

under Article X) shall be resolved exclusively in the courts of _____.

As noted above, many national courts will interpret even a broadly worded exclusive forum selection clause as permitting ancillary litigation outside the contractual forum. Nonetheless, where applicable law is unclear or where it is important to preserve such options, an express reservation should generally be made.

J. Forum Selection Clauses in Routine Transactions

Much international business takes the form of smaller, routinized transactions. Contractual documentation for these transactions is virtually never individually tailored. In these circumstances, a standard form contract should typically contain a simple forum selection clause which will not provoke objections from counter-parties and which will not raise unnecessary issues of enforceability or interpretation. In many cases, the most sensible course is an exclusive forum selection specifying the party's domicile, combined with an equally simple choice-of-law clause:

All disputes relating to this Agreement shall be subject to the exclusive jurisdiction of the courts of _____, and shall be decided in accordance with the laws of _____.

Alternatively, a non-exclusive forum selection clause, again selecting the drafting party's home-courts, can be used. Additionally, as discussed below, a simple arbitration clause providing for arbitration under a set of leading arbitration rules in a recognized jurisdiction, can offer a workable solution. (See p. 132 below.)

CHAPTER THREE

DRAFTING INTERNATIONAL ARBITRATION AGREEMENTS

Almost all international arbitrations occur pursuant to arbitration clauses contained in commercial contracts concluded well before any dispute arises. It is, of course, possible for parties to agree to submit an existing dispute to arbitration, and this sometimes happens. (The resulting agreement is called a "submission agreement" or "*compromis*"; a model of such an agreement is set forth in Appendix B.) Typically, however, it is difficult to negotiate a submission agreement once a concrete dispute has arisen and litigation tactics have been explored. As a consequence, relatively few disputes are arbitrated pursuant to submission agreements.

A selection of model institutional clauses for use in commercial contracts, including provisions for use in contracts with states and state-related entities, is contained in Appendix C. Nonetheless, parties are in principle free to draft their arbitration agreement in whatever terms they wish and in practice this freedom is liberally exercised. Like forum selection clauses, arbitration agreements are largely a product of the parties' interests, negotiations, and drafting skills.

International arbitration agreements can be very short, very long, or somewhere in between. National courts have upheld arbitration clauses that are as brief as "English law – arbitration, if any, London according ICC Rules," or "arbitration – Hamburg, Germany." At the other extreme, arbitration agreements in large, multi-party transactions sometimes take the form of separately executed documents running to dozens of pages and (purportedly) addressing every conceivable procedural eventuality. A selection of commonly used international arbitration clauses is contained in Appendix Q.

In many circumstances, the most sensible drafting approach is a relatively short arbitration clause identical to or based closely on one of the model clauses recommended by a leading arbitral institution. These model clauses provide a tested form of wording that avoids the ambiguities, internal inconsistencies, gaps, and other defects that can affect products of hasty drafting or negotiation; they

also incorporate institutional arbitration rules, which typically contain provisions addressing a wide range of issues that are difficult satisfactorily to deal with in an *ad hoc* arbitration clause. For these reasons, absent unusual circumstances and specialized advice, it is almost always wise to avoid lengthy arbitration agreements, drafted in an effort to suit a specific transaction, and instead to rely entirely or largely on short, model clauses.

Alterations or additions to the model provision should be made with care and expert counsel to avoid unforeseen inconsistencies, conflicts, or similar problems. There is also some risk that departures from the model wording of a particular institution may permit challenges to the arbitral tribunal's jurisdiction based upon speculation about the parties' intent in making such changes. For this reason, it is usually advisable to adopt the wording recommended by a particular institution except where specialized advice counsels otherwise.

Whatever basic approach is adopted, however, a number of issues should be considered in drafting an international arbitration agreement. These issues are outlined below. The discussion first addresses a handful of critical elements that must be included in virtually every international arbitration clause. It then considers a number of additional elements which may be either desirable or necessary in particular cases.

A. Critical Elements of International Arbitration Agreements

There are several critical elements which must be addressed in almost every international arbitration clause. These are:

- Agreement to binding arbitration
- Scope of the arbitration agreement
- Selection of an arbitral seat (or place of the arbitration)
- Use of an arbitral institution and its rules
- Appointment, number, and qualifications of the arbitrators
- Language of the arbitration
- Formalities, capacity, and validity
- Choice-of-law clause

In particular cases, other provisions may be either vital to an effective international arbitration agreement or advantageous to one party. These provisions are also detailed below. (See pp. 90-132 below.)

1. Agreement to Binding Arbitration

It is elementary that any arbitration clause must clearly set forth the parties'

agreement to arbitrate. This means that their agreement should expressly refer to "arbitration" (rather than to mediation, settlement, "ADR," accounting, or some other form of non-judicial resolution). These other forms of alternative dispute resolution are not categorized as "arbitration" under many international treaties and national arbitration statutes, and will often not qualify for the "pro-enforcement" safeguards provided by these instruments. Care should also be taken to avoid unfamiliar labels or qualifications, such as "*arbitrato irrituale*" in Italy, which can refer to forms of dispute resolution other than arbitration.

The requirement that the parties agree to arbitrate also means that a defined category of disputes (*see* the discussion of "scope" below) should be referred to arbitration for a "binding" or "final" disposition. The clause ought not treat arbitration as a possible future option, applicable if the parties so agree after a dispute arises, nor ought it suggest that arbitration will produce merely a recommended or precatory result, as opposed to a binding, enforceable award. In essence, the clause must provide: "All disputes *shall be finally resolved* by arbitration ..." All the model clauses set forth below, and almost any usable arbitration agreement, include some variation of this formula.

2. Scope of Arbitration Agreement

Critical to any arbitration clause is its "scope" – that is, the range of disputes or claims that will be subject to the agreement to arbitrate. For example, are all disputes between the parties, bearing any conceivable connection to their contractual relations, subject to arbitration? Or, will only contract claims that clearly arise under the express terms of the parties' agreement be arbitrated? Alternatively, should particular types of claims be carved out or excluded from an otherwise broad arbitration agreement?

The contractual scope of an arbitration clause must be distinguished from the question whether particular issues or disputes are legally capable of being arbitrated. The latter issue, referred to outside the United States as whether a dispute is "arbitrable" or "objectively arbitrable," is discussed below. (See pp. 69 and 148-149 below.)

a. Formulae for Scope of Arbitration Agreements

As with forum selection agreements, there are a handful of formulae that are frequently used to define the scope of arbitration clauses. These formulae include: (i) "all disputes *arising under* this Agreement"; (ii) "all disputes *arising out of* this Agreement"; (iii) "all disputes *in connection with* this Agreement"; and (iv) "all disputes *relating to* this Agreement." Alternative formulations are also encountered, including: (v) "all disputes relating to this Agreement, including any question regarding its existence, validity, breach, or termination";

and (vi) “all disputes relating to this Agreement or the subject matter hereof.”

As already discussed, some courts have drawn surprisingly fine distinctions between these different formulae. For example, disputes often arise over the question whether an arbitration clause extends to tort or other non-contractual claims. A few national courts have reasoned that a dispute only “arises under” a contract if a party’s claims are contractual ones, seeking to enforce the terms of its contract; under this rationale, some courts have concluded that tort, quasi-contract, statutory, or other non-contractual claims do *not* “arise under” the parties’ agreement. In contrast, more expansive phrases like “relating to” and “in connection with” are generally held to extend broadly to contractual and non-contractual claims having some reasonable relation to the parties’ contract.

Many other courts have refused to consider fine distinctions between the foregoing formulae (sometimes holding that this is properly a decision for the arbitral tribunal). Nonetheless, the possibility of such restrictive interpretations should be recalled when drafting arbitration agreements.

b. Advantages of Arbitration Agreements With Broad Scope

As a general rule, it is wise to draft international arbitration clauses as broadly as possible to catch all disputes having any connection with the parties’ dealings. It is usually better to avoid – except in fairly compelling circumstances – efforts to exclude particular types of disputes from arbitration. Faced with a live dispute, and the temptations of forum shopping or perceived attractions of delay, few parties will lack the ingenuity to cast their claims or defenses in terms that purport to fall outside a narrow, or exception-filled, agreement to arbitrate. In turn, this will lead almost inevitably to parallel proceedings in both the arbitral forum and national courts, and to jurisdictional disputes over the application of a clause to particular claims. None of this fosters rational, efficient resolution of the parties’ real dispute.

c. Drafting Arbitration Agreements With Broad Scope

Drafting a broad arbitration clause, like drafting an expansive forum clause, requires addressing several components. First, it is generally desirable to begin with a descriptive preamble broadly submitting “*all disputes, claims, controversies, and disagreements*” to arbitration, rather than a simple reference to “any disputes” or “all claims.” This reduces the risk of litigation or arbitral proceedings over whether a “dispute” is involved (as distinguished, in some litigants’ submissions, from a mere “claim” or “disagreement”).

Second, this preamble formula should ordinarily be used together with one or more broad connecting phrases, such as disputes “*relating to*” or “*arising in connection with*” the parties’ agreement. It is usually desirable to avoid

confining an arbitration clause merely to disputes “arising under” or “arising from” an agreement, because of the risk that these formulae will exclude non-contractual claims. (See pp. 39-40 above.)

In addition, disputes sometimes arise over the question whether an arbitration clause extends to disputes regarding the formation of a contract (e.g., claims of fraudulent inducement or invalidity) or the termination of a contract. Some arbitral institution’s model clauses (such as that of the LCIA) address this possibility by expressly providing that disputes, including “any question regarding [the contract’s] existence, validity, or termination,” will be arbitrated. In general, courts in developed states have concluded that commonly used arbitration clauses extend to disputes about the validity, enforceability, and legality of the parties’ underlying agreement. (See pp. 146-147 below.) Nonetheless, where the issue is considered important, an arbitration clause can be drafted to apply expressly to disputes relating to the validity of the parties’ underlying agreement, “including its existence, formation, validity, enforceability, performance, or termination.” Where an institution’s model clause contains such a reference, agreements to arbitrate in accordance with the institution’s rules should virtually always preserve the reference.

Finally, references to the “subject matter of the Agreement” are also often appropriate. This widens the scope of the arbitration clause, and will often extend to disputes regarding the formation and validity of the underlying contract.

Taken together, the foregoing guidelines produce a “broad” clause along the following lines:

All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement, or the subject matter of this Agreement, shall be finally resolved by arbitration. ...

Or:

All disputes, claims, controversies, and disagreements relating to or arising out of this Agreement (including the formation, existence, validity, enforceability, performance, or termination of this Agreement), or the subject matter of this Agreement, shall be finally resolved by arbitration. ...

An alternative formulation, drafted as concisely as possible, would provide:

All disputes relating to this Agreement shall be finally resolved by arbitration. ...

As noted earlier, where a set of institutional arbitration rules are incorporated, care should be taken in considering alterations to the institution’s model clause.

Although the addition of language in order to broaden the scope of a clause is often appropriate, it is important to recall that any changes to a model clause will be subject to special scrutiny in the event of future disputes.

Finally, issues of interpretation and enforceability under the law(s) applicable to particular arbitration clauses must also be considered. The foregoing examples and commentary are useful as a general matter, and may be sufficient in particular cases. Nonetheless, they are not a substitute for detailed advice in specific cases.

d. Exclusions From Scope of Arbitration Agreements

Even where the parties have agreed to a broad arbitration clause, there may be claims or disputes that one party does *not* want submitted to arbitration. Exceptions to the scope of arbitration agreements (like exceptions to forum selection clauses) should be used cautiously and drafted carefully, because they can lead to jurisdictional disputes and other uncertainties. In appropriate contexts, however, carefully drafted exceptions may be useful.

A generic provision providing for exclusion of particular matters from the parties' agreement to arbitrate can be drafted along the following lines:

With the exception of those claims which are specifically excluded (pursuant to [Article X(2)] below) from arbitration under this [Article X(1)], all disputes, claims, controversies, and disagreements relating to or arising out of this Agreement shall be finally resolved by arbitration. ...

Or:

Claims under the following Articles of this Agreement are specifically excluded from arbitration hereunder: [Articles V, VII and ...].

Ordinarily, exclusions from the scope of the agreement to arbitrate should be avoided except in unusual circumstances; the examples identified below are some of the instances where exclusions may be appropriate. Where such an exclusion is used, the excluded disputes should be the subject of a specific forum selection (or other dispute resolution) provision.

i. Injunctive Relief for Intellectual Property Rights

Licensors of intellectual property sometimes wish to expressly retain the right to seek immediate remedies against unauthorized uses of their property by licensees. Among other things, licensors may insist on preserving their ability to obtain preliminary injunctive relief from national courts in the place where unauthorized use of their property occurs, rather than first proceeding through an

arbitration and then, some time later, enforcing the award locally. As discussed below, many institutional arbitration rules permit parties to seek injunctive relief in aid of arbitration from national courts, notwithstanding their agreement to arbitrate. (See pp. 112-114 below.) In many cases, this may offer sufficient procedural protection for intellectual property licensors.

If further flexibility to seek injunctive relief against unauthorized use of intellectual property is desired, however, the following language can be used:

Any violation of Article [X] hereof [relating to trademarks, patents] would cause irreparable injury to [Licensor]. [Licensor] may, in addition to any other rights under this Agreement and notwithstanding the arbitration agreement contained in this Article [XX], seek specific performance of Article [X] and any other available injunctive relief in any court of competent jurisdiction against any violation of such Article [X].

Such exceptions can also be graduated, depending upon the time at which they are invoked:

Prior to the appointment of the arbitrator(s), either party may seek provisional or interim measures from any court of competent jurisdiction. After the appointment of the arbitrator(s), the arbitrator(s) shall have exclusive power to consider and grant requests for provisional or interim measures.

In general, exceptions such as these may create more problems than benefits. They may conflict with the parties' chosen institutional rules, or applicable law, while making parallel proceedings more likely.

ii. Validity of Intellectual Property Rights

Alternatively, some intellectual property owners wish to preclude any arbitral consideration of disputes concerning the ownership or validity of their intellectual property. This is because of the perception that arbitrators may lack the expertise to efficiently resolve complex intellectual property disputes or that the absence of appellate review in such circumstances is inappropriate. Where this view is adopted, the following clause may be used as a model:

All disputes arising out of or relating to this Agreement, except "Licensed Mark Disputes" (as defined below), shall be finally resolved by arbitration in accordance with [identify institutional rules]. "Licensed Mark Disputes" shall constitute all disputes relating to the Licensor's ownership of, the validity of, or the registration of any Licensed Mark.

If such a provision is adopted, it should be combined with a forum selection clause applicable to the category of intellectual property disputes which is

CHAPTER FIVE

ENFORCING INTERNATIONAL ARBITRATION AGREEMENTS

After disputes have arisen, parties frequently disagree over the interpretation and enforceability of the arbitration agreements they have signed, just as disagreements arise concerning forum selection clauses. The rules governing the enforcement of international arbitration agreements differ, however, in vital respects from those governing forum selection clauses. In general, international arbitration agreements are more readily enforceable, and more expansively interpreted, than forum selection clauses. This is largely a consequence of a framework of "pro-arbitration" international conventions and national laws which apply to international arbitration agreements, but not to forum clauses.

A. Legal Framework for International Arbitration

1. The New York Convention

The centerpiece of the legal regime governing international arbitration agreements is the United Nations Convention on Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"). The Convention was drafted under U.N. auspices in 1958, and has been ratified by more than 140 countries, including virtually all significant trading states. A list of the Convention's parties is included in Appendix A.

The Convention was designed to enhance the enforceability of international arbitration agreements and awards. It is widely regarded as having contributed to the significant increase in the use and efficacy of international commercial arbitration in recent decades. The English language text of the New York Convention is reprinted in Appendix A.

In broad outline, the Convention requires national courts to: (a) recognize and enforce international arbitration agreements, subject to certain exceptions (Articles II(1), II(3)); and (b) recognize and enforce foreign arbitral awards, again

subject to specified exceptions (Articles III, V). As a consequence of these provisions, and of national legislation implementing them, international arbitration agreements and awards are typically subject to an avowedly pro-enforcement international legal regime. As detailed below, this specialized regime materially increases the likelihood that international arbitration agreements will be given effect in the courts of Contracting States.

2. *Other International Arbitration Conventions*

Although the New York Convention is the most important international treaty affecting commercial arbitration, there are other more specialized treaties that are also of importance.

a. *ICSID Convention*

The Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention") was drafted under U.N. and World Bank auspices in 1965. The ICSID Convention has been ratified by some 148 Contracting States. A list of the Convention's parties is included in Appendix G.

As discussed above (*see* p. 126 above) the Convention provides a specialized arbitration regime for "investment disputes" between states and foreign investors that agree to arbitrate pursuant to the Convention. Where an arbitration agreement or award is subject to the ICSID Convention, the Convention's regime overrides inconsistent provisions of other treaties, including the New York Convention.

The ICSID Convention contains a variety of unusual provisions. These include clauses regarding choice-of-law (providing, absent contrary choice, for application of the host state's laws and "such rules of international law as may be applicable"), an internal process for reviewing and potentially annulling arbitral awards, and theoretically direct enforceability of ICSID arbitral awards in member states' courts without judicial review. (*See* pp. 126-129 above.)

b. *Panama Convention*

The Inter-American Convention on International Commercial Arbitration ("Panama Convention"), drafted in 1975, has been ratified by the United States and 20 South and Central American states. The Convention was conceived at a time when long-standing distrust of arbitration made many South American states reluctant to ratify the New York Convention, and it was intended as a more acceptable regional alternative.

The interplay between the Panama Convention and the New York

Convention is complex. In acceding to the Convention, the United States adopted a reservation according to which, if an agreement or award was otherwise subject to both the Panama and New York Conventions, the former would control where a majority of the parties involved were citizens of states that ratified the Panama Convention; this rule can be altered by agreement among the parties. The New York Convention is the subject of a larger, more developed body of precedent than the Panama Convention, which generally counsels in favor of selecting it when a choice is available.

The Panama Convention largely parallels the New York Convention in its treatment of international arbitration agreements and awards. In addition, however, the Panama Convention also provides that, where the parties' arbitration agreement does not incorporate any specific institutional arbitration rules, then the rules of procedure of the "Inter-American Commercial Arbitration Commission" will govern, and that the Commission will act as appointing authority with respect to arbitrators. This can be useful in cases where the parties have not agreed upon an appointing authority, by reducing the likelihood of resort to local courts for the appointment of arbitrators.

c. *European Convention on International Commercial Arbitration*

The European Convention on International Commercial Arbitration ("European Convention") was drafted in 1961 and entered into force in October 1965. The European Convention has now been ratified by over 30 countries (the majority of which are in Europe), including a significant number of countries in Eastern Europe and the former Soviet Union. The European Convention imposes a variety of obligations upon signatory states, many of which mirror the New York Convention.

d. *Bilateral Investment Treaties*

Bilateral investment treaties ("BITs") became common during the 1980s and 1990s, as a means of encouraging capital investment in developing markets. Most capital-exporting states (including the United States and many EU states) have entered into numerous BITs with countries in developing regions. There are currently more than 2,500 BITs in force, with that number increasing annually.

In a typical BIT, the host state undertakes to accord fair and equitable treatment to investments; to treat investors and investments as favorably as investors and investments from the host state or any third state; to guarantee unrestricted transfer of investments and returns; and not to expropriate investment except for a public interest and on payment of prompt, adequate, and effective compensation.

In addition, the overwhelming majority of BITs provide for some form of arbitration. Under typical BITs, the host state ordinarily extends a generic invitation to all investors who are nationals of the other Contracting State to submit investment disputes to arbitration – even in the absence of an arbitration agreement in the contract(s) giving rise to the dispute. ICSID is the favored forum for this form of arbitration, although some BITs permit *ad hoc* arbitration under the UNCITRAL Rules or specified institutional arbitration rules on an equal footing with ICSID.

The possibility of “arbitration without privity” under a BIT is often an option to consider in international commercial disputes, as discussed above. For this reason, careful attention should be paid to whether disputes under a particular contract may fall within an applicable BIT and the effect that this may have upon the available dispute resolution procedures. A list of websites that contain links to applicable BITs is included in Appendix P.

3. National Arbitration Legislation

The existence of the nearly-universal New York Convention enhances the likelihood that international arbitration agreements and awards will be enforceable. At the end of the day, however, it may well be necessary in particular cases for either arbitration agreements or arbitral awards to be judicially enforced. In some countries, the New York Convention and other international treaties are directly applicable in national courts. In many nations, however, the New York Convention and other treaties are not automatically applicable in domestic courts, but must be implemented by national legislation.

Different nations have adopted widely differing types of arbitration legislation. Among other things, different countries apply varying standards to such matters as resolution of challenges to the arbitrators’ jurisdiction, judicial review of arbitral awards made within national territory, and the availability of effective procedural mechanisms to support enforcement efforts (*e.g.*, attachment). These differences can have substantial practical consequences for parties seeking to enforce an international arbitral award.

In recent years, there has been an increasing tendency towards uniformity of national arbitration statutes, in part by virtue of the UNCITRAL Model Law (discussed below). This tendency continues, and has reduced somewhat the disparities among the arbitration regimes of different states. Nonetheless, the practical realities of arbitration, and judicial responses to arbitration, in different countries still varies widely. As a practical matter, this has significant effects on the enforceability of arbitration agreements and awards in different jurisdictions.

4. UNCITRAL Model Law

More than 60 states, including many major trading states, have adopted national arbitration legislation based on the United Nations Commission on International Trade Law (“UNCITRAL”) Model Law on International Commercial Arbitration. UNCITRAL Model Law countries include Australia, Austria, Bahrain, Bermuda, Canada, Egypt, England (to an extent), Germany, Hong Kong, India, Mexico, Russia, Singapore and Spain. The UNCITRAL Model Law, which was first released in 1985, is reproduced in Appendix K. A number of provisions of the Model Law were revised in 2006; the 2006 Revisions, which have only recently started to be widely adopted, are at Appendix L. A list of countries that have adopted the UNCITRAL Model Law and its revisions is included in Appendix M. The purpose of the Model Law is to make international arbitration agreements and awards more readily, predictably, and uniformly enforceable. The Model Law also seeks to minimize the potential for judicial interference in international arbitral proceedings.

The UNCITRAL Model Law contains 36 articles, which deal comprehensively with the issues that arise in national courts in connection with international arbitration. Among other things, the Model Law contains provisions concerning the enforcement of arbitration agreements (Articles 7-9), appointment of and challenges to arbitrators (Articles 10-15), jurisdiction of arbitrators (Article 16), provisional measures (Article 17), conduct of the arbitral proceedings (including language, seat, and procedures) (Articles 18-26), evidence-taking and discovery (Article 27), applicable law (Article 28), awards (Articles 29-33), setting aside or annulling awards (Article 34), and recognition and enforcement of awards, including bases for non-recognition (Articles 35-36).

Under the Model Law, written international arbitration agreements are presumptively valid and enforceable, subject to limited, specified exceptions. Article 8 of the Model Law provides for the enforcement of valid arbitration agreements, regardless of the arbitral seat, by way of a dismissal or stay of national court litigation. The Model Law also adopts the separability doctrine (Article 16), and grants arbitrators authority (competence-competence) to consider their own jurisdiction (also in Article 16).

Article 5 of the UNCITRAL Model Law prescribes a principle of judicial non-intervention in arbitral proceedings. The Model Law also affirms the parties’ autonomy (subject to due process limits) with regard to the arbitral procedures (Article 19(1)) and, absent agreement between the parties, the tribunal’s authority to prescribe such procedures (Article 19(2)). The basic approach of the Model Law to the arbitral proceedings is to define a basic set of procedural rules which – subject to a very limited number of mandatory principles of fairness, due process and equality of treatment – the parties are free to alter by agreement. The Law also provides for judicial assistance to the

arbitral process in prescribed and limited respects, including provisional measures, constitution of a tribunal and evidence-taking (Articles 9, 11-13 and 27).

Article 34 of the Model Law mandates the presumptive validity of international arbitral awards, subject to a limited, exclusive list of grounds for annulment of awards in the arbitral seat; these grounds parallel those available under the New York Convention for non-recognition of an award (*i.e.*, lack or excess of jurisdiction, non-compliance with arbitration agreement, due process violations, public policy, and non-arbitrability). In a parallel provision, Articles 35 and 36 of the Model Law require the recognition and enforcement of foreign awards (made in arbitral seats located outside the recognizing state), again on terms identical to those prescribed in the Convention.

The 2006 amendments to the Model Law made only modest changes. These included a revised (and significantly reduced) form requirement for arbitration agreements (in Article 7), revised provisions regarding interim measures (in Article 17), including to allow a party to seek orders from the tribunal *ex parte*, and a limited number of additional provisions (including technical amendments and statements of principle regarding interpretation of the Model Law).

B. Interpretation of International Arbitration Agreements

Some national courts adopt a “pro-arbitration” approach to the interpretation of the scope of arbitration agreements. For example, U.S. courts apply a strong presumption favoring the interpretation of arbitration agreements to extend to disputed issues. In case of doubt regarding the scope of an arbitration clause, and its coverage of particular disputes, courts must resolve the issue in favor of arbitration. Swiss, English, German, and some other national courts also interpret international arbitration agreements relatively expansively. Although other national courts approach the task of interpreting an arbitration agreement as one of objectively ascertaining the parties’ intent, as a practical matter doubts about the scope of a concededly valid agreement are often resolved in favor of arbitration.

C. Separability of International Arbitration Agreements

In many nations, including all major trading states, an arbitration agreement is presumptively “separable” from the underlying contract in which it appears. National arbitration legislation often expressly so provides. (*See* UNCITRAL Model Law Article 16; Swiss Law on Private International Law Article 178(3); U.S. Federal Arbitration Act §2; German Civil Procedure Act Article 1040(1)).

Most leading institutional arbitration rules do so as well. (*See* 2010 UNCITRAL Arbitration Rules Article 23; 2012 ICC Rules Article 6(9); LCIA Rules Article 23(1)).

The separability presumption has important practical consequences. It means that challenges to the parties’ underlying contract will generally not be regarded as affecting or vitiating the parties’ “separate” arbitration agreement. Specifically, if a party alleges that the parties’ underlying contract was fraudulently induced or is invalid for lack of consideration, this will not provide a legal basis for a refusal to arbitrate. The theory is that the arbitration clause is a separate and independent agreement that exists even if the underlying contract is invalid.

National courts recognize a variety of exceptions to the separability presumption, which can be important in practice. Among other things, the separability presumption may not apply where the parties have agreed to the contrary or where the very existence of the underlying contract is challenged. These exceptions can raise complex issues under applicable national law.

Another consequence of the separability presumption is that a different law may apply to the parties’ arbitration agreement than to their underlying contract. This has been relied upon by some national courts (*e.g.*, French and U.S.) to embrace avowedly “international” rules of substantive law that significantly limit the grounds for challenging the validity of international arbitration agreements. In other jurisdictions, the separability presumption can give rise to complex choice-of-law issues (whose practical importance should ordinarily be limited by the trend towards uniform, pro-enforcement national arbitration laws).

D. Presumptive Enforceability of International Arbitration Agreements

One of the central purposes of the New York Convention was to make international arbitration agreements more readily enforceable. Article II of the Convention provides:

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration. ...
3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

reliability for independent judgment to be questioned by a party. I acknowledge that by signing this declaration, I assume a continuing obligation promptly to notify the Secretary-General of the Centre of any such relationship or circumstance that subsequently arises during this proceeding."

Any arbitrator failing to sign a declaration by the end of the first session of the Tribunal shall be deemed to have resigned.

Rule 7
Replacement of Arbitrators

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator. The procedure of such replacement shall be in accordance with Rules 1, 5 and 6.

Rule 8
Incapacity or Resignation of Arbitrators

- (1) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Rule 9 shall apply.
- (2) An arbitrator may resign by submitting his resignation to the other members of the Tribunal and the Secretary-General. If the arbitrator was appointed by one of the parties, the Tribunal shall promptly consider the reasons for his resignation and decide whether it consents thereto. The Tribunal shall promptly notify the Secretary-General of its decision.

Rule 9
Disqualification of Arbitrators

- (1) A party proposing the disqualification of an arbitrator pursuant to Article 57 of the Convention shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.
- (2) The Secretary-General shall forthwith:
 - (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman of the Administrative Council; and
 - (b) notify the other party of the proposal.
- (3) The arbitrator to whom the proposal relates may, without delay, furnish explanations to the Tribunal or the Chairman, as the case may be.
- (4) Unless the proposal relates to a majority of the members of the Tribunal, the other members shall promptly consider and vote on the proposal in the absence of the arbitrator concerned. If those members are equally divided, they shall, through the Secretary-General, promptly notify the Chairman of the proposal, of any explanation furnished by the arbitrator concerned and of their failure to reach a decision.
- (5) Whenever the Chairman has to decide on a proposal to disqualify an arbitrator, he shall use his best efforts to take that decision within 30 days after he has received the proposal.

- (6) The proceeding shall be suspended until a decision has been taken on the proposal.

Rule 10
Procedure during a Vacancy on the Tribunal

- (1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman of the Administrative Council of the disqualification, death, incapacity or resignation of an arbitrator and of the consent, if any, of the Tribunal to a resignation.
- (2) Upon the notification by the Secretary-General of a vacancy on the Tribunal, the proceeding shall be or remain suspended until the vacancy has been filled.

Rule 11
Filling Vacancies on the Tribunal

- (1) Except as provided in paragraph (2), a vacancy resulting from the disqualification, death, incapacity or resignation of an arbitrator shall be promptly filled by the same method by which his appointment had been made.
- (2) In addition to filling vacancies relating to arbitrators appointed by him, the Chairman of the Administrative Council shall appoint a person from the Panel of Arbitrators:
 - (a) to fill a vacancy caused by the resignation, without the consent of the Tribunal, of an arbitrator appointed by a party; or
 - (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.
- (3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, *mutatis mutandis*, 6(2).

Rule 12
Resumption of Proceeding after Filling a Vacancy

As soon as a vacancy on the Tribunal has been filled, the proceeding shall continue from the point it had reached at the time the vacancy occurred. The newly appointed arbitrator may, however, require that the oral procedure be recommenced, if this had already been started.

CHAPTER II
WORKING OF THE TRIBUNAL

Rule 13
Sessions of the Tribunal

- (1) The Tribunal shall hold its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretary-General. If upon its constitution the Tribunal has no President because the parties have agreed that the President shall be elected by its members, the Secretary-General shall fix the dates of that session. In both cases, the parties shall be consulted as far as possible.
- (2) The dates of subsequent sessions shall be determined by the Tribunal, after consultation with

the Secretary-General and with the parties as far as possible.

(3) The Tribunal shall meet at the seat of the Centre or at such other place as may have been agreed by the parties in accordance with Article 63 of the Convention. If the parties agree that the proceeding shall be held at a place other than the Centre or an institution with which the Centre has made the necessary arrangements, they shall consult with the Secretary-General and request the approval of the Tribunal. Failing such approval, the Tribunal shall meet at the seat of the Centre.

(4) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

Rule 14
Sittings of the Tribunal

- (1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.
- (2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.
- (3) The President of the Tribunal shall fix the date and hour of its sittings.

Rule 15
Deliberations of the Tribunal

- (1) The deliberations of the Tribunal shall take place in private and remain secret.
- (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.

Rule 16
Decisions of the Tribunal

- (1) Decisions of the Tribunal shall be taken by a majority of the votes of all its members. Abstention shall count as a negative vote.
- (2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decision by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

Rule 17
Incapacity of the President

If at any time the President of the Tribunal should be unable to act, his functions shall be performed by one of the other members of the Tribunal, acting in the order in which the Secretary-General had received the notice of their acceptance of their appointment to the Tribunal.

Rule 18
Representation of the Parties

- (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretary-General, who shall promptly inform the Tribunal and the other party.

- (2) For the purposes of these Rules, the expression “party” includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

CHAPTER III
GENERAL PROCEDURAL PROVISIONS

Rule 19
Procedural Orders

The Tribunal shall make the orders required for the conduct of the proceeding.

Rule 20
Preliminary Procedural Consultation

- (1) As early as possible after the constitution of a Tribunal, its President shall endeavor to ascertain the views of the parties regarding questions of procedure. For this purpose he may request the parties to meet him. He shall, in particular, seek their views on the following matters:

- (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
- (b) the language or languages to be used in the proceeding;
- (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
- (d) the number of copies desired by each party of instruments filed by the other;
- (e) dispensing with the written or the oral procedure;
- (f) the manner in which the cost of the proceeding is to be apportioned; and
- (g) the manner in which the record of the hearings shall be kept.

- (2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, except as otherwise provided in the Convention or the Administrative and Financial Regulations.

Rule 21
Pre-Hearing Conference

- (1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tribunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

- (2) At the request of the parties, a pre-hearing conference between the Tribunal and the parties, duly represented by their authorized representatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

Rule 22
Procedural Languages

(1) The parties may agree on the use of one or two languages to be used in the proceeding, provided, that, if they agree on any language that is not an official language of the Centre, the Tribunal, after consultation with the Secretary-General, gives its approval. If the parties do not agree on any such procedural language, each of them may select one of the official languages (*i.e.*, English, French and Spanish) for this purpose.

(2) If two procedural languages are selected by the parties, any instrument may be filed in either language. Either language may be used at the hearings, subject, if the Tribunal so requires, to translation and interpretation. The orders and the award of the Tribunal shall be rendered and the record kept in both procedural languages, both versions being equally authentic.

Rule 23
Copies of Instruments

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretary-General, every request, pleading, application, written observation, supporting documentation, if any, or other instrument shall be filed in the form of a signed original accompanied by the following number of additional copies:

- (a) before the number of members of the Tribunal has been determined: five;
- (b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Rule 24
Supporting Documentation

Supporting documentation shall ordinarily be filed together with the instrument to which it relates, and in any case within the time limit fixed for the filing of such instrument.

Rule 25
Correction of Errors

An accidental error in any instrument or supporting document may, with the consent of the other party or by leave of the Tribunal, be corrected at any time before the award is rendered.

Rule 26
Time Limits

- (1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.
- (2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.
- (3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

Rule 27
Waiver

A party which knows or should have known that a provision of the Administrative and Financial Regulations, of these Rules, of any other rules or agreement applicable to the proceeding, or of an order of the Tribunal has not been complied with and which fails to state promptly its objections thereto, shall be deemed—subject to Article 45 of the Convention—to have waived its right to object.

Rule 28
Cost of Proceeding

(1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:

- (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
- (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

(2) Promptly after the closure of the proceeding, each party shall submit to the Tribunal a statement of costs reasonably incurred or borne by it in the proceeding and the Secretary-General shall submit to the Tribunal an account of all amounts paid by each party to the Centre and of all costs incurred by the Centre for the proceeding. The Tribunal may, before the award has been rendered, request the parties and the Secretary-General to provide additional information concerning the cost of the proceeding.

CHAPTER IV
WRITTEN AND ORAL PROCEDURES

Rule 29
Normal Procedures

Except if the parties otherwise agree, the proceeding shall comprise two distinct phases: a written procedure followed by an oral one.

Rule 30
Transmission of the Request

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member a copy of the request by which the proceeding was initiated, of the supporting documentation, of the notice of registration and of any communication received from either party in response thereto.

Rule 31
The Written Procedure

(1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:

- (a) a memorial by the requesting party;
- (b) a counter-memorial by the other party;

and, if the parties so agree or the Tribunal deems it necessary:

- (c) a reply by the requesting party; and
- (d) a rejoinder by the other party.

(2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however, the parties may instead agree that one of them shall, for the purposes of paragraph (1), be considered as the requesting party.

(3) A memorial shall contain: a statement of the relevant facts; a statement of law; and the submissions. A counter-memorial, reply or rejoinder shall contain an admission or denial of the facts stated in the last previous pleading; any additional facts, if necessary; observations concerning the statement of law in the last previous pleading; a statement of law in answer thereto; and the submissions.

Rule 32
The Oral Procedure

(1) The oral procedure shall consist of the hearing by the Tribunal of the parties, their agents, counsel and advocates, and of witnesses and experts.

(2) Unless either party objects, the Tribunal, after consultation with the Secretary-General, may allow other persons, besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal, to attend or observe all or part of the hearing, subject to appropriate logistical arrangements. The Tribunal shall for such cases establish procedures for the protection of proprietary or privileged information.

(3) The members of the Tribunal may, during the hearings, put questions to the parties, their agents, counsel and advocates, and ask them for explanations.

Rule 33
Marshalling of Evidence

Without prejudice to the rules concerning the production of documents, each party shall, within time limits fixed by the Tribunal, communicate to the Secretary-General, for transmission to the Tribunal and the other party, precise information regarding the evidence which it intends to produce and that which it intends to request the Tribunal to call for, together with an indication of the points to which such evidence will be directed.

Rule 34
Evidence: General Principles

(1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.

(2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

- (a) call upon the parties to produce documents, witnesses and experts; and
- (b) visit any place connected with the dispute or conduct inquiries there.

(3) The parties shall cooperate with the Tribunal in the production of the evidence and in the other measures provided for in paragraph (2). The Tribunal shall take formal note of the failure of a party to comply with its obligations under this paragraph and of any reasons given for such failure.

(4) Expenses incurred in producing evidence and in taking other measures in accordance with paragraph (2) shall be deemed to constitute part of the expenses incurred by the parties within the meaning of Article 61(2) of the Convention.

Rule 35
Examination of Witnesses and Experts

(1) Witnesses and experts shall be examined before the Tribunal by the parties under the control of its President. Questions may also be put to them by any member of the Tribunal.

(2) Each witness shall make the following declaration before giving his evidence:

“I solemnly declare upon my honour and conscience that I shall speak the truth, the whole truth and nothing but the truth.”

(3) Each expert shall make the following declaration before making his statement:

“I solemnly declare upon my honour and conscience that my statement will be in accordance with my sincere belief.”

Rule 36
Witnesses and Experts: Special Rules

Notwithstanding Rule 35 the Tribunal may:

- (a) admit evidence given by a witness or expert in a written deposition; and
- (b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the subject of the examination, the time limit, the procedure to be followed and other particulars. The parties may participate in the examination.

Rule 37
**Visits and Inquiries;
Submissions of Non-disputing Parties**

(1) If the Tribunal considers it necessary to visit any place connected with the dispute or to conduct an inquiry there, it shall make an order to this effect. The order shall define the scope of the visit or the subject of the inquiry, the time limit, the procedure to be followed and other particulars. The parties may participate in any visit or inquiry.

(2) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Rule called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a

filing, the Tribunal shall consider, among other things, the extent to which:

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

The Tribunal shall ensure that the non-disputing party submission does not disrupt the proceeding or unduly burden or unfairly prejudice either party, and that both parties are given an opportunity to present their observations on the non-disputing party submission.

Rule 38
Closure of the Proceeding

- (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
- (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

CHAPTER V
PARTICULAR PROCEDURES

Rule 39
Provisional Measures

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.
- (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.
- (6) Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the

agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.

Rule 40
Ancillary Claims

- (1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim arising directly out of the subject-matter of the dispute, provided that such ancillary claim is within the scope of the consent of the parties and is otherwise within the jurisdiction of the Centre.
- (2) An incidental or additional claim shall be presented not later than in the reply and a counter-claim no later than in the counter-memorial, unless the Tribunal, upon justification by the party presenting the ancillary claim and upon considering any objection of the other party, authorizes the presentation of the claim at a later stage in the proceeding.
- (3) The Tribunal shall fix a time limit within which the party against which an ancillary claim is presented may file its observations thereon.

Rule 41
Preliminary Objections

- (1) Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Centre or, for other reasons, is not within the competence of the Tribunal shall be made as early as possible. A party shall file the objection with the Secretary-General no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.
- (2) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute or any ancillary claim before it is within the jurisdiction of the Centre and within its own competence.
- (3) Upon the formal raising of an objection relating to the dispute, the Tribunal may decide to suspend the proceeding on the merits. The President of the Tribunal, after consultation with its other members, shall fix a time limit within which the parties may file observations on the objection.
- (4) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.
- (5) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (1) or to object, in the course of the proceeding, that a claim lacks legal merit.

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

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

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

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

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

b. if the court finds that:

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

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

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

APPENDIX L – 2006 Revisions to UNCITRAL Model Law

UNCITRAL Model Law on International Commercial Arbitration

Amendments by the United Nations Commission on International Trade Law on 7 July 2006.

Article 1. Scope of application¹

1. This Law applies to international commercial² arbitration, subject to any agreement in force between this State and any other State or States.
2. The provisions of this Law, except articles 8, 9, 17H, 17I, 17J, 35 and 36, apply only if the place of arbitration is in the territory of this State.

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

...

Article 2 A. International origin and general principles

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

1. In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
2. Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.

...

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

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

CHAPTER II. ARBITRATION AGREEMENT

Option I

Article 7.

Definition and form of arbitration agreement

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

1. "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
2. The arbitration agreement shall be in writing.
3. An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
4. The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
5. Furthermore, an arbitration agreement is in writing if it is contained in an exchange of statements of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.
6. The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

Option II

Article 7. Definition of arbitration agreement

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

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

CHAPTER IV A. INTERIM MEASURES AND PRELIMINARY ORDERS

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

Section 1. Interim measures

Article 17. Power of arbitral tribunal to order interim measures

1. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.
2. An interim measure is any temporary measure, whether in the form of an award or in another form, but which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:
 - (a) Maintain or restore the status quo pending determination of the dispute;
 - (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
 - (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
 - (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

Article 17 A. Conditions for granting interim measures

1. The party requesting an interim measure under article 17(2)(a), (b) and (c) shall satisfy the arbitral tribunal that:
 - (a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and
 - (b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.
2. With regard to a request for an interim measure under article 17(2)(d), the requirements in paragraphs (1)(a) and (b) of this article shall apply only to the extent the arbitral tribunal considers appropriate.

Section 2. Preliminary Orders

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

1. Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.
2. The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.
3. The conditions defined under article 17A apply to any preliminary order, provided that the harm to be assessed under article 17A(1)(a), is the harm likely to result from the order being granted or not.

Article 17 C. Specific regime for preliminary orders

1. Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.
2. At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.
3. The arbitral tribunal shall decide promptly on any objection to the preliminary order.
4. A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.
5. A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

Section 3. Provisions applicable to interim measures and preliminary orders

Article 17 D. Modification, suspension, termination

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

Article 17 E. Provision of security

1. The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.
2. The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate or unnecessary to do so.

Article 17 F. Disclosure

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

Article 17 G. Costs and damages

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

Section 4. Recognition and enforcement of interim measures

Article 17 H. Recognition and enforcement

1. An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court, irrespective of the country in which it was issued, subject to the provisions of article 17 I.
2. The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
3. The court of the State where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

*Article 17 I. Grounds for refusing recognition or enforcement*³

1. Recognition or enforcement of an interim measure may be refused only:
 - (a) At the request of the party against whom it is invoked if the court is satisfied that:
 - (i) Such refusal is warranted on the grounds set forth in article 36(1)(a)(i), (ii), (iii) or (iv); or
 - (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the State in which the arbitration takes place or under the law of which that interim measure was granted; or
 - (b) If the court finds that:
 - (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or
 - (ii) Any of the grounds set forth in article 36(1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.
2. Any determination made by the court on any ground in paragraph (1) of this article shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

Section 5. Court-ordered interim measures

Article 17 J. Court-ordered interim measures

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

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

...

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

...

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

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

⁴ The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonization to be achieved by the model law if a State retained even less onerous conditions.