the words "under this Law" since the meaning of the words "in the territory of this State" is already implied in article 1, and it is therefore superfluous to include these words in article 34.

4. It is proposed to retain both bracketed wordings (Czechoslovakia, Italy) and to link them by the conjunction "and" (Italy).

5. Mexico expresses doubt about the formulation of paragraph (1), which provides that the setting aside procedure is the only recourse to a court against the arbitral award, since article 36(1) also provides recourse against "recognition or enforcement of an arbitral award", and article 16(2) gives two other recourses: a plea that the arbitral tribunal does not have jurisdiction and a plea that the arbitral tribunal is exceeding the scope of its authority. It is suggested that this be clarified in article 34(1).

6. The Federal Republic of Germany proposes to harmonize the wordings of articles 34(1) and 36(1)(a)(v) on the basis of the wording of article 34(1).

7. Japan expresses the view that the "award" which is subject to setting aside under article 34 should mean only a final award on the merits of the case.

Article 34, paragraph (2)(a)

8. The proposals of Czechoslovakia, Italy and Sweden deal with the inclusion of other grounds for setting aside an arbitral award. Czechoslovakia proposes to add the following ground to the list in paragraph (2)(a): "the award contains decisions on matters which are impossible or prohibited under the law of the State". Italy proposes to consider including in the grounds for attacking an award the grounds for revision of an arbitral award which are provided, for example, in article 831 of the Italian Code of Civil Procedure (e.g. where decisive evidence withheld by the other party has been found after the judgement was rendered or where the judgement is based on evidence that is recognized to be false after the judgement was rendered). Sweden, noting that the provisions governing the setting aside of an award appear to be exhaustive, is of the opinion that, for example, a challenge of an arbitrator or false evidence might also constitute grounds for setting aside an award. Sweden proposes to consider whether all errors providing a ground for setting aside an award should be treated in the same way. As regards certain grounds for setting aside, Sweden suggests that the requirement should be imposed that the error had affected the outcome or was otherwise of a serious nature.

9. In the view of India, article 34 appears to be unduly favourable to the losing party by providing too many grounds for attacking the award and a long period of time for applying to set aside the award.

10. The view of Cyprus is that the word "proper" in paragraph (2)(a)(ii) may give rise to problems of interpretation and that it should be expressly provided when a notice is not proper. The same comment is made in regard to article 36(1)(a)(ii).

11. IBA suggests reconsidering paragraph (2)(a)(ii) with a view to substituting the words "given a full and proper opportunity to present his case" for the present words "unable to present his case". The proposed wording would correspond better with the equality provision in article 19(3) (see also paragraph 8 of the compilation of comments on article 19, reflecting the comment of IBA on article 19(3)).

12. Venezuela, noting that in the Spanish version of paragraph (2)(a)(ii) the words "o árbitros" are placed in parenthesis, suggests that these words be retained without parenthesis for the reason of clarity and because the parenthesis may be interpreted as an indication of doubt as to the appropriateness of these words. This observation applies also to article 36(1)(a)(ii).

Article 34, paragraph (2)(b)

13. Poland expresses doubt about the suitability of paragraph (2)(b)(i), which provides that the question whether a dispute is capable of settlement by arbitration is to be decided according to the law of the forum competent to set aside the award. While it is advisable to apply such rule to recognition and enforcement of an award, it should not be applied in proceedings to set aside the award because the consequences of setting aside are not limited to the State of the forum but extend very widely. It is proposed to consider replacing the words "under the Law of this State" by the words "under the rules of law applicable to the substance of the dispute".

14. In the view of India, the term "public policy" in paragraph (2)(b)(ii) is rather vague.

Article 34, paragraph (4)

15. Austria suggests the deletion of paragraph (4) because any action by the arbitral tribunal to eliminate the grounds for setting aside presupposes the setting aside of the defective award by the Court.

16. The United States endorses the policy of paragraph (4) designed to permit an arbitral tribunal, under appropriate circumstances, to cure such defects as might otherwise necessitate the setting aside of the award.

17. The German Democratic Republic suggests that the possibility of suspending court proceedings concerning the setting aside of an award should be regulated in more compelling terms in order to give the arbitral tribunal itself the opportunity to continue the arbitral proceedings or to eliminate the grounds for setting aside.

18. IBA suggests reconsidering paragraph (4) with a view to bringing it closer to the previous version of article 34(4) as discussed by the Working Group at its last session. 36/ This would establish a more clearly defined and workable basis for rescuing an award from nullity if the defect in respect of which recourse is sought is relatively minor, or remediable.

19. In the opinion of Japan, paragraph (4) is not clear as to the situations to be covered by it and should, therefore, be subjected to further study.

36/ A/CN.9/246, para. 126.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Appropriateness of retaining this chapter

1. Poland, besides expressing some reservations regarding the provisions on recognition and enforcement (see paragraphs 7 and 11, below), approves the provisions as very progressive and favourable to arbitral awards made under the model law; it notes that the awards dealt with in the model law seem to have features of "international" arbitral awards rather than "foreign" awards as defined in the 1958 New York Convention.

2. The Republic of Korea is of the view that, because of the complex problems of jurisdiction and the scope of application, it would be better to replace paragraph (1) of article 35 by the following provisions dealing with the awards made in the territory of "this State", awards made outside the territory of "this State" under foreign law, and awards made outside the territory of "this State" under "this Law":

> "(1) An arbitral award made in the territory of this State and under this Law shall have the same effect between the parties as a final judgement by a court.
>
> (1 bis) An arbitral award made outside the territory of this State under a foreign law shall be recognized in accordance with the principles of reciprocity and international comity by the decision of the court (or under the terms provided in the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards).
>
> (1 ter) An award made outside the territory of this State under this Law, or made in the territory of this State under a foreign law, shall be recognized for enforcement in this State by the decision of the court, taking account of international law as provided in article 38 of the Statute of the International Court of Justice, and taking account of all the relevant circumstances."

3. Austria suggests the deletion of the provisions of chapter VIII on recognition and enforcement of arbitral awards because the recognition and enforcement of awards made outside the territory of the State concerned is adequately dealt with in the 1958 New York Convention. Provisions on the recognition and enforcement of awards made in the territory of the State concerned are unnecessary since such awards have the same legal effect as court decisions; under Austrian law there are no special procedures for the recognition and enforcement of awards so that an award is the basis for immediate granting of measures of execution.

4. Sweden queries the suitability of regulating the question of recognition and enforcement of awards in a model law, since the provisions of the model law on recognition and enforcement differ in some respects from those of the 1958 New York Convention. Since these differences may create problems for the States which have adopted the Convention, Sweden suggests the replacement of the regulation of these questions in the model law by a recommendation to the States that adopt the model law also to adhere to the Convention.

5. Finland is of the view that no provisions on recognition and enforcement of foreign awards should be included in the model law, unless they are more favourable to recognition and enforcement than the provisions of the 1958 New York Convention. The reason is that a State which does not want to become a party to the Convention would not accept the model law. As to the awards made in the State where recognition or enforcement is sought, i.e. other than foreign awards, a refusal of recognition or enforcement should only be allowed on the grounds mentioned in article 36(1)(a)(v) and 36(1)(b).

6. IBA appreciates that, if an acceptable degree of harmonization is to be achieved, a relatively simple and well defined basis both for actions for recourse and for actions for enforcement must be established. Furthermore, in order to be compatible with the present international regime, it is important that the operations of the 1958 New York Convention should not be disturbed; or, if it is to be disturbed, it should be done in a manner which can be well understood by the courts of countries adopting the model law, and lawyers who practise within those jurisdictions. On balance, it is suggested that the model law should not in fact deal with the question of recognition and enforcement of foreign arbitral awards. This should be left to the 1958 New York Convention, and any improvements achieved either by amending the Convention by protocol, or, as has been suggested, 37/ by moving towards a more unified approach to the Convention. As regards enforcement of awards in international arbitrations held within the territory of the relevant State, article 35 is regarded satisfactory in so far as the mechanisms are concerned. However, attention is drawn to the fact that grounds for refusal of recognition or enforcement, as set out in article 36, are drawn directly from the provisions of the 1958 New York Convention. This Convention was specifically designed to cover the question of enforcement of foreign awards, and assumed that such awards would have been subject to court supervision in the State in which they were issued. It is suggested that article 36 should be reviewed in the light of the fact that "domestic" awards will not have been subject to any court control in another State. In other words, if the question of enforcement of foreign awards is dealt with in a separate article, which simply applies the criteria of the 1958 New York Convention (as is the case, for example, in the English Arbitration Act 1975), then a separate article could deal with the refusal of enforcement of a domestic award. Such a separate article would not proceed on the assumption that the award has been subject to court control in the State in which it was made.

7. Poland is of the view that there is an uncertainty as to how the 1958 New York Convention is going to be applied to the awards covered by the present chapter VIII of the model law, and that this uncertainty should be resolved by the model law.

8. Italy notes that, according to the definition provided in article 1 for the model law in general, articles 35 and 36 refer to awards rendered in international commercial arbitration. It suggests that this point be expressed in the text.

37/ A.J. van den Berg, The New York Convention of 1958, (Deventer, Kluwer 1981).

Requirement of reciprocity as a condition for recognition or enforcement

9. Czechoslovakia suggests adding a new provision stating that the awards made in a country other than the country where recognition or enforcement is sought may be recognized or enforced if reciprocal treatment is secured.

10. Norway, referring to its comments on articles 1 and 34 (see paragraph 1 of the compilation of comments on article 1 and paragraph 2 of the compilation of comments on article 34) where it favours that the criterion for the territorial scope of application of the model law should be the territory of the State in which the arbitration took place, states that a natural, if not necessary, consequence of this view would be to make the recognition and enforcement of foreign awards conditional upon reciprocity. It is suggested that consideration should be given to including such a condition in the text, at least in respect of foreign awards not based on the model law, i.e. awards in international commercial arbitration, as defined in article 1, based on procedural rules different from those of the model law. It is noted, however, that it is difficult to distinguish between the international commercial awards which are based upon the model law from those which are not, due to the very nature of the concept of the model law; if the uniform rules were to be adopted as a convention, one could probably distinguish easily between foreign awards which are based on the uniform rules (awards made in Contracting States) from those which are not.

11. Poland, noting that the model law does not provide a requirement of reciprocity in the recognition and enforcement of arbitral awards, expresses the view that this seems to be questionable and proposes to include in the model law the right of the signatories to make a reservation in this respect.

12. In order to avoid difficulties which might arise in the application of the model law, at least for some States, the Soviet Union considers it worthwhile to discuss the question of including in this article a provision which, following the example of the 1958 New York Convention, would allow the acceptance of the model law subject to the condition of reciprocity as regards the application of article 36 to international arbitral awards.

13. The United States, referring to a view of the Working Group expressed at its seventh session, 38/ expresses the understanding that the freedom of any State to apply article 35 only on the basis of reciprocity, as expressed in its national legislation, is fully preserved.

"Double control" of awards

14. With regard to the right of a party to assert defences against recognition and enforcement of an award, the United States supports the prevailing view expressed at the seventh session of the Working Group to the effect that "a party should be free to avail itself of the alternative system of defences which was recognized by the 1958 New York Convention and should be maintained in the model law". 39/ This means that such defences may be

38/ A/CN.9/246, para. 144.
39/ Ibid., para. 154.

asserted either in a setting aside procedure, or in opposition to an application for recognition and enforcement of the award. In the discussion of articles 34 and 36 at the seventh session of the Working Group, a concern was expressed over the potential of conflicting decisions, during the initial three-month period following issuance of an award, stemming from the right of a party to oppose an award under either procedure, that of setting aside in the Court of article 6 or by way of objection to recognition or enforcement. 40/ One of the solutions subsequently suggested was to provide for the mandatory adjournment of decisions on recognition or enforcement in the event that setting aside proceedings have been initiated. In the view of the United States, this problem of "double control" is already dealt with in a practical way by article 36(2) which gives the court where recognition or enforcement is sought the discretion to adjourn its decision on the matter and, in appropriate cases, to order the other party to provide security.

Article 35. Recognition and enforcement

1. While India approves the uniform treatment of international awards irrespective of their country of origin, it suggests the inclusion of some provisions on the technical procedures for enforcement, taking into account the difficulties with the application of the 1958 New York Convention.

2. The Soviet Union notes that the model law contains no direct provision which would determine the moment in which an arbitral award made in "this State" becomes binding on the parties, and that article 35(1), providing that "an arbitral award, irrespective of the country in which it was made, shall be recognized as binding", does not specify such moment. It is also noted that according to article 36(1)(v), the recognition or enforcement of an award may be refused if it "has not yet become binding on the parties". It is suggested that, if an award is made in a foreign State, the question of when it becomes "binding" is decided under the law of that foreign State, and, if an award is made in "this State", this question should be decided on the basis of "this Law". It is therefore proposed to include an indication on this point by providing, for example, that the award is binding on the parties from the date it was made or from the date it was delivered to each party (article 31(3) and (4)), or that the award, if it does not provide otherwise, is "subject to immediate enforcement", or something of this kind.

3. The United States supports the policy of article 35 which, in a single article, provides uniform conditions for the recognition and enforcement of awards in international commercial arbitration regardless of their place of origin. It is pointed out that, as noted by the Working Group at its fifth session, the inclusion of provisions dealing with recognition and enforcement not only of domestic but also foreign awards in the country adopting the model law, may be viewed as "an important step towards creating, in addition to the multilateral and bilateral network, a unilateral system of recognition and enforcement of foreign arbitral awards." 41/ The United States is satisfied that inconsistencies, if any, between the legal regimes of the model law and

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40/ A/CN.9/246, para. 152.
41/ A/CN.9/233, para. 129.

the 1958 New York Convention, would be avoided by the wording of article 1(1) which specifically provides that application of the model law is "subject to any multilateral or bilateral agreement which has effect in this State." The potential for conflict between the two regimes is further ameliorated by the "more-favourable-right" provision of article VII(1) of the 1958 New York Convention.

Article 36. Grounds for refusing recognition and enforcement

Article 36, paragraph (1)

1. Argentina expresses the view that article 36 should be interpreted in the sense that an award would not be recognized where the court finds that the arbitral tribunal had proceeded without jurisdiction or had infringed the exclusive jurisdiction of the court before which the recognition or enforcement is sought.

2. The United States, noting that article 36(1) extends the scope of its provisions to international arbitration awards irrespective of their place of origin, suggests that a review of the provisions of this article shows that not all of the grounds for the refusal of recognition or enforcement may be equally applicable to both "domestic" and "foreign" awards. The United States considers that each of the provisions need to be reviewed at the next session of the Commission in light of the decision still to be made on the territorial scope of application of the model law.

3. As to the view of Finland to restrict the grounds for recognition or enforcement of awards made in the territory of the State where recognition or enforcement is sought to the grounds mentioned in article 36(1)(a)(v) and 36(1)(b), see paragraph 5 of the compilation of comments on chapter VIII of the model law.

Article 36, paragraph (1)(a)(i)

4. In the view of Cyprus, the phrase in paragraph (1)(a)(i) "failing any indication thereon" calls for improvement; it is suggested to replace that phrase by the phrase "or failing such choice of law by the parties".

Article 36, paragraph (1)(a)(ii)

5. Cyprus makes two comments on paragraph (1)(a)(ii). One concerns the word "proper" and is reflected in paragraph 10 of the compilation of comments on article 34. The other one is on the words "was otherwise unable to present his case" which are considered to be very wide; it is thought that the causes of inability to present one's case ought to be expressly provided and that a discretionary power may be left to the court to refuse recognition and enforcement when it considers the alleged cause reasonable in the circumstances.

6. For a comment of Venezuela on the Spanish text of the model law applying equally to articles 36(1)(a)(ii) and 34(2)(a)(ii), see paragraph 12 of the compilation of comments on article 34.

Article 36, paragraph (1)(a)(iv)

7. In the view of Cyprus, the phrase in paragraph (1)(a)(iv) "the arbitral procedure was not in accordance with the agreement" is so wide that it affords a party a basis for complaining of minor deviations from the procedure.

8. In the opinion of Mexico, the phrase in paragraph (1)(a)(iv) "was not in accordance with the law of the country where the arbitration took place" is incongruent with paragraph (3) of article 11 which provides the procedure to be followed by the arbitral tribunal in the case where the parties have not agreed on such procedure. It is, therefore, not "the law of the country where the arbitration took place" which should be followed, but this law, i.e. the model law. Moreover, the proposed solution and the use of the suggested terminology would coincide with the provision of article 34(2)(a)(iv).

Article 36, paragraph (1)(b)(ii)

9. India is of the view that the term "public policy" in paragraph (1)(b)(ii) is too vague and allows conflicting interpretations.

10. Qatar notes that article 36 governs the question of refusing recognition or enforcement of an award in any State which will adopt the model law and that, according to paragraph (1)(b)(ii), recognition or enforcement of an award may be refused where the recognition or enforcement would be contrary to the public order (or public policy) of the State concerned. It is considered that where an arbitral award is valid and binding in a country so that the issue is limited to a simple recognition or enforcement of that award in another country, the public order of the country of recognition or enforcement should be observed to the narrowest extent, i.e. only with regard to the proceedings required for recognition or enforcement. The proceedings normally envisage a compulsory measure to secure payment of a pecuniary amount or other executory measures which in themselves, independently from the subject-matter of the dispute and the legal rules applied by the arbitral tribunal, do not constitute an encroachment upon the public order of a country. These legal rules, as they are applied to the subject-matter of the dispute, might be seen as inconsistent with the public order of the country of enforcement or recognition, although they are not inconsistent with the public order in the country where or according to the law of which the arbitral award was made. Where the rights of the parties are determined in pecuniary form, by recognition of a title or in another way which does not in itself affect the public order in the country of recognition or enforcement, the public policy reason should not be used for refusing recognition or enforcement. Otherwise, this would mean reopening the consideration of the dispute in which a decision has already been made, and as a consequence of such action, arbitral proceedings would be wasted and the confidence necessary in transactions in general and in international transactions in particular would be shaken. In support of its view, Qatar notes that many States, among them the United States of America, have legislation and certain case law which provide for such restricted interpretation of public order. Consequently, Qatar suggests that the following text be inserted at the end of paragraph (1)(b)(ii):

"In deciding whether an arbitral award would be contrary to the public policy of the State, there shall be no reconsideration of the subject-matter of the dispute upon which a ruling has been made by that award and the decision shall relate only to the proceedings or actions that will be required by the recognition or enforcement."

Proposed addition to article 36

11. Norway proposes to insert the following new paragraph in article 36:

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

C. Comments on additional points

1. Suggestions to add certain definitions

Counter-claim

1. Norway and the United States note that there is no reference to counter-claims in the model law and that the understanding of the Working Group was that any provision of the model law referring to the claim would apply, mutatis mutandis, to a counter-claim. 42/ Nevertheless, Norway proposes, for clarity and information, to include in article 2 a provision to the effect that, unless otherwise stated, any provision referring to claims shall apply, mutatis mutandis, to counter-claims; it is pointed out, however, that it would be necessary to make a careful examination as to exceptions to such principle equating the counter-claim with the claim. The United States considers it desirable that an explicit statement which permits and regulates counter-claims be included in the model law and it proposes that this be done either by adding a reference to counter-claims in article 23(1) and (2) (also in article 16(2)) or by the inclusion of a general provision in article 2 to the effect that all references to claims and defences apply, mutatis mutandis, to counter-claims.

2. Mexico proposes to add, after the first sentence of article 23(1) dealing with the statement of defence in respect of particulars contained in the statement of claim, the words "or, where appropriate, to state a counter-claim".

3. Czechoslovakia suggests adding, at an appropriate place, the following provision:

"Until the end of the hearing the arbitral tribunal has the right to conduct the proceedings also on counter-claims covered by the arbitration agreement and on claims presented as set-offs in the form of a defence."

42/ A/CN.9/246, paras. 73 and 196.

This State

4. Mexico proposes to add to article 2 a definition of the expression "this State", as used at various places in the model law, indicating that it means the country that has adopted the model law.

Party

5. India proposes that a sub-paragraph be added to article 2 defining "party" as a "natural or juridical person who has entered into an arbitration agreement, irrespective of whether that person is named or identified in the agreement".

Appointing authority

6. The German Democratic Republic observes that the term "appointing authority" is used in article 11 but not defined in the model law. It suggests that a definition of that term be included in article 2.

Award

7. Mexico proposes to specify in article 2 the types of decisions of an arbitral tribunal which are to be comprehended by the word "award" as used in article 34(1) and other articles which may distinguish various kinds of awards (e.g. article 16(3)). (As to which types of awards may be subject to setting aside under article 34, see comments by Austria, Norway and Poland on article 16 (paragraph 7 of the compilation of comments on article 16) and comments by Japan on article 34 (paragraph 7 of the compilation of comments on article 34)).

2. Suggestions for new provisions on additional issues

Calculation of time-limits

8. Norway proposes to include a general provision on the calculation of time-limits, in particular whether the first and/or the last day of the term should be counted and the extension of the period where it would otherwise expire on a dies non juridicus (reference is made to articles 28 and 29 of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) 43/).

Burden of proof

9. The Soviet Union considers it worthwhile from a practical point of view, following the example of article 24 of the UNCITRAL Arbitration Rules, other known international and national rules, as well as arbitration laws, to include in the model law (for example, as article 24 bis) an indication to the effect that each party bears the burden of proof of those facts to which it refers, and that arbitrators are entitled to demand from the parties the presentation of additional evidence. While these questions may be resolved, at least indirectly, by the general rule contained in article 19(2), the importance of these questions warrants that they be settled in the model law in a clearer and more direct way.

43/ United Nations document A/CONF.63/15.

10. In order to clarify the responsibilities of the parties and of the arbitral tribunal, the United States believes that it would be useful to add to article 24 a statement regarding the burden of proof, namely that "each party shall have the burden of proving the facts relied on to support its claim or defence". The same language is found in article 24(1) of the UNCITRAL Arbitration Rules. Absent such language, some parties may not be diligent or some arbitral tribunals might misconceive their role as being investigatory.

Evidence of witnesses

11. The United States proposes that two aspects of arbitral procedure, pertaining to the presentation of evidence by witnesses, be addressed by specific provisions of the model law. Firstly, it would be prudent to add a provision that "the arbitral tribunal is free to determine the manner in which witnesses are examined, unless the parties have agreed otherwise". This language is modelled on article 25(4) of the UNCITRAL Arbitration Rules. This power is already implicit in article 19(2) of the model law, which gives the arbitral tribunal discretion to conduct the arbitration in such manner as it considers appropriate, subject to the agreement of the parties and other provisions of the model law. However, the manner of questioning witnesses arises in almost every international arbitral proceeding, and it would be useful to have a specific provision which can be cited to support the position that this matter is for determination by the arbitral tribunal. Secondly, the United States suggests the inclusion of a provision that "evidence of witnesses may also be presented in the form of written statements signed by them". Inclusion of such a provision in the model law, as is done in article 25(5) of the UNCITRAL Arbitration Rules, would clarify that this useful and at times necessary method of presenting testimony is available to parties in international commercial arbitration proceedings.

Conflicts of law issues

12. The German Democratic Republic observes that the model law does not contain rules on certain conflicts of laws, for example, rules on the law applicable to arbitration agreements and on the law applicable to awards on the merits, and that the preliminary drafts contained proposals for such rules which appeared to be appropriate to the nature and purpose of the model law. It is suggested that the advisability of having such rules be reconsidered.

Costs of arbitral proceedings

13. The German Democratic Republic, Qatar and Sweden suggest that the model law should deal with the question of costs of arbitral proceedings. In the view of the German Democratic Republic, the model law should regulate the principles in the matters of costs, including distribution of costs and the obligation to make advance payments, and that articles 38, 40(1) and 41(1) of the UNCITRAL Arbitration Rules could serve as a model for such regulation. Qatar proposes the inclusion of provisions related to the costs of arbitration, advance deposits for the costs and the apportionment of the final costs between the parties; stressing the importance of such provisions for the orderly conduct of international arbitration, Qatar suggests that the provisions to be included be modelled on articles 38 to 40 of the UNCITRAL Arbitration Rules. Sweden, considering the arbitration costs to be an

important question, points out that the model law is fairly detailed in other aspects and that, therefore, the absence of provisions on costs appears to be a defect.

14. As to a proposal by Finland to deal with the effect of a failure of a party to pay his share of the advance to the arbitrators, see paragraph 1 of the compilation of comments on article 11.

3. Other comments

Modification of and amendment to contracts

15. The Federal Republic of Germany observes that the question as to whether an arbitral tribunal should have the authority to modify a contract so as to adapt it to a changed situation or to amend it is being discussed on a broad international scale. It is the understanding of the Federal Republic of Germany that the absence of a provision on that point means that there is no intention to grant to the arbitral tribunal this sort of authority. The delegation of the Federal Republic of Germany advocated that there be no such provision in the model law and it continues to hold that view. It is thought that the argument against the inclusion of a provision on this issue is not so much that an adaptation of contracts involves questions of substantive law while the model law is a law on procedure, but that the activity of the arbitral tribunal is concentrated on the interpretation and application of contractual agreements and legal provisions. The authority to modify and amend contracts, such as is given to the State courts of the Federal Republic of Germany, would often be the best way to arrive at a settlement of a dispute in terms of a just accommodation of interests. Nevertheless, a provision of this kind in the model law does not seem appropriate. If the parties have provided in the arbitration agreement for the possibility of making modifications or amendments in the contract, the arbitral tribunal can take the appropriate measures. An agreement of this kind does not have to be made expressis verbis; it may be derived from the significance and purpose of the agreement. However, if the parties do not want an arbitration of this kind, it should not be imposed on them.

Commentary on the model law

16. In the opinion of CEC it would be desirable that a report be adopted by the Commission in conjunction with the model law. Such report should, in its first part, explain the nature of the model law in the system of international law, indicate the procedure which may be used to incorporate the model law in a national legal system, and consider the relation of the model law, as incorporated in the legal system of a State, to international agreements entered into by the State and its relation to other legal rules on arbitration of the State. It is observed, however, that in view of the variety of legal systems which may adopt the model law, such report could only provide general guidelines directed principally to those States which are less familiar with the arbitral procedure. In its second part, the report should contain an article-by-article analytical commentary of the model law explaining briefly the reasons for adopting particular solutions.

Drafting

17. The Soviet Union expresses its understanding that attention will be paid at the session of the Commission to the need for establishing corresponding language versions of the model law, to the uniform use of terminology (e.g. the terms "country" and "State", especially in articles 35 and 36), to the titles of individual chapters and articles, and similar matters.

18. IBA suggests that the text should be reviewed to ascertain whether the words "territory", "country" and "State" are used appropriately in their respective contexts.