

# **Michigan Law Revision Commission**

**TWENTY-SIXTH ANNUAL REPORT  
1991**

**MICHIGAN  
LAW REVISION COMMISSION**

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ANTHONY DEREZINSKI, *Vice Chairman*  
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MICHIGAN LAW REVISION COMMISSION  
Twenty-Sixth Annual Report to the Legislature

To the Members of the Michigan Legislature:

The Michigan Law Revision Commission hereby presents its twenty-sixth annual report pursuant to Section 403 of Act No. 268 of the Public Acts of 1986, MCL 4.1403.

The Commission, created by Section 401 of that Act, MCL 4.1401, consists of: two members of the Senate, with one from the majority and one from the minority party, appointed by the Majority Leader of the Senate; two members of the House of Representatives, with one from the majority and one from the minority party, appointed by the Speaker of the House; the Director of the Legislative Service Bureau or his or her designee, who serves as an ex-officio member; and four members appointed by the Legislative Council. Terms of the members appointed by the Legislative Council are staggered. The Legislative Council designates the Chairman of the Commission. The Vice Chairman is elected by the Commission.

Membership

The legislative members of the Commission during 1991 were Senator David Honigman of West Bloomfield; Senator Virgil Clark Smith of Detroit; Representative Perry Bullard of Ann Arbor; and Representative Michael Nye of Litchfield. As Director of the Legislative Service Bureau, Elliott Smith was the ex-officio Commission member. The appointed members of the Commission were Anthony Derezinski, David Lebenbom,



Richard McLellan, and, until his death in 1991, Richard C. Van Dusen. Maura Corrigan was appointed to the balance of Mr. Van Dusen's term on November 13, 1991. Mr. McLellan served as Chairman. Mr. Derezinski served as Vice Chairman. Professor Jerold Israel of the University of Michigan Law School served as Executive Secretary. Gary Gulliver served as the liaison between the Legislative Service Bureau and the Commission. Brief biographies of the 1991 Commission members and staff are located at the end of this report.

### The Commission's Work in 1991

The Commission is charged by statute with the following duties:

1. To examine the common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and to recommend needed reform.
2. To receive and consider proposed changes in law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association, and other learned bodies.
3. To receive and consider suggestions from justices, judges, legislators and other public officials, lawyers and the public generally as to defects and anachronisms in the law.
4. To recommend, such changes in the law as it deems necessary in order to modify or eliminate antiquated and inequitable rules of law, and to bring the law of this state, civil and criminal, into harmony with modern conditions.
5. To encourage the faculty and students of the law schools of this state to participate in the work of the Commission.
6. To cooperate with the law revision commissions of other states and Canadian provinces.
7. To issue an annual report.

The problems to which the Commission directs its studies are largely identified through an examination by the Commission members and the Executive Secretary of the statutes and case law of Michigan, the reports of learned bodies and commissions from other jurisdictions, and legal literature. Other subjects are brought to the attention of the Commission by various organizations and individuals, including members of the Legislature.

The Commission's efforts during the past year have been devoted primarily to three areas. First, Commission members provided information to legislative committees relating to various proposals previously recommended by the Commission. Second, the Commission examined suggested legislation proposed by various groups involved in law revision activity. These proposals included legislation advanced by the Council of State Governments, the National Conference of Commissioners on Uniform State Laws, and the law revision commissions of various jurisdictions within and without the United States (e.g., California, New York, and British Columbia). Finally, the Commission considered various problems relating to special aspects of current Michigan law suggested by its own review of Michigan decisions and the recommendations of others.

As in previous years, the Commission studied various proposals that did not lead to legislative recommendations. In the case of certain uniform or model acts, the Commission found that the subjects treated had been considered by the Michigan legislature in recent legislation. In other instances, uniform or model acts were not pursued because similar legislation was currently pending before the Legislature upon the initiation of legislators having a special interest in the particular subject.

Two of the topics studied by the Commission have resulted in specific legislative recommendations. Those are:

- (1) Amendment of the Uniform Contribution Among Tortfeasors Act

- (2) International Commercial Arbitration

## Proposals for Legislative Consideration in 1992

In addition to its new recommendations, the Commission recommends favorable consideration of the following recommendations of past years upon which no final action was taken in 1991:

(1) Uniform Transfers to Minors Act, 1984 Annual Report, page 17.

(2) Uniform Law on Notarial Acts, 1985 Annual Report, page 17.

(3) Uniform Determination of Death Act, 1987 Annual Report, page 13. SB 304 and HB 5150.

(4) Uniform Fraudulent Transfer Act, 1988 Annual Report, page 13. HB 5317.

(5) Consolidated Receivership Statute, 1988 Annual Report, page 72.

(6) Condemnation Provisions Inconsistent with the Uniform Condemnation Procedures Act, 1989 Annual Report, page 15.

(7) Proposed Administrative Procedures Act, 1989 Annual Report, page 27. HB 5136.

(8) Judicial Review of Administrative Agency Action, 1990 Annual Report, page 19.

(9) Amendment of Uniform Statutory Rule Against Perpetuities, 1990 Annual Report, page 141.

## Current Study Agenda

Topics on the current study agenda of the Commission are:

- (1) Assumed Names (Statewide Registration by Individuals and Partnership)
- (2) Usury Statutes
- (3) Declaratory Judgment in Libel Law
- (4) Medical Practice Privileges in Hospitals (Procedures for Granting and Withdrawal)
- (5) Health Care Consent for Minors
- (6) Health Care Information, Access and Privacy
- (7) Public Officials — Conflict of Interest and Misuse of Office
- (8) Reproduction Technology
- (9) Elimination of References to Abolished Courts
- (10) Uniform Anatomical Gift Act
- (11) Uniform Premarital Agreement Act
- (12) Uniform Trade Secrets Act
- (13) Uniform Real Estate Tax Apportionment Act
- (14) Uniform Statutory Power of Attorney
- (15) Uniform Putative and Unknown Fathers Act
- (16) Uniform Custodial Trust Act
- (17) Uniform Commercial Code — Proposed Amendments for Article 6
- (18) Laws Addressing the Powers of County Executives
- (19) Implementation of Report on Judicial Review of Administrative Action
- (20) Tortfeasor Contribution under MCL § 2925a(5)
- (21) Conference Call Participation in Public Meetings

The Commission continues to operate with its sole staff member, the part-time Executive Secretary, whose offices are in the University of Michigan Law School, Ann Arbor, Michigan 48109-1215. By using faculty members at the several Michigan law schools as consultants and law students as researchers, the Commission has been able to operate at a budget substantially lower than that of similar commissions in other jurisdictions.

The Legislative Service Bureau, through Mr. Gary Gulliver, its Director of Legal Research, has generously assisted the Commission in the development of its legislative program. The Director of the Legislative Service Bureau continues to handle the fiscal operations of the Commission under procedures established by the Legislative Council.

## Prior Enactments

The following Acts have been adopted to date pursuant to recommendations of the Commission and in some cases amendments thereto by the Legislature:

### 1967 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Original Jurisdiction of the Court of Appeals	1966, p. 43	65
Corporation Use of Assumed Names	1966, p. 36	138
Interstate and International Judicial Procedures	1966, p. 25	178
Stockholder Action Without Meeting	1966, p. 41	201
Powers of Appointment	1966, p. 11	224
Dead Man's Statute	1966, p. 29	263

### 1968 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Possibilities of Reverter and Rights of Entry	1966, p. 22	13
Stockholder Approval of Mortgage of Corporate Assets	1966, p. 39	287
Corporations as Partners	1966, p. 34	288
Guardians Ad Litem	1967, p. 53	292
Emancipation of Minors	1967, p. 50	293
Jury Selection	1967, p. 23	326

### 1969 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Access to Adjoining Property	1968, p. 19	55
Recognition of Acknowledgments	1968, p. 64	57
Dead Man's Statute Amendment	1966, p. 29	63
Notice of Change in Tax Assessments	1968, p. 30	115
Antenuptial and Marital Agreements	1968, p. 27	139
Anatomical Gifts	1968, p. 39	189
Administrative Procedures Act	1967, p. 11	306
Venue for Civil Actions	1968, p. 17	333

### 1970 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Land Contract Foreclosures	1967, p. 55	86
Artist-Art Dealer Relationships	1969, p. 41	90
Minor Students' Capacity to Borrow Act	1969, p. 46	107
Warranties in Sales of Art	1969, p. 43	121
Appeals from Probate Court	1968, p. 32	143
Circuit Court Commissioner Powers of Magistrates	1969, p. 57	238

### 1971 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Revision of Grounds for Divorce	1970, p. 7	75

Civil Verdicts by 5 of 6 Jurors In Retained Municipal Courts	1970, p. 40	158
Amendment of Uniform Anatomical Gift Act	1970, p. 45	186

#### 1972 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Summary Proceedings for Possession of Premises	1970, p. 16	120
Interest on Judgments	1969, p. 59	135
Business Corporations	1970, Supp.	284
Constitutional Amendment re Juries of 12	1969, p. 60	HJR "M"

#### 1973 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Execution and Levy in Proceedings Supplementary to Judgment	1970, p. 51	96
Technical Amendments to Business Corporation Act	1973, p. 8	98

#### 1974 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Venue in Civil Actions Against Non-Resident Corporations	1971, p. 63	52

Choice of Forum	1972, p. 60	88
Extension of Personal Jurisdiction in Domestic Relations Cases	1972, p. 53	90
Technical Amendments to the Michigan General Corporation Act	1973, p. 37	140
Technical Amendments to the Revised Judicature Act	1971, p. 7	297
Technical Amendments to the Business Corporation Act	1974, p. 30	303
Amendment to Dead Man's Statute	1972, p. 70	305
Attachment and Collection Fees	1968, p. 22	306
Contribution Among Joint Tortfeasors	1967, p. 57	318
District Court Venue in Civil Actions	1970, p. 42	319
Due Process in Seizure of a Debtor's Property (Elimination of Pre- judgment Garnishment)	1972, p. 7	371

### 1975 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Hit-Run Offenses	1973, p. 54	170
Equalization of Income Rights of Husband and Wife in Entirety Property	1974, p. 12	288
Disposition of Community Property Rights at Death	1973, p. 50	289
Insurance Policies in Lieu of Bond	1969, p. 54	290
Child Custody Jurisdiction	1969, p. 23	297



### 1976 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Due Process in Seizure of a Debtor's Property (Replevin Actions)	1972, p. 7	79
Qualifications of Fiduciaries	1966, p. 32	262
Revision of Revised Judicature Act Venue Provisions	1975, p. 20	375
Durable Family Power of Attorney	1975, p. 18	376

### 1978 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Juvenile Obscenity	1975, p. 133	33
Multiple Party Deposits	1966, p. 18	53
Amendment of Telephone and Messenger Service Company Act	1973, p. 48	63
Elimination of References to Abolished Courts:		
a. Township By-Laws	1976, p. 74	103
b. Public Recreation Hall Licenses	1976, p. 74	138
c. Village Ordinances	1976, p. 74	189
d. Home Rule Village Ordinances	1976, p. 74	190
e. Home Rule Cities	1976, p. 74	191
f. Preservation of Property Act	1976, p. 74	237
g. Bureau of Criminal Identification	1976, p. 74	538
h. Fourth Class Cities	1976, p. 74	539
i. Election Law Amendments	1976, p. 74	540

j. Charter Townships	1976, p. 74	553
Plats	1976, p. 58	367
Amendments to Article 9 of the Uniform Commercial Code	1975, Supp.	369

#### 1980 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Condemnation Procedures	1968, p. 8	87
Technical Revision of the Code of Criminal Procedure	1978, p. 37	506

#### 1981 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of References to the Justice of the Peace: Sheriff's Service of Process	1976, p. 74	148
Court of Appeals Jurisdiction	1980, p. 34	206

#### 1982 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Limited Partnerships	1980, p. 40	213
Technical Amendments to the Business Corporation Act	1980, p. 8	407
Interest on Probate Court Judgments	1980, p. 37	412

### 1983 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of References to Abolished Courts:		
Police Courts and County Board of Auditors	1979, p. 9	87
Federal Lien Registration	1979, p. 26	102

### 1984 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Legislative Privilege:		
a. Immunity in Civil Actions	1983, p. 14	27
b. Limits of Immunity in Contested Cases	1983, p. 14	28
c. Amendments to R.J.A. for Legislative Immunity	1983, p. 14	29
Disclosure of Treatment Under the Psychologist/Psychiatrist- Patient Privilege	1978, p. 28	362

### 1986 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Amendments to the Uniform Limited Partnership Act	1983, p. 9	100

### 1987 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Amendments to Article 8 of the Uniform Commercial Code	1984, p. 97	16
Disclosure in the Sale of Visual Art Objects Produced in Multiples	1981, p. 57	40, 53, 54

### 1988 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Repeal of M.C.L. §764.9	1982, p. 9	113
Statutory Rule Against Perpetuities	1986, p. 16	417, 418
Transboundary Pollution Reciprocal Access to Courts	1984, p. 71	517

### 1990 Legislative Session

<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of Reference to Abolished Courts:		
a. Procedures of Justice Courts and Municipal Courts	1985, p. 12; 1986, p. 125	217
b. Noxious Weeds	1986, p. 128; 1988, p. 154	218
c. Criminal Procedure	1975, p. 24	219
d. Presumption Concerning Married Women	1988, p. 157	220
e. Mackinac Island State Park	1986, p. 138; 1988, p. 154	221
f. Relief and Support of		

the Poor	1986, p. 139; 1988, p. 154	222
g. Legal Work Day	1988, p. 154	223
h. Damage to Property by Floating Lumber	1988, p. 155	224

### 1991 Legislative Session

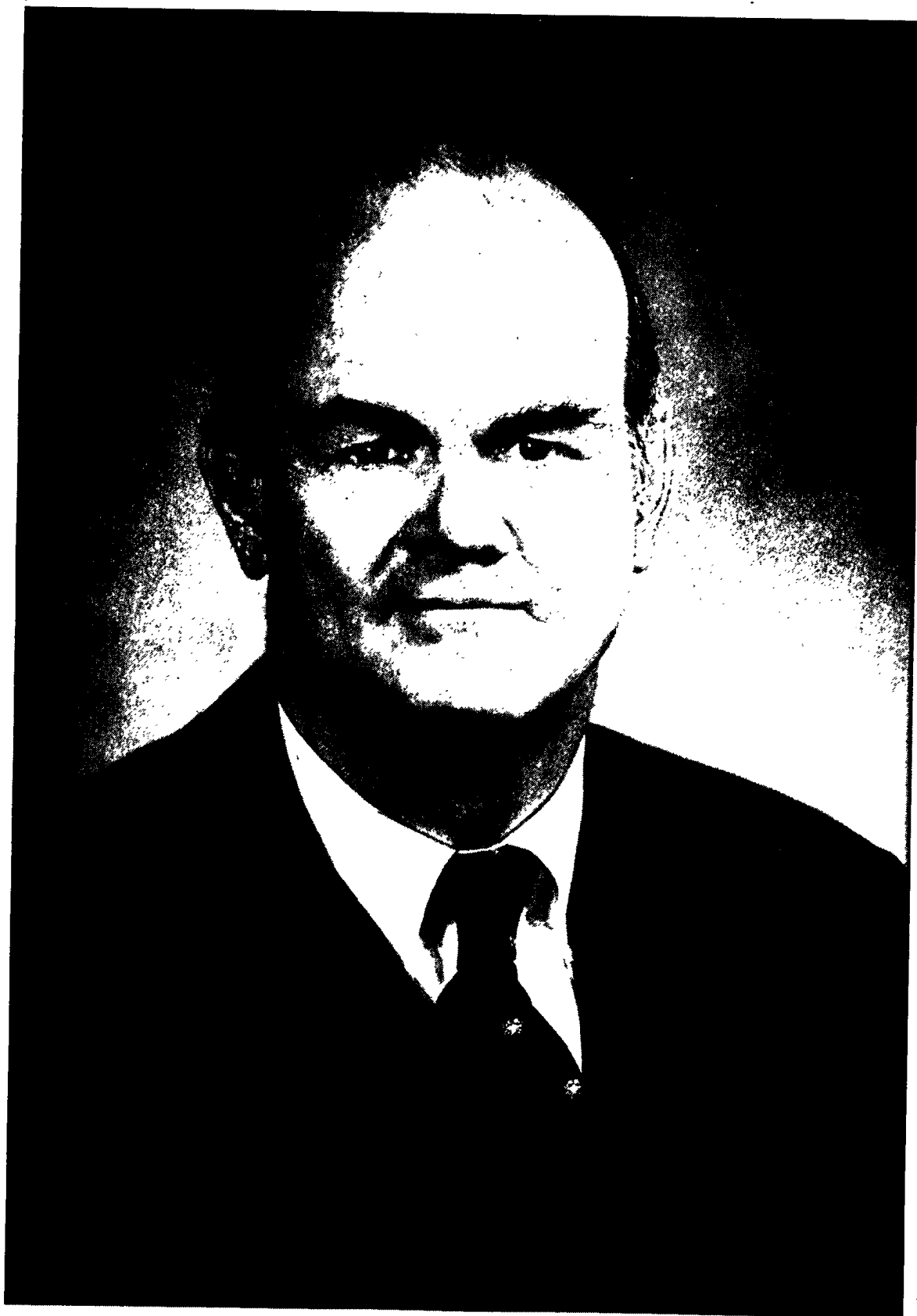
<u>Subject</u>	<u>Commission Report</u>	<u>Act No.</u>
Elimination of Reference to Abolished Courts:		
a. Land Contracts	1988, p. 157	140
b. Insurance	1988, p. 156	141
c. Animals	1988, p. 155	142
d. Trains	1986, pp. 153, 155; 1987, p. 80; 1988, p. 152	143
e. Appeals	1985, p. 12	144
f. Crimes	1988, p. 153	145
g. Library Corporations	1988, p. 155	146
h. Oaths	1988, p. 156	147
i. Agricultural Products	1986, p. 134; 1988, p. 151	148
j. Deeds	1988, p. 156	149
k. Corporations	1989, p. 4; 1990, p. 4	150
l. Summer Resort Corporations	1986, p. 154; 1988, p. 155	151
m. Association Land	1986, p. 154; 1988, p. 155	152
n. Burial Grounds	1988, p. 156	153
o. Posters, Signs, and Placards	1988, p. 157	154
p. Railroad Construction	1986, p. 157; 1988, p. 156	155
q. Work Farms	1988, p. 157	156
r. Recording Duties	1988, p. 154	157
s. Liens	1986, pp. 141, 151, 158; 1988, p. 152	159

The Commission continues to welcome suggestions for improvement of its program and proposals.

Respectfully submitted,

Richard D. McLellan, Chairman  
Anthony Derezinski, Vice Chairman  
David Lebenbom  
Maura Corrigan  
Sen. David Honigman  
Sen. Virgil Clark Smith  
Rep. Perry Bullard  
Rep. Michael Nye  
Elliott Smith

Date: February 13, 1992



## A RESOLUTION HONORING MR. RICHARD VAN DUSEN

Whereas, The members of the Michigan Law Revision Commission, as well as citizens throughout Michigan, were deeply saddened to learn of the passing of Mr. Richard C. Van Dusen, a member of this commission since 1977. Throughout his lifetime of service, Dick Van Dusen touched and enriched many lives as a dedicated public servant, wise counselor, concerned citizen, and loving family man. He will be genuinely missed; and

Whereas, The members of this commission are indeed fortunate to have known and worked with this dear friend and talented colleague. Along with his intelligence and commitment, he brought a wealth of experience to this entity. Dick was the Executive Partner and Chairman of Dickinson, Wright, Moon, Van Dusen & Freeman, one of the state's top law firms. Previous to his service on this commission, he had served as State Representative, a Delegate to the Michigan Constitutional Convention, Legal Advisor to Governor Romney, and Under Secretary of the United States Department of Housing and Urban Development; and

Whereas, A graduate of the University of Minnesota and Harvard Law School, Dick contributed to the betterment of others through his efforts in education. He had served as Trustee of the Cranbrook Schools in Bloomfield Hills and of Deerfield Academy in Massachusetts. Moreover, he was the Chair of the Wayne State University Board of Governors and helped in making it one of the nation's leading urban universities. His hard work, leadership, and contributions will continue to assist Wayne State University far into the future; and

Whereas, Dick also had a lasting impact as an officer in the United Way, the Greater Detroit Chamber of Commerce, and other community service organizations; as a board member for the Automobile Club of Michigan, MCN Corporation, and Butterfield Theatres; and as the Director of the Federal National Mortgage Corporation of Washington, D.C.; and

Whereas, One of Michigan's outstanding leaders and citizens, Dick Van Dusen was a kind and considerate friend to many and a devoted husband, father, and grandfather. Clearly, Dick bequeathed a caring legacy of service that will long endure; now, therefore, be it

Resolved, That the members of the Michigan Law Revision Commission offer our praise and gratitude as a memorial for Mr. Richard C. Van Dusen; and be it further

Resolved, That a copy of this resolution be printed in the 26th Annual Report of the Michigan Law Revision Commission.



# AMENDMENT OF THE UNIFORM CONTRIBUTION AMONG TORTFEASORS ACT

## Introduction

In 1988, the Michigan Supreme Court decided *Theophelis v. Lansing General Hospital*, 430 Mich. 473, 424 N.W.2d 478 (1988). The holding of that case, boiled down to its bare bones, is that a plaintiff's release of a tortfeasor/agent (here an employee) operates to also release the principal (here the employer), even though the release expressly reserves the plaintiff's rights against the principal. In reaching this holding, the Court decided that vicarious liability, arising here under the doctrine of respondeat superior, is not covered by Michigan's version of the Uniform Contribution Among Tortfeasors Act (U.C.T.A.). *Theophelis* was based on a combination of preexisting Michigan legal precedent, a lack of clear legislative intent, and the canon of statutory construction that statutes in abrogation of the common law be strictly construed. Even if it adopted a correct interpretation of current statutes and prior Michigan case law, a basic policy question remains -- whether Michigan law should continue to recognize a distinction between the effect of a covenant not to sue and a release as to a claim resting on vicarious liability when such a distinction no longer exists as to joint liability as a result of the U.C.T.A.

## Prior Law

The problems under the common law that the U.C.T.A. sought to address were succinctly stated by the Michigan Law Revision Commission:

At common law a person allegedly injured by the tortious action of two or more persons could choose among those found liable against whom to execute judgment. The tortfeasor who paid all or a disproportionate share of the judgment could not obtain contributions from the other tortfeasors. If the injured person chose to settle his claim against one of the joint tortfeasors, the effect of the settlement varied. If the tortfeasor was given a covenant not to sue, claims against other tortfeasors were unaffected. However, if a release was given, all tortfeasors were released regardless of any reservations in the release. The

tortfeasor who paid the injured person was unable in either case to obtain contributions from his co-tortfeasors.<sup>1</sup>

Because joint tortfeasors at common law could not obtain contribution from one another, the difference between the covenant not to sue and the release was merely semantic as far as a settling tortfeasor was concerned. A covenant not to sue would protect the settling tortfeasor as effectively as the release. From the plaintiff's standpoint, however, the difference was great. If a covenant not to sue was given, claims against other joint tortfeasors were preserved. If a release was given, those claims were lost.

In the vicarious-liability setting, the difference between the two forms of settlement had a broader significance at common law, as it affected both future recovery by the plaintiff and the future liability of the settling tortfeasor. The release of a tortfeasor/agent was seen as releasing the principal, even if the document specifically stated that the claim against the principal was reserved. This result followed from the foundation of vicarious liability, which is based on derivative liability for the actions of the agent. If the agent is released from liability, that eliminates as well the grounding for imposing derivative liability. On the other hand, if the settling tortfeasor/agent was given a covenant not to sue, the plaintiff could still maintain an action against the party vicariously liable for the agent's actions. This followed from the view that the covenant did not relieve the tortfeasor/agent of liability, but only gave procedural protection. If the plaintiff then sued and recovered from the vicariously liable party, the vicariously liable party could, in turn, maintain an action for indemnification against the settling tortfeasor. Thus, in the vicarious liability situation, the plaintiff interested in gaining further recovery would prefer the covenant not to sue (as in the joint liability situation), but the settling tortfeasor here would not be indifferent as to whether he received a release or covenant not to sue. The latter would leave the possibility of indemnification liability and the former would preclude such liability.

### **Purposes Of The Uniform Act**

The primary purpose of the Uniform Contribution Among Tortfeasors Act was to provide for contribution among tortfeasors who shared a common

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<sup>1</sup> Recommendation to the Legislature Relating to Contribution Among Joint Tortfeasors, Michigan Law Revision Commission Second Annual Report, p. 57 (1967).

liability for unintentional wrongs. The comment by the drafters of the Act sum up the problems it was designed to address:

Under the existing law an injured person may select whom he wishes to sue from among those jointly liable to him for an injury. He need not sue all. He may settle out of court or he may sue all and collect the full amount of the judgment from one. Under the prevailing law rule there is no recourse by one who voluntarily pays or who is forced to pay the common liability, against the others who are equally liable to the injured party but who have escaped payment. This act would distribute the burden of responsibility equitably among those who are jointly liable and thus avoid the injustice often resulting under common law.<sup>2</sup>

Section 4 of the Uniform Act dealt with the application of this policy to the settling tortfeasor. That section, with slight changes in wording, is included in the Michigan version of the U.C.T.A. at M.C.L. §600.2925d. Section 2925d provides:

When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 persons liable in tort for the same injury or the same wrongful death:

(a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.

(b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.

(c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

The U.C.T.A. commentary accompanying §4 does not specifically address the vicarious liability problem. The main objective of this section was to promote settlements by relieving a settling tortfeasor from any liability for contribution to other tortfeasors. The commentary notes that the 1939 version of the statute, which altered the common law by providing for contribution among joint tortfeasors, provided no special protection for a settling

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<sup>2</sup> Commissioners' Prefatory Note (1955 Revision), Uniform Contribution Among Tortfeasors Act. 12 U.L.A. 59.

tortfeasor. A settling tortfeasor remained open to contribution actions by other tortfeasors, thus discouraging settlements. Of course, settlements also would not be encouraged if settlement could be achieved only by having the plaintiff lose the right to sue other tortfeasors. The option to retain that right was available, however, if the plaintiff used a covenant not to sue. Nonetheless, §4 provided that the release also would not operate as a discharge of other tortfeasors unless it specifically so provided. The U.C.T.A. commentary noted that this provision (referring also to covenants not to sue) would "make no significant change in practice, since any plaintiff wishing to hold other joint tortfeasors insists on a covenant not to sue instead of a release."<sup>3</sup> The commentary does not specifically address the question of why the provision on the release was thought necessary when the covenant not to sue was available. The purpose here apparently was to remove a trap for the unwary plaintiff not familiar with the common law distinction between the covenant and the release.

It should be noted that §4 and other aspects of the Uniform Act deal only with contribution. Section 1(f) of the Act, as restated in M.C.L. §600.2925a(7), reads:

This section does not impair any right of indemnity under existing law. Where 1 tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

The U.C.T.A. comment which accompanies §1(f) notes, "Where a master is vicariously liable for the tort of his servant, the master does not need contribution from the servant and will not seek it, since he is entitled to full indemnity. The master, of course, may recover contribution from any third tortfeasor against whom he has no right of indemnity."<sup>4</sup>

### **The Theophelis Ruling**

*Theophelis* involved a medical malpractice action with multiple defendants. To simplify a complex factual setting, it may be thought of as a

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<sup>3</sup> Commissioners' Comment to §4 Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 99.

<sup>4</sup> Commissioners' Comment to §1 Uniform Contribution Among Tortfeasors Act, 12 U.L.A. 66.

case involving three parties; the plaintiff tort victim, a defendant hospital, and a defendant nurse anesthetist. The two defendants stood in a master-servant relationship. Plaintiff alleged negligence on the part of both defendants. In addition, plaintiff asked that the master be held vicariously liable for the negligence of the servant. Prior to trial, the plaintiff settled with the servant, executing a "Settlement and Release Agreement" in exchange for a monetary payment. This agreement expressly reserved plaintiff's claims against the hospital, but apparently made no distinction between the claims based on the hospital's negligence and the claims based on the hospital's vicarious liability for the negligence of the defendant nurse. The jury awarded the plaintiff one million dollars, which the trial judge reduced by the amount paid by the nurse in settlement of the claim. The hospital appealed, and the Court of Appeals ruled: (1) that the release of the nurse released the hospital from any claim based on a theory of respondeat superior and, (2) that there was insufficient evidence to support the only claim of independent negligence not already disposed of at trial.

The Michigan Supreme Court granted leave to appeal from the Court of Appeals' decision, limited to two issues. The first issue was whether the settlement reached with the nurse released the hospital from vicarious liability. The second issue was whether the release should be reformed as a covenant not to sue. Three Justices, in an opinion by Griffin, J., held that the common law, rather than M.C.L. §600.2925d, applied, that the release of the agent/nurse therefore operated to discharge the principal/hospital, and that reformation of the release was inappropriate. Justice Boyle agreed that M.C.L. §600.2925d "does not abrogate the common-law rule that release of the agent of a vicariously liable principal operates to discharge the principal," but wrote separately because she was "unable to reach a firm conclusion that the trial court held that the document in question was a release." Three Justices, in an opinion by Justice Levin, argued that "the release of an employed agent does not release a vicariously liable employer/principal" because "the vicariously liable employer/principal is a 'tortfeasor' \* \* \* for the same injury within the meaning of RJA §2925d." Justice Archer, who joined that opinion, also wrote separately, arguing that the evidence introduced at trial was sufficient for the jury to determine that the "hospital was liable for independent as well as vicarious acts of negligence."

What is clear from the above mixture of opinions is that a Court majority, based on the reasons provided in Justice Griffin's lead opinion, agreed that §600.2925d does not apply to the vicarious liability situation and that a release of the agent releases the principal as well, even if the release expressly states that the claim against the principal is reserved. The lead

opinion began its discussion of this issue by noting that, at common law, a release of an agent would bar any recovery against the principal on a vicarious liability theory even if the release specifically reserved claims against the principal. The Court then addressed the plaintiff's argument that the issue should be governed not by the common law, but by §600.2925d. That argument was correct, it noted, only if a party liable solely vicariously is a "tortfeasor" within the meaning of the U.C.T.A. Noting that courts in other jurisdictions had divided as to that term's definition, it adopted the position that the vicariously liable party is not within the term's compass. *Geib v. Slater*, 320 Mich. 316, 31 N.W.2d 65 (1948), had held that the term "tortfeasor," as used in a predecessor to the current contribution statute, did not include parties only vicariously liable. Other decisions which discussed the current Contribution Act had never suggested that vicariously liable parties were "tortfeasors" and the legislature had never expressed an intent to change the common law doctrine that the release of an agent discharges the principal. The lead opinion also cited the Commissioners' comments to §2 of U.C.T.A., which referred to the treatment of master and servant together as having a "single share" in the allocation of contribution. A footnote added that holding the principal liable notwithstanding the release might frustrate the settlement goal of §4 in light of the Act's preservation of the right of indemnification.

Disagreeing with the majority, Justice Levin argued that: (1) an objective of Michigan's adoption of the U.C.T.A. was to supersede *Geib*; (2) there was no policy justification for the *Geib* position, as the later case of *Burcher v. Thomsen*, 328 Mich. 312, 43 N.W.2d 866 (1950), had declined to accept policy arguments for "excepting vicariously liable defendants from the rule that another tortfeasor is not relieved of liability if the injured person settles by covenant not to sue"; (3) that drawing a distinction between a release and a covenant not to sue was justified only by archaic formalism; (4) that the term "tortfeasor" was simply shorthand for "one liable in tort"; and (5) that the presence of indemnification did not detract from the settlement objective of §4, as it was "somewhat unusual" for a hospital to seek indemnification from a physician or nurse.

### The U.C.T.A. in Other States

The *Theophelis* decision placed Michigan in a small minority of states which have held that vicariously-labile parties are not tortfeasors within the

meaning of the Uniform Act. Courts in Alaska<sup>5</sup>, California<sup>6</sup>, Delaware<sup>7</sup>, Florida<sup>8</sup>, Nevada<sup>9</sup>, New Hampshire<sup>10</sup>, Rhode Island<sup>11</sup> and Virginia<sup>12</sup> have held statutes substantially similar to §4 of the Uniform Act to apply to the vicarious liability situation. Only New Mexico<sup>13</sup>, Tennessee<sup>14</sup>, and North Dakota<sup>15</sup> have taken the view of *Theophelis*, when interpreting statutes substantially similar to the provision at issue in that case. Illinois, which has an intermediate appellate decision that supports the *Theophelis* majority position,<sup>16</sup> also has a later contrary ruling by another intermediate appellate court division.<sup>17</sup> There has been no legislative response to the lack of clarity in the Uniform Act, and the National Conference of Commissioners on Uniform Laws is not likely to revise the Act since the Uniform Comparative Fault Act includes a provision on contribution and is now the dominant N.C.C.U.S.L. Act dealing with that subject.<sup>18</sup>

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<sup>5</sup> *Alaska Airlines, Inc. v. Sweat*, 568 P.2d 916 (Alaska 1977).

<sup>6</sup> *Ritter v. Technicolor Corp.*, 27 Cal.App.3d 152, 103 Cal.Rptr. 686 (1972).

<sup>7</sup> *Clark v. Brooks*, 377 A.2d 365 (Del. Super. 1977).

<sup>8</sup> *Vasquez v. Board of Regents*, 548 So.2d 251 (Fla.App. 1989).

<sup>9</sup> *Van Cleave v. Gamboni Construction Co.*, 706 P.2d 845 (Nev. 1985).

<sup>10</sup> *Waters v. Hedberg*, 496 A.2d 333 (N.H. 1985).

<sup>11</sup> *Smith v. Raparot*, 225 A.2d 666 (R.I. 1967).

<sup>12</sup> *Thurston Metals & Supply Co., Inc. v. Taylor*, 339 S.E.2d 538 (Va. 1986).

<sup>13</sup> *Kinetics, Inc. v. El Paso Products Co.*, 99 N.M. 22, 653 P.2d 522 (1982).

<sup>14</sup> *Craven v. Lawson*, 534 S.W.2d 653 (Tenn. 1976).

<sup>15</sup> *Horjesi v. Anderson*, 353 N.W.2d 316, 318 (N.D. 1984).

<sup>16</sup> *Bristow v. Griffiths Construction Co.*, 140 Ill.App.3d 191, 94 Ill.Dec. 506, 488 N.E.2d 332 (1986).

<sup>17</sup> *Brady v. Prairie Material Sales, Inc.*, 190 Ill.App.3d 571, 137 Ill.Dec. 857, 546 N.E.2d 802 (1989).

<sup>18</sup> The U.C.T.A., in its section 2, bars consideration of relative degree of fault in determining pro rata shares in liability. The Michigan counterpart was amended to provide for consideration of relative degrees of fault in 1986. See M.C.L. §600.2925b, reproduced in the appendix.

## The Basic Policy Question

The correctness of the *Theophelis* ruling as a matter of statutory interpretation does not necessarily resolve the basic policy issue of whether a release as well as a covenant not to sue should bar a plaintiff's vicarious-liability action against the principal (assuming the document did not by its terms discharge the principal). Even if §4 of the U.C.T.A. was not intended to apply to the vicarious liability situation, that hardly precludes a fresh look at the question of whether the position taken in that provision should be extended to the vicarious liability situation. The decision to eliminate the common law distinction apparently rested on the assumption that it could serve as a trap for the unwary plaintiff. Some lawyers might not be aware of such a "finespun" distinction.<sup>19</sup> Possibly, there was concern that even where a lawyer was aware of the distinction, he or she might fear that a document intended to be a covenant not to sue would be interpreted as a release and therefore have an unintended effect of releasing other tortfeasors. Elimination of any such hidden consequences was seen as promoting settlement by giving the plaintiff absolute assurance that the other tortfeasors would not be released unless the document specifically said exactly that. Is there any reason not to similarly eliminate traps so as to promote settlements in the vicarious liability situation?

One might be that settlements here are less desirable because they only promote two rounds of suits, one by the plaintiff against the principal and the other by the principal against the agent, rather than a single suit in which both are joined. This point was suggested in fn. 14 of Justice Griffin's opinion, where the opinion noted that holding the principal subject to suit despite the release had been argued against on the ground that "it actually spawns litigation and leads to circuity of action." Justice Levin's response was that (1) any such policy concern had been rejected in *Burcher* (allowing settlement through the covenant not to sue), and (2) since indemnification suits are not common, creating traps in settlements does stand in the way of allowing tortfeasor/agents to "buy their peace." Another argument against treating the release in the same fashion as the covenant not to sue is that the unwary tortfeasor/agent, seeing the term "release," might not realize that he or she is still liable for indemnification. It seems unlikely, however, that the covenant

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<sup>19</sup> Arguably it might also have been thought that the law should not deal in a distinction characterized by the Michigan Supreme Court as seemingly "overtechnical," by the Restatement of Torts as "arbitrary" and by the United States Supreme Court as "grounded upon a formalistic doctrine." See *Theophelis* (dissent by Levin, J., citing sources). However, the thrust of those criticisms was not so much that the law have a better image than that it not create (as the United States Supreme Court noted) "a trap for unwary plaintiff's attorneys."



not to sue more readily places such an uninformed person on notice of the possibility of indemnification. Still another reason is that settling tortfeasors should be able to cut off future liability if in a sufficiently strong bargaining position to do so. That can be achieved, however, even under §4 by simply having the release expressly state that the principal is discharged. Finally, there is the argument that a change in the law may serve as a trap for lawyers who have relied on *Theophelis*. However, a plaintiff's attorney who relies on *Theophelis* will use a covenant not to sue, and extension of the §4 policy to the vicarious-liability situation will not alter the impact of the covenant not to sue (it changes the law only as to the release).

The Commission has concluded that, on balance, the advantages of applying the §4 policy to the vicarious liability situation justify a legislative overturning of the result in *Theophelis*. The policy concerns of §4 apply in large part to the elimination of the distinction between the covenant and the release in the vicarious liability case as well as the joint tortfeasor case. Very often, as in *Theophelis* itself, attorneys will be dealing with settlements in cases that present a possibility of third party liability under a theory not yet determined (i.e., either joint tortfeasor or vicarious liability or both). In such cases, attorneys desiring to preserve that action must remember to use a covenant not to sue, although the teaching of §4 and the practice that has grown up around it is to make a release perfectly acceptable. Counsel from other jurisdictions, knowing that Michigan has the U.C.T.A., may fail to take the precaution of checking Michigan case law and so be unaware of the *Theophelis* distinction. Finally, there is value in reducing the complexity of the law by simply having the same rule for all settling parties liable in tort, without regard to the theoretical grounding for that liability.

The Commission proposes that the policy of §4 [M.C.L. §600.2925d] be carried over to the vicarious liability setting, by adding a new section that both (1) repeats the language of the §4 provision as to non-discharge, with a specific reference to vicarious liability, and (2) notes that the release or covenant does not affect indemnification. The last provision is desirable because the Michigan provision on preserving indemnification, in §600.2925(a)(7) refers to "this section" (as compared to the U.C.T.A. provision that refers to "this Act"). It also would provide clear notice that the threat of indemnity remains. The proposed provision should be added as §600.2925e, and provide that:

When a release or covenant not to sue or not to enforce judgment is given in good faith to a person liable in tort for an injury or wrongful death and any other person is vicariously liable for that tortious action:

(a) It does not discharge the person who is vicariously liable for that tortious action unless its terms so provide.

(b) It does not impair any right of indemnity under existing law.

**600.2925a. Contribution between tort-feasors**

Sec. 2925a. (1) Except as otherwise provided in this act, when 2 or more persons become jointly or severally liable in tort for the same injury to a person or property or for the same wrongful death, there is a right of contribution among them even though judgment has not been recovered against all or any of them.

(2) The right of contribution exists only in favor of a tort-feasor who has paid more than his pro rata share of the common liability and his total recovery is limited to the amount paid by him in excess of his pro rata share. A tort-feasor against whom contribution is sought shall not be compelled to make contribution beyond his own pro rata share of the entire liability.

(3) A tort-feasor who enters into a settlement with a claimant is not entitled to recover contribution from another tort-feasor if any of the following circumstances exist:

(a) The liability of the contributee for the injury or wrongful death is not extinguished by the settlement.

(b) A reasonable effort was not made to notify the contributee of the pendency of the settlement negotiations.

(c) The contributee was not given a reasonable opportunity to participate in the settlement negotiations.

(d) The settlement was not made in good faith.

(4) In an action to recover contribution commenced by a tort-feasor who has entered into a settlement, the defendant may assert the defenses set forth in subsection (3) and any other defense he may have to his alleged liability for such injury or wrongful death.

(5) A tort-feasor who satisfies all or part of a judgment entered in an action for injury or wrongful death is not entitled to contribution if the alleged contributee was not made a party to the action and if a reasonable effort was not made to notify him of the commencement of the action. Upon timely motion, a person receiving such notice may intervene in the action and defend as if joined as a third party.

(6) A liability insurer, who by payment has discharged in full or in part the liability of a tort-feasor and has thereby discharged in full its obligation as insurer, is subrogated to the tort-feasor's right of contribution to the extent of the amount it has paid in excess of the tort-feasor's pro rata share of the common liability. It may assert this right either in its own name or in the name of its insured. This provision does not limit or impair any right of subrogation arising from any other relationship.

(7) This section does not impair any right of indemnity under existing law. Where 1 tort-feasor is entitled to indemnity from another, the right of the indemnity obligee is for indemnity and not contribution, and the indemnity obligor is not entitled to contribution from the obligee for any portion of his indemnity obligation.

(8) This section does not apply to breaches of trust or of other fiduciary obligations.

(9) This section shall not operate to increase the liability of the secretary of state under Act No. 198 of the Public Acts of 1965, as amended, being sections 257.1101 to 257.1132 of the Michigan Compiled Laws.

#### **600.2925b. Pro rata shares of tortfeasors**

Sec. 2925b. Except as otherwise provided by law, in determining the pro rata shares of tortfeasors in the entire liability as between themselves only and without affecting the rights of the injured party to a joint and several judgment:

- (a) Their relative degrees of fault shall be considered.
- (b) If equity requires, the collective liability of some as a group shall constitute a single share.
- (c) Principles of equity applicable to contribution generally shall apply.

Amended by P.A.1986, No. 178, § 1, Eff. Oct. 1.

#### **600.2925c. Enforcement of contribution**

Sec. 2925c. (1) Whether or not judgment has been entered in an action against 2 or more tort-feasors for the same injury or wrongful death, contribution may be enforced by separate action.

(2) When a judgment has been entered in an action against 2 or more tort-feasors for the same injury or wrongful death, contribution may be enforced in that action by judgment in favor of 1 against other judgment defendants by motion upon notice to all parties to the action.

(3) If there is a judgment for the injury or wrongful death against the tort-feasor seeking contribution, a separate action by him to enforce contribution shall be commenced within 1 year after the judgment has become final by lapse of time for appeal or after appellate review.

(4) If there is not a judgment for the injury or wrongful death against the tort-feasor seeking contribution, his right to contribution is barred unless he has discharged by payment the common liability within the statute of limitations period applicable to claimant's right of action against him and has commenced his action for contribution within 1 year after payment, or unless he has agreed while action is pending against him to discharge the common liability and has, within 1 year after the agreement, paid the liability and commenced his action for contribution.

(5) The recovery of a judgment for an injury or wrongful death against 1 tort-feasor does not of itself discharge the other tort-feasors from liability for the injury or wrongful death unless the judgment is satisfied. Satisfaction of the judgment does not impair any right of contribution.

(6) The judgment of the court in determining the liability of the several defendants to the claimant for an injury or wrongful death is binding as among such defendants in determining their right to contribution.

#### **600.2925d. Release or covenant not to sue; effect**

Sec. 2925d. When a release or a covenant not to sue or not to enforce judgment is given in good faith to 1 of 2 or more persons liable in tort for the same injury or the same wrongful death:

- (a) It does not discharge any of the other tort-feasors from liability for the injury or wrongful death unless its terms so provide.
- (b) It reduces the claim against the other tort-feasors to the extent of any amount stipulated by the release or the covenant or to the extent of the amount of the consideration paid for it, whichever amount is the greater.
- (c) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

## INTERNATIONAL COMMERCIAL ARBITRATION

In order to realize its full potential as a center for international commercial dispute resolution, Michigan should adopt legislation which provides specifically for international commercial arbitration. As discussed in Professor Kennedy's report, various reasons exist for adopting such legislation, with the most compelling related to three legal developments that occurred in the 1980's. The first came in 1985 with the U.S. Supreme Court's landmark decision in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). The Court there endorsed resort to arbitration to resolve international commercial disputes, even when the dispute involved an antitrust claim. The second occurred in 1986 when Canada became the first country to adopt the Model Law on International Commercial Arbitration, drafted by the United Nations Commission on International Trade Law (the UNCITRAL Model Law). All of Canada's provinces and territories have likewise enacted the Model Law. The third took place in late 1987 with the signing of the U.S.-Canada Free Trade Agreement, offering the genuine prospect for substantial economic growth for Michigan business.

To date, seven states have enacted international commercial arbitration legislation: California, Connecticut, Florida, Georgia, Hawaii, Maryland, and Texas. The UNCITRAL Model Law, these seven state laws, and the federal law dealing with arbitration are all reprinted in the Appendix to Professor Kennedy's report. They are briefly summarized below.

### The UNCITRAL Model Law

The United Nations Commission on International Trade Law (UNCITRAL) was established in 1966 by the UN General Assembly to promote the unification of international trade law on a global basis. UNCITRAL has produced substantial results in several areas, including international arbitration and conciliation. In 1976, it produced the UNCITRAL Arbitration Rules, which are comprehensive, up-to-date, and widely accepted. These rules are being used by the US-Iran Claims Tribunal in The Hague. In 1980, UNCITRAL developed a companion set of Conciliation Rules. In 1985, following three years of drafting, UNCITRAL produced the Model Law on International Commercial Arbitration. The Model Law establishes a uniform practice and procedure for arbitration of international commercial disputes and attempts to meet the essential requirements of party autonomy and basic fairness.

The U.S. government strongly supported UNCITRAL's work on the Model Law and was generally satisfied with the final product. In 1986, Canada became the first country to enact the Model Law at the national level. Since then, every province has also adopted it. The Model Law is being given serious consideration in Australia, Germany, the United Kingdom, Egypt, and Hong Kong.

At the state level in the United States, the Model Law was adopted verbatim by Connecticut in 1989 and with only slight modification in California in 1988 and in Texas in 1989. It was used as a basic source of ideas for the Florida International Arbitration Act, with many of the Model Law's provisions being included in the Florida legislation. It also served as a source of ideas for Hawaii's and Georgia's international arbitration statutes.

The Model Law applies in international commercial arbitration. "International" is defined in Article 1:3, generally covering arbitrations where either one of the parties or the subject matter of the arbitration is located in a country other than the place of arbitration. "Commercial" is not defined in the text, but a footnote to Article 1:1 states that a broad interpretation is intended and provides an extensive, nonexclusive list of commercial relationships.

Under the Model Law, courts are permitted to intervene only where explicitly provided in the Model Law. Each state enacting the Model Law specifies the courts or other authorities that will perform the stated functions. If a court action is brought in a matter which is the subject of an arbitration agreement, Article 8 directs the court, upon the request of a party, to refer the matter to arbitration unless the court finds the agreement to be void, inoperative, or incapable of being performed. Under Article 9, the court may also provide interim measures of protection before or during arbitral proceedings. Under Article 11:3, the court appoints arbitrators, failing party agreement on their selection. The parties are free to agree on the number of arbitrators, but absent agreement, the number is three (Article 10). A party may challenge an arbitrator and if unsuccessful may request the court to rule on the challenge. The court's decision is non-appealable (Article 14:3).

Article 34:2 of the Model Law provides seven grounds for setting aside an award or refusing to recognize or enforce it: (1) party incapacity, (2) invalidity of the arbitration agreement under the law chosen by the parties, (3) defective notice of the proceedings that prevented a party from making its presentation, (4) the award deals with a dispute beyond the scope of the arbitration agreement, (5) the arbitral procedure or composition of the

tribunal was not in accordance with the agreement, (6) the subject matter of the dispute is not capable of settlement by arbitration under the laws of the state, or (7) the award is in conflict with the state's public policy. (These grounds are identical to the grounds listed in the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, discussed below.)

The Model Law also provides procedural protections and the opportunity for the parties to agree on expanded protections. For example, the parties are to be treated equally and each given a full opportunity to present their cases (Article 18). The parties may submit any relevant documents with their statements of claim or defense and may amend or supplement their statements during the course of the proceedings (Article 23). The Model Law requires that the parties be given sufficient advance notice of any hearing or other meeting of the arbitral tribunal for the inspection of evidence (Article 24:2). Ex parte communications are prohibited (Article 24:3).

Absent agreement of the parties, however, the arbitral tribunal has broad authority to determine procedural matters, including the place for arbitration, for hearing witnesses, or for the inspection of evidence (Article 20:2). Since the arbitral tribunal may conduct the proceedings in any manner it considers appropriate, it also decides whether to hold oral hearings or whether to conduct the proceedings on the basis of documentary evidence alone (Article 24:1).

The parties may agree on the law to be applied to the substance of the dispute, but absent agreement the arbitral tribunal uses the conflict of laws rules which it determines to be applicable to arrive at the applicable substantive law (Article 28).

Finally, although the Model Law's aim is to be comprehensive, some aspects of arbitration are not covered by the Model Law, including (1) arbitrability, (2) the capacity of parties to conclude an arbitration agreement, (3) sovereign immunity, (4) consolidation of arbitration proceedings, and (5) enforcement of interim measures issued by the arbitral tribunal.

### **State Legislative Activity**

The seven states that have enacted international commercial arbitration statutes had one common principal motivation -- attracting international business. Whether there is a demonstrable link between such statutes and

increased international business in the state is debatable, but the economic rationale for adopting international commercial arbitration legislation persists, given the states' desire to increase exports, attract foreign investment, and raise employment levels. In any event, considering that the cost of international commercial arbitration is free to the state, it is hard to argue against the favorable cost/benefit rationale that has been offered by the states that have adopted such legislation. A more favorable attitude of foreign counsel and clients toward the United States as a forum for arbitration may in fact increase foreign trade between the United States and other nations.

In chronological order, Florida was the first state to enact an international commercial arbitration statute. Florida enacted the Florida International Arbitration Act in 1986. It did not use the Model Law as a template, but rather as one of many sources. The goal was to promote Miami as an international commercial center for Latin America. In general, the Florida international arbitration statute provides more procedural detail than its general Arbitration Code.

A relative flurry of legislative activity took place in 1988 with three states enacting international arbitration legislation. California became the second state to enact international arbitration legislation, adopting the Model Law with limited changes. Two significant deviations from the Model Law bear mention. First, California dropped the last two chapters of the Model Law dealing with recourse against an award and recognition and enforcement of awards. There was evidently some concern that these two chapters might be preempted by federal law, a fear that was probably unwarranted in light of a 1989 U.S. Supreme Court decision to be discussed below. Second, California added a conciliation section based on the UNCITRAL Conciliation Rules that were adopted in 1980. California's hope was to capitalize on its proximity to Asia and the cultural preference of Asians for non-confrontational methods of dispute resolution. Foreigners' fears of large American jury verdicts was another reason for adoption of the legislation.

Georgia was the next state to enact international arbitration legislation. Georgia, like Florida, considered the Model Law and many other sources in drafting its own 1988 international arbitration legislation. In the end, Georgia relied heavily on New York general arbitration statutes as a model. Georgia hoped its new law would encourage investment in the state.

Hawaii adopted a distinctive act in 1988 that promotes not only international arbitration, but mediation and conciliation as well. Like California, Hawaii's objective is to attract trade with Pacific Rim countries. Unlike all the other states, Hawaii has created a Center for International



Commercial Dispute Resolution in an attempt to attract international arbitrations that arise not only out of a Hawaii connection, but also international arbitrations with no particular Hawaii nexus.

Two states enacted international arbitration statutes in 1989, Texas and Connecticut. Texas enacted an international arbitration act modeled after California's international arbitration legislation, with the same deletions from and additions to the Model Law. Connecticut adopted the Model Law verbatim.

The state most recently adopting an international arbitration statute is Maryland, which did so last year. Its legislation carves out international commercial arbitrations from coverage under its general arbitration statute, and provides that all such arbitrations are to be governed by federal law.

### **Federal Law On Arbitration**

The principal sources of federal arbitration law are the Federal Arbitrations Act (the FAA), the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), and the Inter-American Convention on International Commercial Arbitration which went into effect last fall. The U.S.-Canada Free Trade Agreement itself has no provision for private dispute resolution.

The FAA applies to all written arbitration agreements covering contracts involving commerce. The policies which the FAA seeks to implement include enforcement of arbitration agreements, effective functions of the arbitration process, and the establishment of an efficient procedure for judicial involvement in arbitral proceedings and enforcement of arbitral awards.

The New York Convention was ratified and implementing legislation enacted by Congress in 1970. Some 80 countries, including Canada, are parties to it. It provides for judicial recognition and enforcement in U.S. courts of arbitration awards rendered in another country which is a party to the convention. The grounds for denying recognition or enforcement are identical to the seven grounds contained in the Model Law.

The Inter-American Convention essentially mirrors the New York Convention. Its importance is that it complements the New York Convention by including as parties several Latin American countries which are not parties to the New York Convention.

To the extent that a state arbitration statute is not inconsistent with the procedural provisions of the FAA, and does not undermine the substantive federal policy favoring the resolution of disputes by arbitration, there does not appear to be any preemption problem. In 1989, the U.S. Supreme Court held in *Volt Information Sciences, Inc. v. Board of Trustees of Stanford University*, 489 U.S. 468 (1989), that the states are free to go their own way procedurally in this context, as long as they do not undermine the federal policy favoring arbitration. The Court made it clear in the *Volt* decision that Congress did not occupy the field of arbitration when it enacted the FAA, and thus state laws dealing with the subject, even in the interstate setting, are not preempted.

### RECOMMENDATION

The Commission recommends that the legislature adopt the UNCITRAL Model Law with two additions. First, a provision should be added permitting courts to consult the Model Law's *travaux preparatoires* (the legislative history of the Model Law) as an interpretive guide. This provision would follow the pattern used by the Canadian provinces in their respective adoptions of the Model Law. It should increase the likelihood of a uniform interpretation of the Model Law. Second, following the pattern of California and Texas, the UNCITRAL Conciliation Rules should be included in the legislation as well. Conciliation is strictly voluntary; any party may withdraw and proceed to arbitration at will.

The best reason for Michigan to adopt the Model Law, and with as few modifications as possible, isn't because California, Texas, or Connecticut has done so, but because all of the Canadian provinces have. The legislature should not adopt the Model Law in lieu of the existing Michigan arbitration statute, but rather as a supplement to it. Michigan need not replace its statutory scheme for domestic cases that is generally well understood and familiar. An attempt to do so would more likely generate needless opposition than result in the adoption of a statute limited to international disputes.

The Michigan statute on arbitration, the Uniform Arbitration Act on which it is based, and the Michigan Court rule on arbitration are set forth in Appendix A of Professor Kennedy's report. There are only a few substantive differences between the Model Law and the current Michigan law. However, the two laws differ markedly in structure and content. First, the Michigan law is clearly the product of a common law approach to statutory drafting -- leaving many statutory gaps to be filled in later by the judiciary. The drafters

of the Model Law, by contrast, worked to develop a "code" in the civil law tradition. As a consequence, the Model Law is more comprehensive and fully elaborated than the basic Michigan statute. For example, there are at least eleven gaps in the Michigan arbitration statute which are addressed in the Model Law. Subjects which the Model Law covers but on which the Michigan arbitration statute is silent include:

1. A provision for an award of interim relief.
2. The use of experts.
3. A challenge procedure.
4. Authority for the arbitrator to rule on the arbitrator's jurisdiction.
5. A provision that a statement of the facts supporting the claim and a response to each of the allegations to be filed.
6. A detailed default procedure.
7. A provision on the language to be used.
8. Guidelines on choice of law.
9. Procedures in the event of a settlement.
10. The form and content of an award.
11. An elaborate description of what constitutes an "agreement in writing."

Second, unlike the Michigan law, which was drafted to govern domestic arbitrations between parties in the state, the Model Law addresses many of the special problems that arise only in international arbitrations. In the international context, at least some of the parties and counsel will certainly be unfamiliar with the federal and Michigan law and practice involving arbitration. International parties may have difficulties in using the FAA or the Michigan law to answer questions -- beginning with the decision whether to arbitrate in the United States. In many cases, the more fully-articulated Model Law would provide an answer, especially for Canadian parties and counsel for whom the Model Law has been the law the past three to four years. In most instances, the Model Law would simply provide clearer guidance without radically departing from contemporary U.S. practice. The Model Law would certainly dispense with a foreign lawyer having to parse United States case law for judicial "gap-filler" answers, and then get answers that are not always clear.

This last factor leads to some of the practical reasons for adopting the Model Law. An important consideration in selecting a site of arbitration in an international matter is the parties' perception of the character of the legal regime in which the arbitration will take place. The parties are likely to be concerned about the certainty of the legal regime. The principal objective of the Model Law is to establish a clear, well-articulated set of rules conducive to

international commercial arbitration, an objective which it seems to have achieved. The adoption of the Model Law would, in addition, send a clear message that Michigan is hospitable to international arbitration. There is obviously more to making Michigan an international commercial arbitration center than the adoption of a statute. Nevertheless, adoption of the Model Law in Michigan could be a very useful first step.

The report that follows was written for the Commission by Professor Kevin Kennedy of the Detroit College of Law. It contains a thorough review of all of the provisions noted above. The Commission recommends adoption of a statute having the content suggested in Professor Kennedy's report. That statute would follow the UNCITRAL Model Law (Appendix B) and add to it the Conciliation Rules, found in statutory form in the California statute (Appendix C) at Chapter Seven. See also Subdivision G of the Texas statute (Appendix I). The special provision on consulting the Model Law's *travaux preparatoires*, should follow a Canadian provision such as British Columbia Stat. 1986, ch. 14, §6, which is set forth below:

In construing the provisions of this Act, a court or arbitral tribunal may refer to the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL Model Arbitration Law and shall give those documents the weight that is appropriate in the circumstances.

**INTERNATIONAL COMMERCIAL ARBITRATION IN  
THE STATE OF MICHIGAN**

**A Preliminary Report to the  
MICHIGAN LAW REVISION COMMISSION**

**Submitted by**

**PROFESSOR KEVIN KENNEDY  
DETROIT COLLEGE OF LAW**

**December 21, 1990**

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## INTRODUCTION

In July, 1990, the Michigan Law Revision Commission contracted with Professor Kevin Kennedy of the Detroit College of Law to undertake a project identifying and analyzing state and federal statutes, treaties, and international conventions applicable to the resolution of international commercial disputes in Michigan. The Commission further directed Professor Kennedy to draft proposed language amending Michigan statutes as necessary to facilitate the resolution of international commercial disputes in Michigan.

This Report is divided into four parts. Part One is a section-by-section analysis of the Michigan arbitration statute and Michigan Court Rule 3.602 dealing with arbitral proceedings. Part Two reviews the laws of those states that have enacted legislation dealing specifically with the arbitration of international commercial disputes. Part Three analyzes federal statutes and the treaties and international conventions to which the United States is a party providing for the non-judicial resolution of disputes, both domestic and international. Part Four identifies areas where statutory reform in Michigan would be appropriate and offers proposed amending language.

The State of Michigan stands poised to capture a unique economic opportunity stemming from the Canada-U.S. Free Trade Agreement which became effective January 1, 1989. In anticipation of the increased trade and investment flows that will result between the United States and Canada as a direct consequence of the Free Trade Agreement's liberalization of trade and investment rules, interest in and demand for private dispute resolution will be heightened on both sides of the border.

In order to realize its full potential as a center for international commercial dispute resolution, the Michigan legislature should give consideration to enacting legislation which provides specifically for international commercial arbitration. Several excellent reasons exist for doing so, but perhaps the most compelling are three legal developments in the 1980's. The first came in 1985 with the U.S. Supreme Court's landmark decision in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,<sup>1</sup> in which the Court endorsed resort to arbitration to resolve international commercial disputes, even when the dispute involved an antitrust claim. The second occurred in 1986 when Canada became the first

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<sup>1</sup> 473 U.S. 614 (1985).

country to adopt the Model Law on International Commercial Arbitration,<sup>2</sup> drafted by the United Nations Commission on International Trade Law (the UNCITRAL Model Law).<sup>3</sup> The third took place in late 1987 with the signing of the Canada-U.S. Free Trade Agreement, offering the genuine prospect for tremendous economic growth for Michigan business.

To date, seven states have enacted international commercial arbitration legislation: California, Connecticut, Florida, Georgia, Hawaii, Maryland, and Texas. These seven state laws are analyzed in detail in Part Two of this report. Before considering current Michigan law, the advantages and disadvantages of international arbitration should be mentioned.

### **A. The Advantages and Disadvantages of International Arbitration**

International arbitration, like domestic arbitration, is a means by which a dispute or class of future disputes can be definitively resolved by a disinterested, nongovernmental body. In a sense, international commercial arbitration is merely a species of domestic arbitration with an international aspect.<sup>4</sup> Within the past 30 years a movement has developed in the international arbitration arena to devise rules which avoid the peculiarities and surprises of local law by excluding them from the arbitral process. Emblematic are the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Model Law on International Commercial Arbitration, both of which are discussed below. Both are limited to international commercial arbitration and provide generally accepted, but very limited, grounds for setting aside or refusing to enforce an arbitral award.<sup>5</sup> The laws of most major trading

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<sup>2</sup> The federal enactment is the Commercial Arbitration Act, Can. Stat. ch. 22 (1986). Because of the many areas reserved exclusively to the provinces under the Canadian Constitution, federal-provincial cooperation was essential in order for a comprehensive international commercial arbitration legal regime to come into existence. All the provinces and territories have enacted the Model Law. See Noecker & Hentzen, The New Legislation on Arbitration in Canada, 22 Int'l Law. 829 (1988).

<sup>3</sup> For a brief description of the UNCITRAL Model Law, see Hoellering, The UNCITRAL Model Law on International Commercial Arbitration, 20 Int'l Law. 327 (1986).

<sup>4</sup> See Caron, The Nature of the Iran-United States Claims Tribunal and the Evolving Structure of International Dispute Resolution, 84 Am. J. Int'l L. 104, 113-14 (1990).

<sup>5</sup> See Ungar, The Enforcement of Arbitral Awards Under UNCITRAL's Model Law on International Commercial Arbitration, 25 Colum. J. Transnat'l L. 717 (1987).

nations provide a considerable degree of freedom for arbitration and often permit parties to use government enforcement measures to ensure compliance with the arbitration process and with arbitral awards. International arbitration has both its strengths and weaknesses as a method for resolving international commercial disputes.<sup>6</sup> First, arbitration is often perceived as a means to obtain a neutral decision-maker, unattached to either party or any governmental authority. This feature can allay business fears of potential bias in a foreign court. Second, a well-drafted arbitration clause generally permits consolidation of litigation between the parties in a single forum, thereby avoiding the expense of multiple proceedings. On the other hand, once touted as an inexpensive and expeditious means of dispute resolution, some commentators criticize arbitration as both slow and expensive.<sup>7</sup> For example, an arbitration involving a \$1 million dispute conducted under the auspices of the International Chamber of Commerce "will result in an administrative charge of \$14,500, and fees per arbitrator ranging from a barebones' minimum of \$7,450 to a maximum of \$30,000. If the dispute involves \$100 million, the figures are \$50,500 (administrative charge) and \$51,450 minimum/\$188,000 maximum (arbitrators' fees)."<sup>8</sup> Third, arbitration tends to be procedurally less formal than litigation. Parties thus have greater freedom to agree on efficient procedural rules and select expert decision-makers. At the same time, however, the lack of detailed procedural rules may result in additional disputes between the parties. Fourth, arbitration typically involves less extensive discovery than is common in litigation in U.S. courts, with the attendant reduction in costs and delay. By the same token, depending on the facts known by the parties concerning the dispute, a party may want the broader discovery rights provided in U.S. courts than is ordinarily available in arbitral proceedings. Finally, international arbitration is usually confidential,<sup>9</sup> helping to preserve business secrets.

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<sup>6</sup> See Ehrenhaft, Effective International Commercial Arbitration, 9 L. & Pol'y Int'l Bus. 1191 (1977)(contending that arbitration is informal, quick, private, convenient, and inexpensive); de Vries, International Commercial Arbitration: A Contractual Substitute for National Courts, 57 Tul. L. Rev. 42 (1982)(arguing that the advantages of speed, economy, and informality attributed to arbitration are overestimated).

<sup>7</sup> See, e.g., Layton, Arbitration in International Commercial Agreements: The Noose Draws Tighter, 9 Int'l Law. 741, 745 (1975); Karrer, Arbitration Saves! Costs: Poker and Hide-and-Seek, 3 J. Int'l Arb. 35 (1986); Kerr, International Arbitration v. Litigation, 1980 J. Bus. L. 164, 175-78.

<sup>8</sup> W. Craig, W. Park, J. Paulsson, International Chamber of Commerce Arbitration 37 (2d ed. 1990).

<sup>9</sup> Ehrenhaft, Effective International Commercial Arbitration, 9 Law & Pol'y Int'l Bus. 1191, 1224 (1977); American Arbitration Ass'n, Commercial Arbitration Rules, art. 25; ICC Arbitration Rules, art. 23.2 (1975); ICSID Arbitration Rules 6(2) & 48(4) (1984).

## B. Institutional Versus "Ad Hoc" Arbitration

International arbitration can be either "institutional" or "ad hoc." The best-known international arbitration institutions are the International Chamber of Commerce, the American Arbitration Association, the London Court of Arbitration, the Stockholm Chamber of Commerce,<sup>10</sup> and the International Centre for Settlement of Investment Disputes.<sup>11</sup> Each of these organizations supervises a substantial number of commercial arbitrations each year. These institutions have promulgated their own set of procedural rules that govern arbitration under the institution's auspices. Each institution maintains a standing staff that assists parties making use of the institution's arbitration procedures. Each institution also charges a fee for the arbitration services it provides.

Ad hoc arbitration is not conducted under the auspices of an arbitral institution. Instead, parties simply select an arbitrator who resolves the dispute without institutional supervision. The parties will sometimes also select a preexisting set of procedural rules designed to govern ad hoc arbitration. The United Nations Commission on International Trade Law has published a commonly used set of such rules.<sup>12</sup>

Although ad hoc arbitration has the advantages of greater flexibility and less expense, most experienced international practitioners prefer the more structured character of institutional arbitration.<sup>13</sup>

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<sup>10</sup> See generally Alley, International Arbitration: The Alternative of the Stockholm Chamber of Commerce, 22 Int'l Law. 837 (1988).

<sup>11</sup> For a description of the major international arbitration institutions and their rules, see International Commercial Arbitration: Recent Developments (PLI 1988); Branson & Tupman, Selecting An Arbitral Forum: A Guide to Cost-Effective International Arbitration, 24 Va. J. Int'l L. 917 (1984); Stein & Wotman, International Commercial Arbitration in the 1980's: A Comparison of the Major Arbitral Systems and Rules, 38 Bus. Law. 1685 (1983). See also W. Craig, W. Park & J. Paulsson, International Chamber of Commerce Arbitration (2d ed. 1990).

<sup>12</sup> See Sanders, Procedures and Practices under the UNCITRAL Rules, 27 Am. J. Comp. L. 453 (1979).

<sup>13</sup> For discussions of the pros and cons, see Golsong, A Guide to Procedural Issues in International Arbitration, 18 Int'l Law. 633, 636 (1984); Higgins, Brown, & Roach, Pitfalls in International Commercial Arbitration, 35 Bus. Law. 1035, 1036-38 (1980).

With this introduction as backdrop, the report turns to a consideration of the current Michigan laws dealing with commercial arbitration.

## PART ONE

### I. OVERVIEW

All 50 states, the District of Columbia, and Puerto Rico have enacted arbitration statutes of general application modelled after one of two statutes, the Uniform Arbitration Act or the United States (Federal) Arbitration Act. In 1955 the Conference of Commissioners on Uniform State Laws promulgated a uniform arbitration act. Since that time, thirty-two states, including Michigan, and the District of Columbia have adopted the Uniform Arbitration Act.<sup>14</sup> The other 18 states and Puerto Rico have enacted arbitration statutes that are modelled after the

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<sup>14</sup> The following jurisdictions have enacted the Uniform Arbitration Act:

Alaska	Alaska Stat. §§ 09.43.010-.180.
Arizona	Ariz. Rev. Stat. Ann. §§ 12-1501 to 12-1518.
Arkansas	Ark. Stat. Ann. §§ 16-108-201 to 16-108-224.
Colorado	Colo. Rev. Stat. §§ 13-22-201 to 13-22-223.
Delaware	Del. Code Ann. tit. 10, §§ 5701-5725.
District of Columbia	D.C. Code Ann. §§ 16-4301 to 16-4319.
Idaho	Idaho Code §§ 7-901 to 7-922.
Illinois	Ill. Ann. Stat. ch. 10, §§ 101-123 (Smith-Hurd).
Indiana	Ind. Code Ann. §§ 34-4-2-1 to 34-4-2-22.
Iowa	Iowa Code Ann. §§ 679A.1-.19.
Kansas	Kan. Stat. Ann. §§ 5-401 to 5-422.
Maine	Me. Rev. Stat. Ann. tit. 14, §§ 5927-5949.
Maryland	Md. Cts. & Jud. Proc. Code Ann. §§ 3-201 to 3-234.
Massachusetts	Mass. Gen. Laws Ann. ch. 251, §§ 1-19.
Michigan	Mich. Comp. Laws Ann. §§ 600.5001-.5035.
Minnesota	Minn. Stat. Ann. §§ 572.08-.30.
Missouri	Mo. Stat. Ann. §§ 435.350-.470.
Montana	Mont. Code Ann. §§ 27-5-111 to 27-5-324.
Nebraska	Neb. Rev. Stat. §§ 25-2601 to 25-2622.
Nevada	Nev. Rev. Stat. §§ 38.015-.205.
New Mexico	N.M. Stat. Ann. §§ 44-7-1 to 44-7-22.
North Carolina	N.C. Gen. Stat. §§ 1-567.1-.20.
North Dakota	N.D. Cent. Code §§ 32-29.2-01 to 32-29.2-20.
Oklahoma	Okla. Stat. Ann. tit. 15, §§ 801-818.
Pennsylvania	42 Pa. Const. Stat. Ann. §§ 7301-7320.
South Carolina	S.C. Code Ann. §§ 15-48-10 to 15-48-240.
South Dakota	S.D. Comp. Laws Ann. §§ 21-25A-1 to 21-25A-38.
Tennessee	Tenn. Code Ann. §§ 29-5-301 to 29-5-320.
Texas	Tex. Stat. Ann. art. 224 to 238-6.
Utah	Utah Code Ann. §§ 78-31a-1 to 78-31a-18.
Vermont	Vt. Stat. Ann. tit. 12, §§ 5651-5681.
Virginia	Va. Code §§ 8.01-581.01 to 8.01-581.016.
Wyoming	Wyo. Stat. §§ 1-36-101 to 1-36-119.

Federal Arbitration Act.<sup>15</sup> Frequently, a jurisdiction will substantially adopt the major provisions of the Uniform Act with substitutions, omissions, and additions. The General Prefatory Notes to the Uniform Arbitration Act, as well as the notes to the Michigan arbitration statute, indicate that Michigan falls into this group<sup>16</sup> (although one commentator does not consider Michigan's arbitration law to be an adoption of the Uniform Act because of its deviations from the Uniform Act<sup>17</sup>). The Uniform Arbitration Act, Michigan's adoption of it, the United States Arbitration Act, and Michigan Court Rule 3.602 are reproduced in the Appendix.

Michigan has enacted two arbitration laws, one of general application,<sup>18</sup> the second dealing with health care malpractice.<sup>19</sup> Michigan has also enacted mandatory mediation statutes dealing with medical malpractice<sup>20</sup> and tort

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<sup>15</sup> The following jurisdictions have enacted arbitration statutes varying in significant degree from the Uniform Arbitration Act:

Alabama	Ala. Code §§ 6-6-1 et seq.
California	Cal. Civ. Pro. Code §§ 1280 et seq.
Connecticut	Conn. Gen. Stat. Ann. §§ 52-408 et seq.
Florida	Fla. Stat. Ann. §§ 682.01 et seq.
Georgia	Ga. Code Ann. §§ 9-9-1 et seq.
Hawaii	Haw. Rev. Stat. §§ 658-1 et seq.
Kentucky	Ky. Rev. Stat. §§ 417.050 et seq.
Louisiana	La. Rev. Stat. Ann. §§ 9:4201 et seq.
Mississippi	Miss. Code Ann. §§ 11-15-101 to 11-15-143.
New Hampshire	N.H. Rev. Stat. Ann. §§ 542:1 et seq.
New Jersey	N.J. Rev. Stat. §§ 2A:24-1 et seq.
New York	N.Y. Civ. Prac. Law §§ 7501 et seq.
Ohio	Ohio Rev. Code Ann. §§ 2711.01 et seq.
Oregon	Or. Rev. Stat. §§ 33.210 et seq.
Puerto Rico	P.R. Laws Ann. tit. 32, §§ 3201 et seq.
Rhode Island	R.I. Gen. Laws §§ 10-3-1 et seq.
Washington	Wash. Rev. Code §§ 7.04.010 et seq.
West Virginia	W. Va. Code §§ 55-10-1 to 55-10-8.
Wisconsin	Wis. Stat. Ann. §§ 788.01 et seq.

<sup>16</sup> Unif. Arbitration Act, General Prefatory Notes, 7 U.L.A. 3 (1985).

<sup>17</sup> M. Domke, Commercial Arbitration, Appendix I, at 2-3 (Wilner ed. 1989).

<sup>18</sup> Mich. Comp. L. Ann. §§ 600.5001-.5035 (1963).

<sup>19</sup> Mich. Comp. L. Ann. §§ 600.5040-.5065 (1975).

<sup>20</sup> Mich. Comp. L. Ann. §§ 600.4901-.4923 (1986).



actions.<sup>21</sup> Of relevance to this project is the general arbitration statute, a section-by-section analysis of which follows, together with the auxiliary court rule, Michigan Court Rule 3.602.

## **II. THE MICHIGAN ARBITRATION STATUTE AND COURT RULE 3.602**

### **A. Section 600.5001 -- General Provision<sup>22</sup>**

The first section of the Michigan arbitration statute provides that all persons may submit any controversy to arbitration that might be the subject of a civil action provided they have so agreed in writing. Expressly excepted from coverage under the statute are collective bargaining agreements.<sup>23</sup> Any subsequent arbitration award is subject to enforcement in circuit court.

### **B. Section 600.5005 -- Real Estate Arbitration**

Arbitration of claims to estates in fee or for life in real property are not permitted. Real estate claims to an interest for a term of years, partition claims between joint tenants or tenants in common, boundary disputes, and dower disputes may be submitted to arbitration.

### **C. Section 600.5011 -- Revocation of Arbitration Agreements**

Unilateral revocation of an arbitration agreement is not permitted. In the event a party to such an agreement defaults after notice, the arbitrator is empowered to proceed and to render an award based on the evidence submitted by the appearing party. The circuit court is authorized to compel arbitration.

### **D. Section 600.5015 -- Appointment of Arbitrator**

Absent agreement on the method of appointing the arbitrator, or in the event the agreed method of appointment fails or the arbitrator who is appointed fails or is unable to act, the circuit court is to appoint an arbitrator.

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<sup>21</sup> Mich. Comp. L. Ann. §§ 600.4951-.4969 (1986).

<sup>22</sup> Section references are to Michigan Compiled Laws Annotated.

<sup>23</sup> M.C.L.A. § 600.5001(3).

**E. Section 600.5021 -- Conduct of Arbitration; M.C.R. 3.602**

The arbitration is to be conducted pursuant to rules of the Supreme Court. Michigan Court Rule 3.602 supplements the Michigan arbitration law chiefly in the area of procedural rules both for the conduct of the arbitration itself and for the judicial enforcement of the award.

**(i) MCR 3.602(B) -- Proceedings to Compel or Stay Arbitration**

A circuit court may compel arbitration on a showing of an arbitration agreement by the moving party, and may stay an arbitration if it is shown that no such agreement exists. It is not grounds for denying an application to compel arbitration that the claim to be arbitrated lacks merit or is not brought in good faith.

**(ii) MCR 3.602(C) -- Stay of Judicial Proceedings**

Any court action involving an issue subject to arbitration must be stayed if an order compelling arbitration or an application for such an order has been filed.

**(iii) MCR 3.602(D) -- Time and Place of Arbitration Hearing**

The arbitrator is empowered to set the time and place for the hearing, and to order adjournments and postponements as necessary.

**(iv) MCR 3.602(E) -- Oath of Arbitrator and Witnesses**

Prior to hearing testimony, the arbitrator is sworn to hear and fairly consider the matters submitted. The arbitrator is empowered to administer oaths to witnesses.

**(v) MCR 3.602(F) -- Subpoenas and Depositions**

The arbitrator has full subpoena power. The arbitrator may also order the taking of the deposition of a witness who cannot be subpoenaed or who is unable to attend the hearing.

**(vi) MCR 3.602(G) -- Representation by Counsel**

A party is entitled to be represented by an attorney at the hearing. Any waiver of that right prior to the hearing is ineffective.

**(vii) MCR 3.602(H) -- Award by Majority of the Arbitrators**

If a panel of arbitrators hears the arbitration, a majority may render a final award unless the submission provides for unanimity. If an arbitrator is unable to act after the commencement of the hearing, the remaining members of the panel may continue and determine the controversy.

**(viii) MCR 3.602(I) -- Confirmation of the Award**

An arbitration award filed with the court within one year after its rendition may be confirmed by the court, unless the award is vacated, corrected, or modified.

**(ix) MCR 3.602(J) -- Vacating the Award**

An arbitration award may be vacated and a rehearing ordered upon an application made within 21 days after the award. This subrule lists four grounds for vacating an arbitration award:

1. The award was procured by corruption, fraud, or other undue means.
2. There was evident partiality by a neutral arbitrator, corruption of an arbitrator, or prejudicial misconduct.
3. The arbitrator exceeded his or her powers.
4. The arbitrator refused to postpone the hearing upon a showing of sufficient cause, refused to hear material evidence, or otherwise conducted the hearing in a manner that substantially prejudiced a party's rights.

**(x) MCR 3.602(K) -- Modification or Correction of Award**

Within 21 days after the award, the circuit court may modify or correct it on one of three grounds:

1. There is an evident miscalculation of figures or an evident mistake in the description of a person, thing, or property referred to in the award.

2. The arbitrator has ruled on a matter not submitted for decision, and the award may be corrected without affecting the merits of the decision submitted.

3. The award is imperfect in a matter of form, not affecting the merits of the controversy.

**(xi) MCR 3.602(L)-(M) -- Judgment, Costs, Appeals**

The circuit court shall render judgment on the confirmed, corrected, or modified award, and the judgment shall have the same force and effect as other judgments. Costs of the arbitration may be taxed as in civil actions. Appeals from the circuit court's orders or judgments may be had as in other civil actions. (This subrule mirrors the provisions of M.C.L.A. § 600.5025.)

**F. Section 600.5031 -- Venue**

Venue for proceedings confirming an arbitration award is to be laid in the circuit court of the county provided for in the arbitration agreement. In the absence of such a designation, proceedings are to be had in one of four places:

1. in the county where the adverse party resides or has a place of business;
2. if the adverse party is a nonresident or has no place of business in Michigan, in the county where the applicant resides or has a place of business;
3. if the arbitration involves real property, in the county where the property is located; or
4. if 1 through 3 are inapplicable, in any county.

**G. Section 600.5033-- Foreign Arbitration Awards**

Although the heading of this section is "Foreign Arbitration Awards," the section itself only covers confirmation of sister state arbitration awards brought into a Michigan court. Sister state arbitration awards may be confirmed, corrected, modified, or rejected, and judgment entered thereon by a Michigan court of competent jurisdiction.

**H. Section 600.5035 -- Equitable Powers of Confirming Court**

Nothing contained in the chapter is to be construed to affect the court's equitable powers over arbitrators, awards, or parties.

## PART TWO

### I. INTERNATIONAL COMMERCIAL ARBITRATION STATUTES

#### A. Introduction

Within the last four years seven states have enacted statutes addressed specifically to international commercial arbitration: California,<sup>24</sup> Connecticut,<sup>25</sup> Florida,<sup>26</sup> Georgia,<sup>27</sup> Hawaii,<sup>28</sup> Maryland,<sup>29</sup> and Texas.<sup>30</sup> All seven states had enacted arbitration statutes of general application prior to adoption of the special international commercial arbitration version. In several instances enactment of international commercial arbitration statutes was in direct response to these states' growing international markets.<sup>31</sup> California, for example, wanted to capitalize on its geographical proximity to Asia. In order to attract international business and investment, increase exports, and raise state employment, these states turned to various sources as models for the adoption of an international commercial arbitration statute, including the Model Law on International Commercial Arbitration prepared by the United Nations Commission on International Trade Law ("UNCITRAL") and adopted by the United Nations General Assembly on

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<sup>24</sup> Arbitration and Conciliation of International Commercial Disputes, Cal. Civ. Proc. Code §§ 1297.11-.432 (Deering 1988).

<sup>25</sup> UNCITRAL Model Law on International Commercial Arbitration, 1989 Conn. Acts 261 (Reg. Sess.), Pub. Act. No. 89-179.

<sup>26</sup> Florida International Arbitration Act, Fla. Stat. Ann. §§ 684.01-.35 (1988).

<sup>27</sup> Resolution of Conflicts Arising Out of International Transactions, Ga. Code Ann. §§ 7.201-.214 (1989).

<sup>28</sup> Hawaii International Arbitration, Mediation, and Conciliation Act, Haw. Rev. Stat. §§ 658D-1--9 (1988).

<sup>29</sup> Maryland International Commercial Arbitration Act, 1990 Md. Laws 333.

<sup>30</sup> Arbitration and Conciliation of International Disputes, Tex. Rev. Civ. Stat. Ann. art. 249-1 to 249-43 (Vernon 1989).

<sup>31</sup> Gregory, International Commercial Arbitration: Comments on Professor Graham's Paper, 13 Canadian Bus. L.J. 42, 44-46 (1987). See Burton, Markets in Motion: U.S.-Japan Trade in the Fast Lane, 18 N.Y.U.J. Int'l L. & Pol. 1137, 1148 (1986); Kerr, International Arbitration v. Litigation, 1980 J. Bus. L. 164, 170.

December 11, 1985.<sup>32</sup> None of the state statutes impose any costs on the states. In the words of one commentator, the recent international commercial arbitration enactments has "met the wishes of the business community and, best of all, it was free."<sup>33</sup> Another has predicted that "as states begin to adopt legislation that makes their states more attractive as arbitral forums, other states are likely to join the competition."<sup>34</sup>

These statutes can be grouped into four categories. In the first group fall those statutes that follow the Model Law verbatim. Connecticut is the one state in this category. Next are those that adopt most but not all of the Model Law's provisions and add many of their own. California and Texas are in this group. California's 1988 version of the Model Law deletes the final two chapters of the Model Law, "Recourse Against an Award" and "Recognition and Enforcement of Awards," (apparently because those two chapters arguably are preempted by the Federal Arbitration Act<sup>35</sup>), and adds a section dealing with conciliation based on UNCITRAL's Conciliation Rules.<sup>36</sup> Connecticut, on the other hand, did not balk at the preemption issue, enacting the UNCITRAL Model Law in its entirety. The conciliation section was added to meet the strong Asian cultural preference for other non-confrontational means of resolving disputes.<sup>37</sup> These same factors motivated Hawaii to include mediation and conciliation provisions in its international commercial arbitration statute. Texas in turn modeled its 1989 international commercial statute after California's.

The third group of states are those that have adopted some of the Model Law's provisions and add many of their own. Florida used the Model Law as one source for its 1986 international commercial arbitration law, but also considered other institutional arbitral rules, treatises, court decisions, conventions, and

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<sup>32</sup> G.A. Res. 40/72, 40 GAOR Supp. (No. 53), at 308, U.N. Doc. A/40/53.

<sup>33</sup> Gregory, supra note 28, at 44-46.

<sup>34</sup> Note, A Proposal to Adopt UNCITRAL's Model Law on International Commercial Arbitration as Federal Law, 25 Tex. Int'l L.J. 43, 52 (1990).

<sup>35</sup> See 9 U.S.C. §§ 10, 201, 207 (1988).

<sup>36</sup> Cal. Civ. Proc. Code § 1297.301 (West Supp. 1990); UNCITRAL Conciliation Rules, 35 U.N. GAOR Supp. (No. 17) at 11, U.N. Doc. A/35/17 (1980).

<sup>37</sup> Hearing on SB 2667 Before the California Senate Committee on Judiciary, pt. 2, at 2 (Jan. 26, 1988).

existing legislation in the United States and overseas.<sup>38</sup> Florida's aim was to attract regional banking and business from Latin America. Finally, in the fourth group are those states that have enacted skeletal international arbitration laws which adopt few, if any, of the Model Law's articles. Georgia, Hawaii, and Maryland are in this category.

The following survey compares the key provisions of the UNCITRAL Model Law with the seven state international commercial arbitration statutes. Because the Connecticut arbitration statute is a verbatim copy of the Model Law, no specific analysis of it will be made. Copies of the Model Law and of the state statutes are included in the Appendix.

## **B. Arbitrability**

The applicability of an international commercial arbitration statute is contingent upon two conditions: The dispute must be both "commercial" and "international."

### **(i) The "Commercial" Nature of the Dispute**

No statute contains an exhaustive list of what constitutes a "commercial transaction" or a "relationship commercial in nature." Instead, some statutes provide a non-exhaustive list of relationships that qualify as "commercial." Article 1, footnote \*\*, of the Model Law, for example, provides:

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

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<sup>38</sup> Loumiet, O'Naghten & Swan, Proposed Florida International Arbitration Act, 16 U. Miami Inter-Am. L. Rev. 591, 594 n.2 (1985).

California lists 18 types of agreements and relationships that qualify as commercial in nature, including contracts for professional services.<sup>39</sup> Texas does likewise, and includes agreements covering intellectual property.<sup>40</sup>

Because the lists themselves are expansive and non-exhaustive, enforcing courts should engage in a strong presumption of arbitrability, subject of course to express statutory exceptions for disputes deemed non-arbitrable. In this last connection, California, Connecticut, and Texas do not enumerate specific disputes which are not arbitrable but instead state generally that their international commercial arbitration statute "does not affect any other law under which certain disputes may not be submitted to arbitration."<sup>41</sup> Florida, Georgia, and Hawaii take the opposite tack. They list non-arbitrable disputes but enumerate more generally what type of disputes are arbitrable. Florida excepts (1) Florida real property disputes, unless the parties expressly submit the dispute to international commercial arbitration, (2) domestic relations disputes, and (3) intergovernmental disputes.<sup>42</sup> Georgia identifies ten disputes to which its international commercial arbitration statute does not apply, including small consumer loans; insurance contracts; employment contracts, unless the arbitration clause is initialed by all signatories at the time of execution of the contract; and bodily injury or wrongful death claims.<sup>43</sup> Hawaii excludes domestic relations and real property disputes from the scope of coverage under its statute.<sup>44</sup>

In determining whether a dispute is commercial in nature, Florida, Georgia, Hawaii, and Maryland collapse the international nature of the dispute into its commercial nature to arrive at a unitary standard for determining the applicability of their respective international commercial arbitration statutes. The focus is on the parties or, alternatively, the subject matter of the underlying

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<sup>39</sup> Cal., § 1297.16(a)-(r).

<sup>40</sup> Tex., art. 249-1, § 6.

<sup>41</sup> Tex., art. 249-1, § 8. Accord Cal., § 1297.17; Conn., Pub. Act. No. 89-179, § 1(5); Model Law, art. 1(5).

<sup>42</sup> Fla., § 684.03(2)(a)-(b).

<sup>43</sup> Ga., § 9-9-2(c)(1)-(10). Although this section is from Georgia's Arbitration Code, it is incorporated by reference in Georgia's Resolution of Conflicts Arising Out of International Transactions, § 9-9-31(c).

<sup>44</sup> Haw., § 658D-4(b)(1)-(2).



transaction. Maryland's provision is typical. It defines "international commercial arbitration" as an arbitration in which the relevant place of business of at least one of the parties (defined as the place of business with the closest relationship to the arbitration agreement<sup>45</sup>) is in a country other than the United States. Alternatively, if none of the parties has a relevant place of business in a country other than the United States, the inquiry is expanded to whether the relationship between any of the parties involves property located outside the United States, envisages performance outside the United States, or has some other reasonable relation with one or more foreign countries.<sup>46</sup> Georgia adds to this list of relationships investment outside the United States,<sup>47</sup> while Florida goes even further by including "the ownership, management, or operation of a business entity through which such an investment [outside the United States] is effected, or any agreement pertaining to any interest in such an entity".<sup>48</sup> Hawaii's version tracks Maryland's, but neither states' scope provision mentions investment disputes specifically.<sup>49</sup>

The state legislatures of Florida, Georgia, Hawaii, and Maryland mentioned that one of the policies for enactment of the legislation was to encourage and promote international commercial arbitration in the state,<sup>50</sup> strongly suggesting that the scope provisions of the respective statutes should be given an expansive rather than a restrictive reading.

## **(ii) The "International" Nature of the Dispute**

The second prong of the inquiry as to the applicability of a state's international commercial arbitration statute turns on whether the dispute is "international" in character. As noted, Florida, Georgia, Hawaii, and Maryland adopt an approach that focuses on the domicile of the parties to the dispute or, if all parties are from the United States, then on the locus of the dispute. Florida and Hawaii add a choice-of-law provision which states that even if the place of

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<sup>45</sup> Md. Cts. & Jud. Proc. § 3-2B-01(b)(1).

<sup>46</sup> *Id.*, § 3-2B-01(b)(1)(I)-(II).

<sup>47</sup> Ga., § 9-9-31(b)(2).

<sup>48</sup> Fla., § 684.03(1)(b)(4).

<sup>49</sup> Haw., § 658D-4(a)(2).

<sup>50</sup> Fla., § 684.02(1); Ga., § 9-9-30; Haw., § 658D-3; Md., § 3-2B-02.

arbitration is outside the state, if the arbitration is within the scope of the international commercial arbitration law, then, in three circumstances, that law shall apply (1) if the parties expressly provide that the law of the state shall govern the dispute; (2) in the absence of such an agreement, if the underlying contract is to be interpreted under that state's law; or (3) in any other case, if an arbitrator determines that that state's law governs the resolution of the dispute after applying conflict of laws principles.<sup>51</sup>

With one exception, California, Connecticut, and Texas do not depart significantly from the other four states' criteria, adhering closely to the Model Law's suggested indicia of whether or not a dispute is international in character: (1) whether the parties' place of business are in different countries; (2) whether the subject matter of the dispute is in a country other than the one where the parties' place of business is located; or (3) whether the parties have agreed expressly that the subject matter of the dispute relates to a country outside the United States.<sup>52</sup> This last criterion -- significant for its deference to freedom of contract and party autonomy -- does not figure at all in the Florida, Georgia, Hawaii, or Maryland statutory schemes. The second criterion is similar, however, to the one enacted by Florida, Georgia, Hawaii, and Maryland that considers a dispute international if the subject matter is outside the United States even when all parties are from the United States.<sup>53</sup>

### C. The Arbitration Agreement

Six of the seven states with an international commercial arbitration statute stipulate that an arbitration agreement must be in writing in order to be enforceable, the one exception being Maryland.<sup>54</sup> Although the Maryland international commercial arbitration statute does not expressly require that the agreement be in writing, it does incorporate by reference the arbitration statutes and laws of the United States.<sup>55</sup> In that connection, Article II of the Convention

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<sup>51</sup> Fla., § 684.05(1)-(3); Haw., § 658D-4(d)(1)-(3).

<sup>52</sup> Cal., § 1297.13(d); Conn., Pub. Act No. 89-179, § 1(3)(a)-(c); Tex., art. 249-1, § 3(1)-(4).

<sup>53</sup> Fla., § 684.03(1)(b); Ga., § 9-9-31(b)(2); Haw., § 658D-4(a)(1); Md. Cts. & Jud. Proc. § 3-2B-01(b)(1)(II).

<sup>54</sup> Cal., § 1297.72; Conn., Pub. Act No. 89-179, § 7(2); Fla., § 684.04(4)-.05; Ga., §§ 9-9-3, 9-9-32; Haw., §§ 658D-4(d), 658D-5; Tex., art. 249-7, § 2.

<sup>55</sup> Md. Cts. & Jud. Proc. § 3-2B-03(a).

on the Recognition and Enforcement of Foreign Arbitral Awards, enacted in federal implementing legislation at 9 U.S.C. § 201, provides that the "Contracting Parties shall recognize an agreement in writing under which the parties undertake to submit [disputes] to arbitration . . . ." In addition, the Maryland arbitration statute of general application provides that "[a] written agreement to submit any existing controversy to arbitration . . . is valid and enforceable . . . ." <sup>56</sup> By negative implication, unless the arbitration agreement has been reduced to writing, it will not be enforceable in Maryland.

The form of an arbitration agreement may be either an arbitration clause in a contract or a separate agreement.<sup>57</sup> Under the Florida and Hawaii provisions, the agreement may be contained in correspondence, telegrams, telexes, or any other form of written communication.<sup>58</sup> The other states include a provision that an arbitration agreement can be evidenced by an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by the other.<sup>59</sup> The content of an arbitration agreement as defined in the Model Law 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."<sup>60</sup> California and Connecticut have adopted this language verbatim.<sup>61</sup> Florida and Hawaii have defined a "written undertaking to arbitrate" as a "writing in which a person undertakes to submit a dispute to arbitration, without regard to whether that undertaking is sufficient to sustain a valid and enforceable contract or is subject to defenses."<sup>62</sup> Texas' definition has a comparable tenor, providing that "[a]n arbitration agreement is an agreement to submit to arbitration disputes that have arisen or may arise between the parties concerning

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<sup>56</sup> Md. Cts. & Jud. Proc. Code Ann. § 3-206(a) (1989).

<sup>57</sup> Cal., § 1297.71; Conn., § 7(1); Fla., § 684.04(4); Ga., § 9-9-3; Haw., § 658D-5; Tex., art. 249-7, § 1.

<sup>58</sup> Fla., § 684.04(4); Haw., § 658D-5.

<sup>59</sup> Cal., § 1297.72; Conn., § 7(2); Ga., § 9-9-32; Tex., art. 249-7, § 2; Model Law, art. 7(2).

<sup>60</sup> Model Law, art. 7(1).

<sup>61</sup> Cal., § 1297.71; Conn., § 7(1).

<sup>62</sup> Fla., § 684.04(4); Haw., § 658D-5.

a defined legal relationship, whether or not contractual."<sup>63</sup> Georgia provides that an arbitration agreement is enforceable "without regard to the justiciable character of the controversy . . . ." <sup>64</sup>

## **D. The Arbitral Tribunal**

### **(i) Composition and Appointment**

The Model Law and Connecticut leave the composition and selection of the arbitral tribunal largely to the parties' own determination. Absent agreement, three arbitrators are to be appointed.<sup>65</sup> California, Florida, and Texas fix the number of arbitrators at one, unless the parties agree to a greater number,<sup>66</sup> perhaps attempting to avoid a preemption issue in view of the Federal Arbitration Act's provision for one arbitrator in the absence of party agreement to the contrary.<sup>67</sup> Georgia, Hawaii, Maryland are silent on this question, although their general arbitration statutes provide for court appointment of one or more arbitrators, in the discretion of the court, unless the parties agree otherwise.<sup>68</sup> Nationality is expressly excluded as a ground for disqualification under the Model Law,<sup>69</sup> as well as under the California, Connecticut, Georgia, and Texas statutes<sup>70</sup>.

In cases where the arbitral tribunal consists of three arbitrators and the parties fail to agree on the method of appointment, the Model Law, California, Connecticut, and Texas provide that each party shall appoint an arbitrator and the two arbitrators shall in turn appoint a third.<sup>71</sup> Court intervention is authorized

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<sup>63</sup> Tex., art. 249-7, § 1.

<sup>64</sup> Ga., § 9-9-3.

<sup>65</sup> Model Law, art. 10(2). Accord Conn., § 10(2).

<sup>66</sup> Cal., § 1297.101; Fla., § 684.09; Tex., art. 249-10.

<sup>67</sup> See 9 U.S.C. § 5.

<sup>68</sup> Ga., § 9-9-7; Haw., § 658-4; Md. Cts. & Jud. Proc. § 3-211.

<sup>69</sup> Model Law, art. 11(1).

<sup>70</sup> Cal., § 1297.111; Conn., § 11(1); Ga., § 9-9-33; Tex., art. 249-11, § 1.

<sup>71</sup> Model Law, art. 11(3); Cal., § 1297.113; Conn., § 11(3); Tex., art. 249-11, § 3.

where either party fails to appoint an arbitrator or the two arbitrators are unable to select a third.<sup>72</sup> There is no appeal from the court appointment.<sup>73</sup> In instances where a sole arbitrator is to resolve the dispute, court appointment is authorized under all the state laws when the parties fail to agree on the selection of the arbitrator.<sup>74</sup> In selecting an arbitrator, the appointing court is directed to consider certain factors in making its selection. The following factors listed in the California statute are typical<sup>75</sup>:

- (1) any qualifications required of an arbitrator by the agreement of the parties;
- (2) other considerations likely to secure the appointment of an independent and impartial arbitrator; and
- (3) in the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

## **(ii) Grounds for Challenge and Challenge Procedure**

The Model Law imposes an affirmative duty on any person approached to serve as an arbitrator to disclose any circumstances that may give rise to justifiable doubts as to their impartiality or independence.<sup>76</sup> This duty is a continuing one for any person ultimately selected as an arbitrator.<sup>77</sup> The Model Law permits a challenge to an arbitrator only if circumstances relating to impartiality and independence are raised, or if the arbitrator fails to possess the qualifications agreed to by the parties.<sup>78</sup> A party may challenge his own arbitrator only for reasons that come to light after the selection was made.<sup>79</sup>

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<sup>72</sup> Model Law, art. 11(3)(a); Cal., § 1297.114; Conn., § 11(3)(a); Tex., art. 249-11, § 4.

<sup>73</sup> Model Law, art. 11(5); Cal., § 1297.117; Conn., § 11(5); Tex., art. 249-11, § 7.

<sup>74</sup> E.g., Cal., § 1297.115; Fla., § 684.23.

<sup>75</sup> Cal., § 1297.118. Accord Model Law, art. 11(5); Conn., § 11(5); Tex., art. 249-11, § 8(1)-(3).

<sup>76</sup> Model Law, art. 12(1).

<sup>77</sup> Id.

<sup>78</sup> Id. art. 12(2).

<sup>79</sup> Id. art. 12(2).

Absent agreement on a challenge procedure, a challenge must be made within fifteen days after the arbitral tribunal is constituted or after becoming aware of a ground for challenge. Unless the challenged arbitrator recuses himself or the other party concurs in the challenge, the arbitral tribunal decides the challenge.<sup>80</sup> If this procedure fails for any reason, the matter may be referred to court for its nonappealable decision on the challenge. Pending the judicial determination, the arbitral tribunal may proceed to an award with the challenged arbitrator participating in the proceeding.<sup>81</sup>

In contrast to the Model Law's general requirement of disclosure, the California and Texas statutes contain a nonexhaustive list of grounds for recusal which is remarkably similar to the grounds listed in Michigan Court Rule 2.003 for disqualification of a judge. Among the grounds which California and Texas list for disqualification are personal bias, knowledge of disputed evidentiary facts, service as a lawyer in the matter in controversy, prior service as an arbitrator in another proceeding involving one of the parties, a relationship within the third degree to a person who has an interest that could be substantially affected by the outcome of the arbitration, or a close personal or professional relationship with a person known to have an interest that could be substantially affected by the outcome of the proceeding.<sup>82</sup> In California the obligation to disclose is mandatory and cannot be waived.<sup>83</sup> The procedure adopted for challenging an arbitrator in California and Texas is virtually identical to the Model Law's.<sup>84</sup> If an arbitrator is removed or is unable to perform his functions de facto, California, Texas, and the Model Law provide for substitution in the same manner as an original appointment.<sup>85</sup> California and Texas further provide that in the event of a substitution during the course of an arbitration with more than one arbitrator, the arbitral tribunal has the discretion to repeat any hearings previously held.<sup>86</sup>

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<sup>80</sup> Id. art. 13(2).

<sup>81</sup> Id. art. 13(3).

<sup>82</sup> Cal., § 1297.121; Tex., art. 249-12, § 1.

<sup>83</sup> Cal., § 1297.122.

<sup>84</sup> Cal., §§ 1297.131-.136; Tex., art. 249-13, §§ 1-6; Model Law, art. 13.

<sup>85</sup> Cal., §§ 1297.141-.154; Tex., art. 249-14, 249-15; Model Law, art. 14-15.

<sup>86</sup> Cal., § 1297.153(b); Tex., art. 249-15, § 3(2).

### (iii) Competence of the Tribunal to Rule on Its Jurisdiction

California, Florida, Georgia, Texas, and the Model Law vest the arbitral tribunal with the power to rule on its own jurisdiction.<sup>87</sup> In California, Georgia, and Texas, the arbitration clause is treated as an agreement independent of the other terms of the contract, so that a determination that the underlying agreement is void does not result in the invalidation of the arbitration clause.<sup>88</sup> California and Texas also require that a jurisdictional challenge be raised in the statement of defense.<sup>89</sup>

### (iv) Power of the Arbitral Tribunal to Order Interim Relief

Unless otherwise stipulated by the parties in their arbitration agreement, the Model Law and the California, Connecticut, Maryland, and Texas statutes authorize the arbitral tribunal to order appropriate interim relief (typically, the posting of security), subject to judicial supervision.<sup>90</sup> Florida and Georgia empower the arbitral tribunal to order interim relief, regardless of the parties' agreement, and without prejudice to the parties' right to seek such relief directly from any appropriate court.<sup>91</sup> Florida adds that resort to a court for interim relief constitutes a waiver of the agreement to arbitrate if so provided in the undertaking to arbitrate.<sup>92</sup> Hawaii has no provision explicitly authorizing the granting of interim relief by an arbitral tribunal, although it does permit the arbitral tribunal to seek judicial assistance.<sup>93</sup> In Maryland the posting of security

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<sup>87</sup> Cal., § 1297.161; Fla., § 684.06(2); Ga., § 9-9-34; Tex., art. 249-16, § 1; Model Law, art. 16.

<sup>88</sup> Cal., § 1297.161; Ga., § 9-9-34; Tex., art. 249-16, § 1. Accord Model Law, art. 16(1). See *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967)(arbitration agreement enforceable notwithstanding that underlying contract is void).

<sup>89</sup> Cal., § 1297.162; Tex., art. 249-16, § 2.

<sup>90</sup> Model Law, art. 9, 17; Cal., §§ 1297.171, 1297.91-.94; Conn., §§ 9, 17; Md., § 3-2B-06(a), (b); Tex., art. 249-17, 249-9.

<sup>91</sup> Fla., § 684.16; Ga., § 9-9-35.

<sup>92</sup> Fla., § 684.16(1).

<sup>93</sup> Haw., § 658D-7(e). See Haw., §§ 658D-7, 658D-8.

can only be required if the party to be required to post security resides in a country that has not acceded to the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards and if that party does not have sufficient assets in the United States to satisfy the amount of the claim.<sup>94</sup> California and Texas empower their courts to preliminarily enjoin the disclosure of trade secrets and the disposition of goods that are the subject matter of the arbitration pending completion of the arbitration.<sup>95</sup> Also in California and Texas, if a court application is made seeking interim measures, the court is to give preclusive effect to the arbitrator's findings of fact bearing on the question of the propriety of interim relief.<sup>96</sup> In Maryland the standard is abuse of discretion.<sup>97</sup>

### (v) The Conduct of Arbitral Proceedings

Each state statute that addresses the question of the conduct of the arbitral proceeding leaves the parties essentially free to fashion their own rules governing the procedure to be followed in the arbitration.<sup>98</sup> Only the Maryland statute is silent on this point. Under the Model Law and the California, Florida, and Texas statutes, in the absence of agreement the arbitral tribunal is vested with the power to conduct the arbitration in the manner it considers appropriate, subject to the express procedural rules set forth in the arbitration statute.<sup>99</sup> In this last connection, a wide range of gap-filling rules are provided in the Model Law and in the California, Florida, and Texas statutes. Georgia, Hawaii, and Maryland, by contrast, are either skeletal in approach or altogether silent on the point, leaving it to the parties to determine their own procedures. Connecticut, of course, tracks the Model Law verbatim.

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<sup>94</sup> Md., § 3-2B-06(a)(1). Maryland also has a good cause exception for requiring the posting of security. *Id.* § 3-2B-06(a)(2).

<sup>95</sup> Cal., § 1297.93(b); Tex., art. 249-9, § 3(b).

<sup>96</sup> Cal., § 1297.94; Tex., art. 249-9, § 4.

<sup>97</sup> Md., § 3-2B-06(b)(2).

<sup>98</sup> Model Law, art. 19; Cal., § 1297.191; Conn., § 19; Fla., § 684.07; Ga., § 9-9-36; Haw., § 658D-7(b); Tex., art. 249-19.

<sup>99</sup> Model Law, art. 19(2); Cal., § 1297.192; Fla., § 684.06(1); Tex., art. 249-19, § 2.



The gap-filling provisions of the Model Law and the California, Florida, and Texas statutes are described below.

**a. Place of Arbitration**

Under the Model Law and the California, Florida, and Texas statutes, the arbitrator is free to select the place of arbitration, having regard to the circumstances of the case, including the convenience of the parties.<sup>100</sup> The arbitrator is authorized to hold the arbitration in more than one place if appropriate for the purpose of receiving evidence.<sup>101</sup>

**b. Commencement of Arbitral Proceeding**

Absent agreement of the parties, the arbitration proceedings commence on the date a request for arbitration is received by the respondent.<sup>102</sup>

**c. Language to be Used in the Proceeding**

The arbitrator has the discretion to select the language applicable to all phases of the arbitration proceeding and to order translations of documentary evidence.<sup>103</sup>

**d. Statement of Claim and Defense**

Within the period of time set by the arbitrator, the claimant must state the facts supporting his claim, the points at issue, and the relief sought. The respondent must state its defense to each of these allegations. Statements of claim or defense may be amended or supplemented, subject to limits by the arbitrator for delay in making the amendment or supplementation.<sup>104</sup>

**e. Hearings and Written Proceedings**

The arbitral tribunal conducts hearings with prior notice at appropriate stages of the proceedings, unless the parties have waived that right. The tribunal retains the discretion to determine whether to hold oral hearings for the presentation of evidence or argument, and whether the proceedings should be

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<sup>100</sup> Model Law, art. 20; Cal., § 1297.202; Fla., § 684.13(1); Tex., art. 20, § 2.

<sup>101</sup> Model Law, art. 20(2); Cal., § 1297.203; Fla., § 684.13(1); Tex., art. 249-20, § 3.

<sup>102</sup> Model Law, art. 21; Cal., § 1297.211; Tex., art. 249-21.

<sup>103</sup> Model Law, art. 22; Cal., §§ 1297.221-.224; Fla., § 684.06(1); Ga., § 9-9-37; Tex., art. 249-22, §§ 1-4.

<sup>104</sup> Model Law, art. 23; Cal., §§ 1297.231-.233; Fla., § 684.13(2); Tex., art. 249-23.

conducted on the basis of documentary proofs. No ex parte communications are permitted.<sup>105</sup> California and Texas specify that all hearings are to be held in camera.<sup>106</sup> California, Florida, and Texas also authorize consolidation of arbitration proceedings.<sup>107</sup>

**f. Default**

Under Article 25 of the Model Law, which California and Texas have adopted,<sup>108</sup> the arbitral tribunal is to terminate the proceeding if, without showing sufficient cause, the claimant fails to communicate its statement of claim in accordance with the procedure set forth in Article 23 of the Model Law. The respondent's failure to communicate its statement of defense is not to be treated as an admission of the claimant's allegations and the proceeding is to continue. Florida provides that a failure to respond shall constitute a general denial of the claim.<sup>109</sup> If any party fails to appear at a hearing or produce evidence, the arbitrator may make an award based on the evidence presented. Florida forbids the making of an award based solely on the default of a party, thereby requiring the nondefaulting party to adduce proofs in support of its claim.<sup>110</sup> Florida also empowers the arbitral tribunal to dismiss claims for failure to prosecute.<sup>111</sup>

**g. Experts Appointed by Tribunal**

Under Article 26 of the Model Law the tribunal may appoint experts to report to it on specific issues and may require the parties to assist the expert by providing him with relevant information. If a party requests, the expert may participate in the hearing and be examined by the parties. The parties may present their own expert witnesses to testify on the points in issue. California, Georgia, and Texas have adopted the Model Law's provision on experts.<sup>112</sup> Hawaii authorizes a similar power of appointment of experts by the arbitrator.<sup>113</sup>

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<sup>105</sup> Model Law, art. 24; Cal., §§ 1297.241-.245; Fla., § 684.13(1); Tex., art. 249-24.

<sup>106</sup> Cal., §§ 1297.245; Tex., art. 249-24, § 5.

<sup>107</sup> Cal., § 1297.271; Tex., art. 249-27, § 1; Fla., § 684.12.

<sup>108</sup> Cal., §§ 1297.251-.253; Tex., art. 249-25.

<sup>109</sup> Fla., § 684.08(4).

<sup>110</sup> Fla., § 684.13(6).

<sup>111</sup> Id.

<sup>112</sup> Cal., §§ 1297.261-.262; Ga., § 9-9-38; Tex., art. 249-26.

#### **h. Representation by Counsel**

Florida is the only state that makes express provision for representation by counsel in an arbitration. It makes that right absolute and non-waivable prior to the commencement of the proceeding.<sup>114</sup>

#### **i. Evidence; Witnesses; Subpoenas; Depositions**

Two distinct approaches are taken on the subject of evidence and testimony. Florida and Hawaii empower the arbitrator to determine the relevance and materiality of evidence without the need to follow formal rules of evidence, to issue subpoenas duces tecum and ad testificandum, to order the taking of depositions and the use of other discovery devices, to fix fees for the attendance of witnesses, and to make awards of interest and of reasonable attorney's fees.<sup>115</sup> Both states also provide for resort to the courts as necessary in exercising these powers.<sup>116</sup>

In contrast to the Florida and Hawaii approach, the Model Law, California, and Texas leave these matters for judicial resolution. They permit the tribunal, or a party with the permission of the tribunal, to request judicial assistance in taking evidence.<sup>117</sup> California and Texas add that such judicial assistance may include requests for the issuance of subpoenas for the attendance of witnesses.<sup>118</sup>

#### **j. Applicable Law**

California, Florida, and Texas follow Article 28 of the Model Law regarding the rules applicable to the substance of the dispute.<sup>119</sup> The guiding principle is that the tribunal is to decide the dispute according to the rules of law

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<sup>113</sup> Haw., § 658D-7(d)(4).

<sup>114</sup> Fla., § 684.14.

<sup>115</sup> Fla., §§ 684.15, 684.18; Haw., §§ 658D-7(d)(1)-(6), 658D-8. Georgia also authorizes the arbitrator to award reasonable attorney's fees and costs. Ga., § 9-9-39(c).

<sup>116</sup> Fla., § 684.15(4); Haw., §§ 658D-7(e), 658D-8.

<sup>117</sup> Model Law, art. 27.

<sup>118</sup> Cal., § 1297.271; Tex., art. 249-27, § 1.

<sup>119</sup> Cal., §§ 1297.281-.285; Fla., §§ 684.15(1), 684.17; Tex., art. 249-28.

chosen by the parties. In order to avoid the problem of renvoi, the parties' choice of law includes the substantive law of the state only and not its conflict of laws rules as well. In the absence of a choice of law provision, the tribunal determines the governing law using the conflict of laws rules which it considers applicable. The tribunal may decide the dispute ex aequo et bono or as amiable compositeur only if so authorized by the parties. In all cases the tribunal is to apply relevant usages of trade.

Although it is otherwise silent on the choice of law issue, Georgia does provide that the selection of that state as the place of arbitration does not in itself constitute selection of Georgia procedural or substantive law as the law governing the dispute.<sup>120</sup> Hawaii provides that regardless of whether the place of arbitration is in Hawaii, its international commercial arbitration statute applies if the dispute is otherwise within the scope of that statute and (1) the parties expressly so provide or, (2) in the absence of such agreement, if Hawaii law is determined to be the governing substantive law under applicable conflict of laws rules.<sup>121</sup>

On issues of procedure, if authorized by the parties or by all members of the panel, the presiding officer has the power to rule on all procedural questions.

#### **k. Decision by Panel of Arbitrators**

Under the Model Law and in California and Texas, if a panel of arbitrators determines the dispute, a majority of its members makes an award unless the parties agree to a different number.<sup>122</sup>

#### **l. Settlement, Mediation, and Conciliation**

If the dispute is settled, Article 30 of the Model Law authorizes reducing the settlement to an arbitral award and gives it the same status and effect as an award on the merits. California and Texas adopt this approach, and include a section which directs the tribunal to encourage settlement and, to that end, to use mediation and conciliation to encourage settlement.<sup>123</sup> To implement this portion of their international arbitration statutes, both California and Texas have enacted identical provisions establishing a fairly detailed conciliation process.<sup>124</sup> In a

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<sup>120</sup> Ga., § 9-9-36.

<sup>121</sup> Haw., § 658D-4(d).

<sup>122</sup> Model Law, art. 29; Cal., § 1297.291; Tex., art. 249-29.

<sup>123</sup> Cal., §§ 1297.301-.304; Tex., art. 249-30.

<sup>124</sup> Cal., §§ 1297.341-.432; Tex., art. 249-34 to 249-43.

similar vein, Hawaii has created a center to facilitate the mediation and conciliation process, authorizing the center to promulgate rules regulating mediation and conciliation.<sup>125</sup>

**m. Form and Contents of Award**

The Model Law and the California, Florida, and Texas statutes require four formalities to be followed when a tribunal issues an award: (1) the award must be in writing; (2) it must be signed by a majority of the arbitrators if it was a panel proceeding; (3) it must state the reasons upon which it is based (unless the parties agree that no reasons be given), and the date and place of arbitration; and (4) it must be delivered to the parties.<sup>126</sup> Georgia only requires that a written statement of reasons be given for the award.<sup>127</sup> California, Florida, and Texas also permit the tribunal to make an interim award, and to award interest and costs. Included in the term "costs" are the fees and expenses of arbitrators and expert witnesses, legal fees and expenses, and administrative fees of the institution supervising the arbitration.<sup>128</sup> In Florida the award may not be publicly disclosed by the tribunal or by a party unless the parties consent in writing to such disclosure; disclosure is required by law, or disclosure is necessary as part of a judicial enforcement proceeding.<sup>129</sup>

**n. Termination of Proceedings**

Under Article 32 of the Model Law arbitration proceedings are terminated ipso facto upon issuance of the final award. In other circumstances, the arbitral tribunal has the power to terminate proceedings when the parties agree to it; when the claimant withdraws its claim, unless the respondent objects and has a legitimate interest in obtaining a final resolution of the dispute; or when the tribunal finds that further proceedings have become unnecessary or impossible. California and Texas have adopted Article 32 verbatim.<sup>130</sup>

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<sup>125</sup> Haw., §§ 658D-5, 658D-7(c).

<sup>126</sup> Model Law, art. 31; Cal., §§ 1297.311-.315; Fla., § 684.19(1)-(3); Tex., art. 249-31, §§ 1-5.

<sup>127</sup> Ga., § 9-9-39(a).

<sup>128</sup> Cal., §§ 1297.316-.318; Fla., § 684.19(3)-(4); Tex., art. 249-31, §§ 6-8.

<sup>129</sup> Fla., § 684.19(3).

<sup>130</sup> Cal., §§ 1297.321-.323; Tex., art. 249-32.

**o. Correction and Interpretation of Award: Additional Award**

Article 33 of the Model Law gives the parties thirty days from receipt of the award to request a correction in the award for computational or clerical errors. If agreed to by the parties, a party may request an interpretation of a specific point or part of the award. The tribunal has thirty days to respond to such requests and need only do so if it considers the request to be justified. The tribunal may also make corrections of a clerical or computational nature on its own initiative. Within that same thirty-day period, a party may request an additional award as to claims presented in the proceeding but omitted from the award.

California and Texas have included this provision in their respective laws.<sup>131</sup> Florida provides generally for vacating, modifying, clarifying, correcting, or amending an award upon request of a party if made within thirty days after issuance of the award.<sup>132</sup> Georgia permits the parties to request an interpretation of an award.<sup>133</sup>

**(vi) Court Proceedings to Set Aside or Enforce Arbitral Awards**

The international arbitration statutes take two distinct approaches toward judicial intervention following the termination of the arbitration proceeding. One approach, adopted by California, Maryland, and Texas,<sup>134</sup> is to prohibit all judicial intervention except as provided under its international commercial arbitration statute or applicable federal law. Neither California nor Texas expressly authorizes its courts to set aside or enforce international commercial arbitration awards, leaving that subject for resolution under federal law. Maryland expressly authorizes its courts to enforce awards and to intervene in an international commercial arbitration proceeding which is contrary to the public policy of the state, but does not set out the procedure to be followed.<sup>135</sup> A broad-brush approach is taken by Hawaii as well. It authorizes enforcement of the

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<sup>131</sup> Cal., §§ 1297.331-.337; Tex., art. 249-33.

<sup>132</sup> Fla., § 684.20.

<sup>133</sup> Ga., § 9-9-39(b).

<sup>134</sup> Cal., § 1297.51; Md., § 3-2B-07; Tex., art. 249-5.

<sup>135</sup> Md., § 3-2B-07.

arbitral award pursuant to the Federal Arbitration Act and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.<sup>136</sup>

In contrast to the virtual statutory silence of California, Hawaii, Maryland, and Texas on the question of enforcement of international commercial arbitration awards, the Model Law and the Florida and Georgia statutes state the grounds for and the procedures to be followed in having an international commercial arbitration award set aside or enforced. The grounds set forth in the Georgia and Florida statutes are closely modeled after those provided in the Federal Arbitration Act. The Model Law's grounds for setting aside or refusing enforcement of an arbitral award track those found in Article V of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention). Articles 34 and 36 of the Model Law specify the same seven grounds for setting aside or refusing to enforce an arbitral award as are contained in the New York Convention:

1. Incapacity of a party.

2. Invalidity of the arbitration agreement under the law to which the parties have subjected it or under the law of the state in which the parties arbitrated.

3. Improper notice to a party of the appointment of an arbitrator or of the arbitral proceedings, or the party was otherwise unable to present its case.

4. Defects in the award (the award deals with a dispute not contemplated by or falling within the terms of the submission to arbitration, or the award contains decisions on matters beyond the scope of the submission<sup>137</sup>).

5. Defects in the composition of the arbitral tribunal or in the arbitral procedure as agreed to by the parties, unless such agreement was in conflict with a non-derogable provision of the Model Law.

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<sup>136</sup> Haw., § 658D-9. The approach taken by these four states is an implicit recognition that federal law preempts state law on the subject of the enforcement of an international commercial arbitration award. *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>137</sup> If the decision on matters beyond the scope of the submission can be separated from those submitted, only the part of the award which contains decisions on matters not submitted may be set aside. Model Law, art. 35(2)(a)(iii).

6. The subject matter of the dispute is not capable of resolution by arbitration under the law of the state.

7. The award conflicts with the public policy of the state.

In addition to furnishing the grounds for setting aside or refusing recognition of an arbitral award, the Model Law further provides that an application for setting aside an award must be made within three months of the award. A court is given the discretion to suspend judicial proceedings in order to give the tribunal an opportunity to eliminate any grounds for setting aside the award, if cure is possible.<sup>138</sup> A court which is asked to enforce an award may adjourn its proceedings if the award is the subject of a pending application to have it set aside in another court.<sup>139</sup>

The grounds for vacating or refusing recognition of an arbitration award in Florida represent a blend of the grounds listed in the New York Convention and the Federal Arbitration Act. In addition to the seven grounds listed above, Florida adds the following as grounds for vacating an award or declaring it not entitled to confirmation:

1. There was no written undertaking to arbitrate or there was fraud in the inducement of that undertaking.

2. A prior tribunal had determined that the dispute was nonarbitrable or the undertaking was invalid or unenforceable, unless the challenging party participated on the merits without objection.

3. The arbitral tribunal conducted its proceedings so unfairly as to substantially prejudice the rights of the challenging party.

4. The award was obtained by corruption, fraud, or undue influence.

5. A neutral arbitrator had a material conflict of interest.<sup>140</sup>

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<sup>138</sup> Model Law, art. 35(3)-(4).

<sup>139</sup> Model Law, art. 36(2).

<sup>140</sup> Fla., § 684.25. See Ga., § 9-9-13. Compare 9 U.S.C. § 10, which lists corruption, fraud, evident arbitrator partiality, arbitrator misconduct, and an arbitrator exceeding his powers as grounds for vacating an arbitral award.



These five grounds are included in the Georgia statute as well. Both Georgia and Florida impose a three-month limitations period on bringing an application to vacate an award.<sup>141</sup> Although the federal legislation implementing the New York Convention is silent on that precise question, 9 U.S.C. § 207 does provide that an application to confirm an award must be brought within three years after an arbitral award falling under the Convention is made. Section 9 of the Federal Arbitration Act provides a one-year period for bringing an action to confirm other arbitration awards, but it too is silent on the question of when an action must be brought to vacate an award.

### **(vii) Consent to Jurisdiction**

Florida and Hawaii provide that participation in an arbitral proceeding in the state or making a written agreement to arbitrate pursuant to the state's international commercial arbitration statute constitutes consent to the exercise of personal jurisdiction by the state courts over the party.<sup>142</sup>

### **(viii) Immunity of Arbitrators**

Only Florida expressly provides for immunity of arbitrators from suit based on the performance of the arbitrator's duties.<sup>143</sup>

### **(ix) Conciliation**

Three states, California, Hawaii, and Texas, provide for resolving international commercial disputes through conciliation in lieu of arbitration. The Hawaii legislation notes that it is the policy of the state to encourage the use of arbitration, mediation, and conciliation to resolve international commercial disputes, but makes no express provision for conciliation, instead leaving it to the center created under its law to establish rules and procedures for conducting conciliation.<sup>144</sup> California and Texas, on the other hand, have enacted detailed provisions on conciliation. Their conciliation statutes provide for the appointment of conciliators, furnish conciliators with principles for conducting

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<sup>141</sup> Fla., § 684.24(3)(b); Ga., § 9-9-13(a).

<sup>142</sup> Fla., § 684.30; Haw., § 658D-6.

<sup>143</sup> Fla., § 684.35.

<sup>144</sup> Haw., §§ 658D-2, 658D-7(c).

their proceedings, permit representation by any person of the parties' choice, guarantee confidentiality of all communications made in the conciliation proceeding, stay all arbitral and judicial proceedings pending the outcome of the conciliation proceedings, give a conciliation agreement which settles the dispute the same status as an arbitral award, authorize the conciliator to award costs, and immunize conciliators from suit.<sup>145</sup> Parties are also given immunity from civil process while present in the state to participate in the conciliation proceeding, and their participation in the conciliation process is not to be deemed as consent to judicial jurisdiction in the event the conciliation fails. As noted, these conciliation rules were drawn from the UNCITRAL Model Rules on Conciliation.<sup>146</sup>

The next part of the Report addresses the federal and international legal environment of international commercial arbitration.

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<sup>145</sup> Cal., §§ 1297.341-.432; Tex., art. 249-34 to 249-43.

<sup>146</sup> UNCITRAL Conciliation Rules, 35 U.N. GAOR Supp. (No. 17) at 11, U.N. Doc. A/35/17 (1980).

## **PART THREE**

### **I. THE FEDERAL AND INTERNATIONAL LEGAL ENVIRONMENT**

#### **A. The Federal Arbitration Act**

The United States Arbitration Act of 1925,<sup>147</sup> sometimes referred to as the Federal Arbitration Act, provides for arbitration in maritime transactions and contracts involving interstate or foreign commerce. (It is reproduced in the Appendix.) The original provisions of the Federal Act do not deviate dramatically from those of the Uniform Act. Provisions of the Federal Arbitration Act which were added in 1970 to implement the New York Convention are discussed in the following section dealing with the New York Convention.

Of greatest importance for purposes of this study is the question whether the Federal Act preempts state arbitration laws. In 1989, the U.S. Supreme Court considered this question in Volt Information Sciences, Inc. v. Board of Trustees of Stanford University,<sup>148</sup> concluding that the Federal Arbitration Act did not preempt a California statute permitting a stay of arbitration where the contracting parties had agreed that the arbitration agreement would be governed by California law. In Volt Information Sciences, Stanford University and a construction firm entered into a construction contract under the terms of which the parties agreed that (1) all disputes between them arising out of or relating to the contract or its breach would be resolved through arbitration, and (2) the contract would be governed "by the law of the place where the Project is located." When a dispute arose over payment for extra work, the firm made a demand for arbitration. The university responded by filing an action in California state court, alleging fraud and breach of contract by the firm, and also seeking indemnity from two other companies involved in the construction project with whom the university did not have arbitration agreements. The firm moved to compel arbitration pursuant to the contract. The university in turn moved to stay arbitration pursuant to a California statute which authorizes a court to stay arbitration pending resolution of related litigation between a party to an arbitration agreement and third parties not bound by such agreement where there is a possibility of conflicting rulings on common issues of law or fact. The state court granted the stay and rejected the challenge that the Federal Arbitration Act

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<sup>147</sup> 9 U.S.C. §§ 1-14.

<sup>148</sup> 489 U.S. \_\_\_\_, 109 S. Ct. 1248 (1989).

preempted the California law, even though the parties' contract involved interstate commerce.

On appeal to the U.S. Supreme Court, a six-member majority affirmed. In an opinion by Chief Justice Rehnquist, the Court held as a preliminary matter that the California court of appeals' holding that the parties intended the choice-of-law clause to incorporate California arbitration rules was a question of state law and would not be set aside by the Court. The Court further ruled that application of the California procedural statute was not preempted by the Federal Arbitration Act because (a) the Act contained no provision authorizing a stay of arbitration in such a situation; (b) even if sections 3 and 4 of the Act<sup>149</sup> were fully applicable in state court proceedings, they did not prevent application of the California statute to stay arbitration where the parties to the contract had agreed to arbitrate in accordance with California law; (c) the Act contained no express preemptive provision and did not reflect a congressional intent to occupy the entire field of arbitration; (d) application of the California statute to stay arbitration, in accordance with the parties' arbitration agreement, would not undermine the goals and policies of the Act; and (e) enforcement of California rules of arbitration according to the terms of the parties' agreement to abide by such rules was fully consistent with the goals of the Act, even if the result was that arbitration was stayed where the Act would otherwise permit it to go forward.<sup>150</sup> The Court identified Congress' principal purpose in enacting the Federal Arbitration Act to be that of "insuring that private arbitration agreements are enforced according to their terms . . . . [I]t does not follow that the FAA prevents the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself."<sup>151</sup>

In the Volt decision, the Court flatly declared that the Federal Arbitration Act "contains no express preemptive provisions, nor does it reflect a congressional intent to occupy the entire field of arbitration."<sup>152</sup> In light of the Court's willingness to set limits on the reach of the broad federal policy of promoting arbitration, the seven international commercial arbitration statutes

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<sup>149</sup> Section 3, 9 U.S.C. § 3, authorizes a stay of court proceedings where an issue is referable to arbitration. Section 4, 9 U.S.C. § 4, authorizes issuance of an order to compel arbitration.

<sup>150</sup> Id. 109 S. Ct. at 1254, 1255.

<sup>151</sup> Id. 109 S. Ct. at 1254-55.

<sup>152</sup> Id. 109 S. Ct. at 1255.

analyzed above may well test the scope of federal preemption in this field.<sup>153</sup> They certainly have been given some room to roam under the Volt decision.

### **B. The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (The New York Convention)**

The most carefully drafted arbitration agreement is worthless if it cannot be enforced. The enforceability vel non of an international arbitration agreement is a question answered under the law of the country where enforcement is sought. Because national laws vary greatly, creating uncertainties when questions of enforceability arise, major trading nations, including the United States, have entered into international agreements designed to eliminate or, at a minimum, reduce this uncertainty.<sup>154</sup> By far the most important international agreement in this connection is the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, popularly known as the New York Convention, which has been ratified by some eighty countries, including Canada.<sup>155</sup>

After U.S. ratification of the New York Convention in 1970, Congress enacted amendments to the Federal Arbitration Act to bring the Convention into effect under U.S. domestic law.<sup>156</sup> In the event of inconsistencies between the

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<sup>153</sup> For additional discussion on the Federal Arbitration Act, see Domke on Commercial Arbitration §§ 4.03-.05 (1988). Compare Southland Corp. v. Keating, 465 U.S. 1 (1984), where the U.S. Supreme Court held that a California state law which was not at least as hospitable to arbitration agreements as are the provisions of the Federal Arbitration Act and which directly conflicted with the Act was preempted.

<sup>154</sup> In addition to the New York Convention, Congress enacted implementing legislation on August 15, 1990, for the Inter-American Convention on International Commercial Arbitration, 14 Int'l Leg. Mat. 336. See Comment, The Inter-American Convention on International Commercial Arbitration, 75 Am. J. Int'l L. 982 (1981). The Inter-American Convention, and the recent federal implementing legislation, are discussed below.

<sup>155</sup> 21 U.S.T. 2517, T.I.A.S. No. 6997 (1970). There is extensive commentary on the New York Convention in the literature. See, e.g., Martinez, Recognition and Enforcement of International Arbitral Awards Under the United Nations Convention of 1958: The "Refusal" Provisions, 24 Int'l Law. 487 (1990); McLaughlin & Genevro, Enforcement of Arbitral Awards Under the New York Convention -- Practice in U.S. Courts, 3 Int'l Tax & Bus. Law. 249 (1986); Quigley, Accession of the United States to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 70 Yale L.J. 1049 (1961).

<sup>156</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, July 31, 1970, Pub. L. No. 91-368, § 1, 84 Stat. 692, codified at 9 U.S.C. §§ 1-14, 201-208 (1988).

Federal Arbitration Act and the New York Convention and its implementing legislation, the latter controls.<sup>157</sup> Similarly, in the event state law directly conflicts with either congressional enactment, the former will be preempted.<sup>158</sup> Federal law and the Convention are silent, however, on many issues bearing on international arbitration. In light of the Supreme Court's recent determination in Volt Information Sciences that Congress did not intend to occupy the entire field of interstate or international arbitration, the states are currently free to enact legislation in order to fill these gaps in the federal legislative scheme.

The following pages describe in greater detail the scope of the New York Convention, the enforceability of arbitration agreements and awards under the Convention, and the exceptions to enforceability. Briefly, the New York Convention addresses the critical problem in international commercial arbitration of creating within the major trading nations a dependable body of rules for securing enforcement of arbitral awards, regardless of the place of the arbitral proceeding or the nationality of the arbitrators. The Convention authorizes the direct enforcement of a foreign arbitral award in the courts of any country which is a party to the Convention, subject to review only on procedural grounds dealing with questions of fairness in obtaining the award, nonarbitrability, and public policy. In order to enforce a foreign arbitral award in the United States, a party need only furnish an authenticated original or certified copy of the award and of the arbitration agreement (together with necessary translations) within three years after the award. Regardless of whether the award is the product of an institutional or ad hoc arbitration, U.S. district courts, as well as state courts, have jurisdiction to hear applications to confirm or challenge a foreign arbitral award. In practice, enforcement is seldom refused.<sup>159</sup>

### (i) Scope of the New York Convention

In the words of the U.S. Supreme Court, the New York Convention was designed to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed and arbitral awards are enforced in the signatory nations."<sup>160</sup> At its core, the Convention requires national courts of

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<sup>157</sup> 9 U.S.C. § 208 (1982).

<sup>158</sup> *Southland Corp. v. Keating*, 465 U.S. 1 (1984).

<sup>159</sup> See Sanders, A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 13 Int'l Law. 269 (1979).

<sup>160</sup> *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n.15 (1974).

signatory countries to refer parties to arbitration when they have entered into a valid agreement to arbitrate an international commercial dispute,<sup>161</sup> and, subject to certain exceptions,<sup>162</sup> to recognize and enforce foreign arbitral awards.

**a. Commercial Relationships**

The scope of the New York Convention is set out in Article I. Article I(3) provides that member states may declare that the Convention applies only to relationships which are considered commercial under the national law of the state making the declaration. Most nations, including the United States, have made such a declaration. In interpreting this provision of the Convention, U.S. courts have construed the term "commercial" broadly.<sup>163</sup>

**b. Foreign Awards and Agreements**

Under Article I(1), the Convention applies only to arbitral awards that either (1) are made outside the country of enforcement or (2) are not considered as domestic awards in the country where enforcement is sought. Congress implemented the limitations of Article I(1) in section 202 of the Federal Arbitration Act which provides in part:

An agreement or award arising out of such a [commercial] relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.

Section 202 thus extends the Convention to certain awards rendered within the United States if the parties' relationship involves foreign property or performance abroad.

**c. Reciprocity**

Articles I(3) and XIV of the Convention provide for the recognition and enforcement of agreements and awards only on a reciprocal basis. The United

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<sup>161</sup> New York Convention, art. II(3).

<sup>162</sup> New York Convention, art. III.

<sup>163</sup> E.g., *Societe Generale de Surveillance v. Raytheon European Management & Sys. Co.*, 643 F.2d 863 (1st Cir. 1981); *Siderius, Inc. v. Compania de Acero del Pacifico*, 453 F. Supp. 22 (S.D.N.Y. 1978).

States has declared that it will "apply the Convention, on the basis of reciprocity, to the recognition and enforcement of only those awards made in the territory of another Contracting State." It is clear from these reciprocity provisions that U.S. courts are not required by the Convention to recognize or enforce arbitral awards rendered in a nation that is not a party to the Convention.

**d. Agreements in Writing**

The scope of the New York Convention is limited to arbitration agreements which are reduced to writing.<sup>164</sup> Article II(2) of the Convention defines "agreements in writing" to include agreements that are reflected in exchanges of letters or telegrams.

**(ii) Enforceability of Arbitration Agreements**

Article II of the New York Convention obliges courts of Contracting States to refer persons who are parties to a valid arbitration agreement to arbitration. Judicial assistance is provided in section 4 of the Federal Arbitration Act, the provisions of which are incorporated by reference in the 1970 legislation implementing the New York Convention<sup>165</sup>.

It is fundamental, of course, that personal jurisdiction must exist over a party to an arbitration agreement before a U.S. court may order that party to proceed with arbitration. Some courts have held that by agreeing to arbitrate within a particular forum, the party implicitly consents to personal jurisdiction of the forum's courts for purposes of suits to compel arbitration.<sup>166</sup> As previously noted, this is a result achieved by statute in Florida and Hawaii.<sup>167</sup>

**(iii) Exceptions to Enforceability of Arbitration Agreements**

Despite the general rule of enforceability of arbitration agreements under the New York Convention, Article II(3) of the Convention expressly excepts cases from referral to arbitration where the arbitration agreement is "null and void, inoperative, or incapable of being performed." Article II(1) of the

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<sup>164</sup> New York Convention, art. II(1).

<sup>165</sup> See 9 U.S.C. § 208.

<sup>166</sup> See, e.g., *Island Territory of Curacao v. Solitron Devices*, 489 F.2d 1313 (2d Cir. 1973), cert. denied, 416 U.S. 986 (1974).

<sup>167</sup> See also 9 U.S.C. §§ 204, 206.



Convention only requires referrals of disputes to arbitration "concerning a subject matter capable of settlement by arbitration." The Supreme Court had occasion to construe this Article in Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,<sup>168</sup> holding that antitrust claims under the Sherman Act are arbitrable. Given the strong federal policy in favor of arbitral dispute resolution reflected in the Mitsubishi case,<sup>169</sup> a presumption will exist in favor of enforcing freely negotiated arbitration agreements, even when the subject matter of the arbitration touches sensitive public policy concerns, unless Congress expressly singles out categories of claims as being nonarbitrable.<sup>170</sup>

#### (iv) Enforceability of Arbitral Awards

Article III of the Convention requires Contracting States to "recognize arbitral awards as binding and enforce them," subject to the seven enumerated exceptions set out in Article V. An expedited procedure for enforcing a foreign arbitral award is prescribed in 9 U.S.C. §§ 6 and 208. Under section 207 of the Federal Arbitration Act, an application for confirmation of the award must be made within three years of the date of the award. Any state international commercial arbitration law providing a different time period for bringing an action to enforce an award arguably would not be preempted by this provision, given that section 207 applies only to enforcement of foreign arbitral awards (any award made under a state international commercial arbitration statute would be only a domestic award.) However, under 9 U.S.C. § 9 an application for enforcement of a domestic arbitral award must be made within one year. To the extent a state law provides a different time period for doing so, it may be preempted.

Despite the Convention's emphasis on facilitating the enforcement of foreign arbitral awards, Article V enumerates seven important exceptions to enforcement (previously discussed in connection with the exceptions to enforcement specified in the Model Law):

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<sup>168</sup> 473 U.S. 614 (1985).

<sup>169</sup> See also Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974)(securities fraud claims are arbitrable).

<sup>170</sup> Id. at 628, 639-40 n.21.

1. The arbitration agreement is invalid because the parties lacked capacity to make such an agreement or the agreement itself was invalid.<sup>171</sup> Article V(1)(a).
2. The losing party was not given proper notice of the appointment of an arbitrator or of the arbitration proceedings or was otherwise prevented from presenting its case. Article V(1)(b).
3. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitrate. Article V(1)(c).
4. The composition of the tribunal or its procedures violated either the parties' agreement or the law of the arbitral forum. Article V(1)(d).
5. The arbitral award is either not yet binding or has been set aside or suspended in the arbitral forum.<sup>172</sup> Article V(1)(e).
6. The subject matter of the parties' dispute is not capable of settlement by arbitration under the laws of the enforcing country. Article V(2)(a).
7. Recognition or enforcement of the arbitral award would be contrary to the public policy of the enforcing country.<sup>173</sup> Article V(2)(b).

Notwithstanding the implication from both the Convention and the language of section 207 of the Federal Arbitration Act that the Convention's

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<sup>171</sup> In *Prima Paint Corp. v. Flood & Conklin Manufacturer*, 388 U.S. 395 (1967), the Supreme Court held that the validity of the contract was itself a matter for the arbitrator to decide.

<sup>172</sup> This provision was a response to concerns that an arbitral award should not be given binding effect in one country when it is not binding under the laws where it was made. At the same time, this provision was designed to avoid "double exequatur," which requires judicial recognition of the award in both the rendering country and the enforcing country. See Martinez, *supra* note, at 504-05.

<sup>173</sup> The public policy defense is the most frequently litigated. In order to avoid making this defense a major loophole to enforcement of arbitral awards, U.S. courts have given it a narrow construction. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier*, 508 F.2d 969 (2d Cir. 1974).

exceptions are exhaustive, U.S. courts have suggested that, in addition to the Convention's seven grounds for nonrecognition of a foreign arbitral award, nonenforcement would be appropriate if the tribunal acted in manifest disregard of law,<sup>174</sup> or if the arbitral forum was unreasonably inconvenient for the losing party.<sup>175</sup> Despite this expansion on the grounds for nonrecognition and nonenforcement, courts in the United States exhibit a strong pro-enforcement attitude toward both domestic and foreign arbitral awards, an attitude that is at the core of the New York Convention.<sup>176</sup>

### **C. The Inter-American Convention on International Commercial Arbitration**

The Inter-American Convention on International Commercial Arbitration, which is modeled after the New York Convention, was adopted in 1975 at a diplomatic conference of the Organization of American States. The Senate gave its advice and consent to ratification of the Inter-American Convention on October 8, 1986, with the understanding that ratification would not be effected until implementing legislation was enacted. On August 15, 1990, the 101st Congress enacted legislation<sup>177</sup> to bring the provisions of the Inter-American Convention on International Commercial Arbitration into domestic effect in the United States.

Even with the parallels between the Inter-American and New York Conventions, Latin American countries have been wary of joining international conventions such as the New York Convention. For example, of the eighteen countries which are parties to the Inter-American Convention,<sup>178</sup> Bolivia, Brazil, El Salvador, Honduras, Nicaragua, Paraguay, and Venezuela are not parties to the New York Convention. These countries have shown less resistance to joining

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<sup>174</sup> E.g., *Stroh Container Co. v. Delphi Indus.*, 783 F.2d 743, 750 (8th Cir.), cert. denied, 476 U.S. 1141 (1986).

<sup>175</sup> *Aerojet-Gen. Corp. v. Amer. Arbitration Ass'n*, 478 F.2d 248, 251 (9th Cir. 1973).

<sup>176</sup> See McLaughlin & Geneviro, Enforcement of Arbitral Awards Under the New York Convention -- Practice in U.S. Courts, 3 Int'l Tax & Bus. Law. 249 (1986).

<sup>177</sup> Pub. L. No. 101-369, 104 Stat. 448 (1990).

<sup>178</sup> Those countries are Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, the United States, Uruguay, and Venezuela.

regionally based conventions, however, including the Inter-American Convention.

The adoption and implementation of the Inter-American Convention by the United States is an important development. Before the Inter-American Convention was adopted in Latin America, agreements to arbitrate future disputes were unenforceable in many Latin American countries; only agreements to arbitrate existing disputes were generally enforceable. Because the overwhelming majority of arbitrations are the product of agreements to arbitrate future disputes, the Latin American position on arbitration effectively eliminated arbitration as a method of commercial dispute resolution in most cases.

The text of the Inter-American Convention is substantially similar to the New York Convention. Article 1 of the Inter-American Convention provides that arbitration agreements are valid, whether the dispute arises in the future or is an existing dispute. This is similar to Article II(1) of the New York Convention. Under the Inter-American Convention, the agreement to arbitrate must be contained in "an instrument signed by the parties," while the New York Convention requires an "agreement in writing."

Article 3 of the Inter-American Convention fills a gap that exists under the New York Convention. That Article provides for a set of fall back procedural rules (i.e., the rules promulgated by the Inter-American Commission) for conducting the arbitral proceeding in the event the parties fail to agree to such rules.

Article 4 of the Inter-American Convention tracks New York Convention Article III which provides that an arbitration agreement is generally enforceable. The Inter-American Convention makes it clearer than the New York Convention that an arbitral award is not appealable and has the force of a final judicial judgment. The grounds for refusing to enforce an arbitral decision in Article 5 of the Inter-American Convention are comparable to those in the New York Convention.

The implementing legislation creates a new Chapter 3 to the Federal Arbitration Act specifically to implement the provisions of the Inter-American Convention.<sup>179</sup> The Inter-American Convention and the U.S. implementing legislation are included in the Appendix. The implementing legislation incorporates by reference those sections of the Federal Arbitration Act which were enacted to implement the New York Convention. In addition, section 306

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<sup>179</sup> Those provisions are codified at 9 U.S.C. §§ 301-307.

of the implementing legislation makes the rules of the Inter-American Commercial Arbitration Commission the applicable rules for conducting the arbitration proceeding, in the absence of party agreement to the contrary. The Inter-American Commission rules are virtually identical to the UNCITRAL arbitration rules. Finally, under section 305, the Inter-American Convention prevails over the New York Convention where a majority of the parties to the arbitration are citizens of a country which has ratified the Inter-American Convention and is a member of the Organization of American States.

#### **D. The UNCITRAL Model Law in Canada**

Before 1985, uncertainty was the hallmark of foreign arbitral awards in Canada. For one thing, double exequatur was the rule, rather than the exception, for enforcement of foreign arbitral awards in Canada. For another, because of the division of powers between the federal and provincial governments, the provinces have exclusive jurisdiction over matters affecting international transactions, resulting in conflict between federal and provincial jurisdiction.

In January, 1985, a seventy-member task force was assembled by the British Columbia government to explore options in the field of international commercial arbitration.<sup>180</sup> Prompted by British Columbia's leadership, in the summer of 1985, the provinces and the federal government reached an agreement that resulted in adoption of the New York Convention by the federal government and the common-law provinces, and the adoption of the UNCITRAL Model Law, with modifications, by Ottawa and all of the provinces.<sup>181</sup> Canada thus became the first country to adopt the UNCITRAL Model Law. Australia, Germany, the United Kingdom, Egypt, Hong Kong, and several smaller developing are considering adopting the UNCITRAL Model Law as well. With these choices opening up, foreign parties are less likely to choose a state of the United States that has not enacted the Model Law as a situs for arbitration when other forums have accessible, familiar, and easily understood arbitral legal regimes.

In addition, British Columbia and Quebec have established international commercial arbitration centers which offer administrative services to parties involved in international commercial arbitration. The primary goal of British Columbia was to capitalize on business expansion in the Pacific Rim by developing international arbitration business in Vancouver.

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<sup>180</sup> See UNCITRAL Arbitration Model in Canada (R. Paterson & B. Thompson, ed. 1987).

<sup>181</sup> See generally Noecker & Hentzen, The New Legislation on Arbitration in Canada, 22 Int'l Law. 829 (1988).

## E. The Canada-U.S. Free Trade Agreement

### (i) Overview

The Free Trade Agreement (FTA) has been tagged with many labels -- historic, unprecedented, ground breaking, trail blazing. Regardless of one's sympathies, it is difficult not to think of the Free Trade Agreement in these terms, given the enormous flow of cross-border trade between Canada and the United States. The FTA liberalizes all trade in goods and most trade in services between two countries with the largest volume of two-way trade in goods in the world. The United States buys more goods from and sells more goods to Canada than any other country. In the two-year period 1984-85, Canada bought 22 percent of all U.S. exports, twice that of second-place Japan.<sup>182</sup> Two-way merchandise trade between Canada and the United States totalled \$147 billion in 1988.<sup>183</sup> Closer to home, Professor John Mogk has observed that "Michigan conducts more trade with Canada than any other state and more than Canada's second and third largest trading partners, Japan and the United Kingdom, combined. In 1987, two-way trade between Michigan and Canada exceeded \$24.8 billion."<sup>184</sup> In 1988 U.S. exports to Canada increased 15.6 percent over 1987, more than doubling the 7.2 increase of 1987.<sup>185</sup> U.S. imports from Canada likewise increased during 1988 by 13.9 percent over the previous year.<sup>186</sup> Even though U.S. export performance improved in 1988, the United States still had a merchandise trade deficit with Canada in 1988 (as it has every year but once since 1970) of \$14.8 billion, a \$1 billion increase over 1987.<sup>187</sup> Trade in automobiles and replacement parts dominates U.S.-Canada merchandise trade, comprising over one-third of all merchandise trade between the two countries. Imports from

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<sup>182</sup> P. Wonnacott, *The United States and Canada: The Quest for Free Trade 2* (1987) [hereinafter Wonnacott].

<sup>183</sup> Operation of the Trade Agreements Programs, U.S. Int'l Trade Comm'n, 40th Report, at 179-80 (USITC Pub. 1989).

<sup>184</sup> J. Mogk, *Michigan State Law Implications of the United States-Canada Free Trade Agreement, A Report to the Michigan Law Revision Commission 1* (Oct. 23, 1989).

<sup>185</sup> *Id.* at 91.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

Canada of passenger cars increased over 30 percent in 1988.<sup>188</sup> In addition to automobiles, trucks, and motor vehicle parts, the other leading U.S. exports to Canada in 1988 were computers, parts of office machinery, and coal.<sup>189</sup> The leading U.S. imports from Canada in 1988 were passenger cars, parts of motor vehicles, newsprint, trucks, crude oil, natural gas, wood pulp, and lumber.<sup>190</sup>

The most significant substantive provisions of the FTA are those covering trade in goods and services, government procurement, and investment. The most significant procedural provision, and certainly the most controversial in the entire Agreement, creates a binational dispute panel for resolving dumping and subsidy complaints. Briefly, Part One of the FTA outlines the objectives and scope of the Agreement. Part Two regulates trade in goods and provides for the elimination of all tariffs on bilateral trade in goods by January 1, 1998, using three formulae. For some sectors (e.g., computers, motorcycles, whiskey), the Agreement immediately eliminated tariffs upon its entry into force on January 1, 1989. For a second group of sectors (e.g., paper, paints, furniture), tariffs are phased out in five equal annual stages beginning January 1, 1989. The elimination of all other tariffs will occur by January 1, 1998, in ten equal annual steps for a third group of trade-sensitive products such as textiles, wearing apparel, tires, steel, and appliances.<sup>191</sup> Part Three, dealing with government procurement, lowers the threshold in the GATT Government Procurement Code from US\$171,000 to US\$25,000, i.e., federal government purchases above this threshold will be open to competitive bidding by each party. Part Four covers trade in services, investment, and business travel. With regard to services, Canada and the United States will extend national treatment to trade in most services so that agriculture, mining, construction, insurance, real estate, and commercial service providers will be treated in the same manner as domestic firms providing those same services.<sup>192</sup> In the field of investment, this same national treatment obligation is assumed in connection with the establishment of

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<sup>188</sup> Id.

<sup>189</sup> Id. at 92.

<sup>190</sup> Id.

<sup>191</sup> FTA, art. 401.

<sup>192</sup> FTA, art. 1401, 1402, annex 1408. Excluded from the scope of coverage are transportation services, most telecommunications services, and the services of doctors, dentists, lawyers, and teachers.

new businesses,<sup>193</sup> with a liberalization of rules for the acquisition of existing businesses in Canada.<sup>194</sup> Part Five, financial services, accords national treatment to investors in the financial services market. Part Six covers settlement of disputes arising under the Agreement. It is to that Part that we next turn our attention.

## (ii) The Institutional Provisions of the FTA

The Canada-U.S. Free Trade Agreement contains two broad institutional provisions for implementing, interpreting, and enforcing the Agreement's obligations. (The relevant provisions are included in the Appendix.) Chapter 18 of the FTA establishes the basic dispute resolution institution, the Canada-U.S. Trade Commission (the Commission), whose mandate is generally to implement and enforce the substantive provisions of the FTA.<sup>195</sup> The second major institutional provision of the FTA is Chapter 19 which creates the binational panel for reviewing both statutory amendments to and administrative determinations under the AD and CVD laws. Neither of these Chapters provides a mechanism for resolving purely private commercial disputes between Canadians and Americans.

In addition to these two major institutions established to smooth the operation of the FTA, several sectors have their own separate framework for implementing and supervising the FTA provisions applicable to them. Most significantly, disputes over financial services are to be resolved through

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<sup>193</sup> FTA, art. 1602.

<sup>194</sup> FTA, art. 1607. The review threshold by Investment Canada for acquisition of existing businesses is to be raised from CAN\$5 million to CAN\$150 million by 1992.

<sup>195</sup> Article 1802, paragraph 1, provides:

The Parties hereby establish the Canada-United States Trade Commission (the Commission) to supervise the implementation of this Agreement, to resolve disputes that may arise over its interpretation and application, to oversee its further elaboration, and to consider any other matter that may affect its operation.

In addition to resolving disputes under the Agreement, the Commission is to supervise its implementation, thus performing a management function as well. See Graham, The Role of the Commission in the Canada-U.S. Free Trade Agreement: A Canadian Perspective 233, in United States/Canada Free Trade Agreement: The Economic and Legal Implications (ABA 1988); Robinson, Dispute Settlement Under Chapter 18 of the U.S.-Canada Free Trade Agreement 261, in United States/Canada Free Trade Agreement: the Economic and Legal Implications (ABA 1988).



notification and consultation between the Canadian Department of Finance and the U.S. Department of the Treasury, pursuant to Article 1704, paragraph 2. The Commission has been expressly divested of jurisdiction over financial services disputes under Article 1801, paragraph 1. Other mechanisms for resolving sectoral disputes have also been created under the FTA that are outside the jurisdiction of the Commission. For example, the parties are to notify and consult with one another on customs matters under Annex 406. A Working Group is created under Annex 705.4 to discuss issues concerning grains. Several Working Groups are created under Article 708, paragraph 4, to implement provisions of the FTA affecting other agricultural products. That same Article establishes a joint monitoring committee to check the progress of these Working Groups. And Article 1503 calls for establishment of procedures for consulting on the temporary entry of business persons.

**a. The Canada-U.S. Trade Commission**

Chapter 18 of the FTA, which creates the Canada-U.S. Trade Commission, establishes a mechanism for resolving most FTA disputes. The principal representative of each party to the Commission is, in the case of Canada, the Minister of International Trade and, in the case of the United States, the U.S. Trade Representative or their designee.<sup>196</sup> The parties have the following basic rights and duties under Chapter 18. First, Article 1803 obligates a party to notify the other of any measure which "might materially affect the operation of" the FTA. Article 1804, mirroring the GATT Article XXII obligation to consult with any other contracting party "with respect to any matter affecting the operation of [GATT]," permits either party to request consultations when any measure of the other party or any other matter affects the operation of the FTA, in the opinion of the requesting party.<sup>197</sup> If consultation fails, submissions may be made to the Commission which in turn may refer the matter to mediation.<sup>198</sup> If any matter referred to the Commission is not resolved in 30 days, it may refer the dispute to binding arbitration or to a panel of experts.<sup>199</sup> Where the dispute is referred to

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<sup>196</sup> Article 1802, paragraph 2.

<sup>197</sup> Another GATT feature borrowed by FTA Article 2011 is that of nullification or impairment contained in GATT Article XXIII. Nullification or impairment essentially is a measure of injury to a party regardless of whether the event causing the injury is violative of GATT. See J. Jackson, *World Trade and the Law of GATT* 163-92 (1969).

<sup>198</sup> Article 1805.

<sup>199</sup> Article 1806, paragraph 1. Article 1807 provides for five-member arbitration panels and the procedures for conducting a Chapter 18 arbitration. Article 1807, paragraph 2, provides for submission to a panel of experts.

arbitration, the party found to have violated the Agreement is required to comply, failing which the aggrieved party "shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute."<sup>200</sup> This provision closely parallels GATT Article XXIII's remedy for nullification or impairment of GATT benefits, leaving it ultimately with the offending party to cease and desist. In addition, as is true with GATT panel proceedings, only the two governments through their designated representatives may appear before the Commission or Chapter 18 panels; private parties have no standing and no right to intervene.

Unfortunately, the dispute resolution mechanisms of Chapter 18 may in the end be no different than those of GATT. It is unfortunate because like GATT and its members inter sese where it has been left up to the offending party to accede to a panel decision when found to be in violation of its international GATT obligations, the Chapter 18 sanction is no different, imposing a sanction that is no sanction at all because it lacks bite. Canada and the United States have failed to surrender a sufficient amount of sovereignty under Chapter 18, as have the GATT contracting parties under Article XXIII. A painful yet valuable lesson from the GATT experience that apparently was forgotten in the course of the FTA negotiations is that economic integration without sufficiently strong institutions to manage that integration have a high probability of eventually unraveling.

Although the jurisdictional mandate of the Commission to resolve disputes under the FTA is broad, it nevertheless has been given no power to resolve AD and CVD disputes.<sup>201</sup> Several sectors also have their own separate framework for implementing and supervising the FTA provisions applicable to them. Most significantly, disputes over financial services are to be resolved through notification and consultation between the Canadian Department of Finance and the U.S. Department of the Treasury under Article 1704, paragraph 2. The Commission has been expressly divested of jurisdiction over financial services disputes under Article 1801, paragraph 1. Other mechanisms for resolving sectoral disputes have also been created under the FTA that are outside the jurisdiction of the Commission. For example, the parties are to notify and consult with one another on customs matters under Annex 406. A Working Group is created under Annex 705.4 to discuss issues concerning grains. Several Working Groups are created under Article 708, paragraph 4, to implement

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<sup>200</sup> Article 1807, paragraph 9.

<sup>201</sup> Article 1801, paragraph 1.

provisions of the FTA affecting other agriculture products. That same Article establishes a joint monitoring committee to check the progress of these Working Groups. And Article 1503 calls for establishment of procedures for consulting on the temporary entry of business persons.

Responsibility for settling disputes under the AD and CVD trade remedy laws has been vested in a binational review panel under Chapter 19 of the FTA.

#### **b. The Binational Dispute Panel**

Chapter 19 of the FTA, the most controversial chapter in the entire Agreement, creates not one but two panel procedures. One is designed to review final AD and CVD administrative determinations, thus substituting judicial review of such determinations with binational panel review.<sup>202</sup> The second has been established to screen amendments to each country's AD and CVD laws. These two procedures are intended to be stop-gap measures, however, and not a permanent feature of the FTA landscape. Under Article 1906 the parties have five years to develop a substitute system for the current AD and CVD legal regime. If no such substitute system is agreed to or implemented within that five-year period, the parties have an additional two years within which to reach such agreement. Failing such agreement, either party may terminate the FTA on six months' notice. Article 1906 only hints at the kind of substitute AD and CVD legal regime the parties are supposed to adopt. Will the substitute system exempt each country from the other's AD and CVD laws? Will the definition of a countervailable subsidy be broadened in order to exempt more or most Canadian assistance programs? Will a larger de minimis subsidy and dumping margin (currently .5 percent in the United States) be adopted so that only the most serious cases will receive administrative relief? The answer the FTA gives to these questions is cryptic.<sup>203</sup> Article 1907 directs the parties to establish a Working Group that will:

- a) seek to develop more effective rules and disciplines concerning the use of government subsidies;
- b) seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization; and

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<sup>202</sup> Article 1904, paragraph 1.

<sup>203</sup> See Horlick & Landers, The Free Trade Agreement Working Group: Developing a Harmonized and Improved Countervailing Duty Law 399, in United States/Canada Free Trade Agreement: The Economic and Legal Implications (ABA 1988); Powell, Antidumping Law and the United States/Canada Free Trade Agreement: Possible Next Steps 415, in United States/Canada Free Trade Agreement: The Economic and Legal Implications (ABA 1988).

c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.<sup>204</sup>

Whether this mandate contemplates wholesale scrapping of the current AD and CVD statutory scheme as applied to the imports of each party, or whether something less ambitious is envisioned, it is difficult to say. It is fairly safe to predict, however, that the most contentious subject on the Working Group's agenda will be subsidization, given the very sensitive nature of this subject for Canada.

### **1. Article 1903 Panel Review of AD and CVD Statutory Amendments**

Although the commitments made by the parties under the Article 1902 standstill provision on AD and CVD statutory amendments are comparatively soft, those commitments nevertheless are not without bite owing to the creation of a panel procedure for reviewing all such statutory amendments. After its enactment, any AD or CVD amendment may be referred to a panel under Article 1904 and Annex 1903.2 for a declaration (1) whether the amendment is consistent with the FTA, the Antidumping Code, the Subsidies Code, or GATT generally; or (2) whether the amendment reverses a binational panel decision and, if so, whether that amendment conforms with GATT, the two GATT Codes, and the FTA. The FTA makes no provision for resort by private parties to an Article 1903 panel proceeding. Thus, only Canada and the United States, through their national representatives, may demand and appear in this specific binational panel proceeding.

The composition of all Chapter 19 panels is the same regardless of whether the challenge is to an AD or CVD statutory amendment or to an AD or CVD determination. First, Annex 1901.2, paragraph 1, states that "the Parties shall develop a roster of individuals to serve as panelists in disputes under this Chapter." Annex 1901.2 further provides for five-member panels with each party appointing two panelists and a fifth neutral panelist being mutually selected by the parties or by the four appointed panelists under Annex 1901.2, paragraphs 1-3. A majority of any Chapter 19 panel must be lawyers. Second, panel decisions are to be based solely on the parties' oral and written submissions under Annex 1903.2, paragraph 1. Third, Article 1903 panel proceedings leading to the panel's final declaratory opinion are confidential, unless the parties otherwise agree, and its final opinion may not be published if the parties so agree. Fourth,

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<sup>204</sup> Article 1907, paragraph 1.

Article 1903 panels proceed under rigorous time constraints. Within 90 days after appointment of the panel chair (which is to be done promptly after appointment of the fifth panelist), an initial opinion containing findings of fact and a determination is issued. In the event of an affirmative determination (one that finds the statutory amendment in violation of Article 1902), the panel may make recommendations on how the amendment can be brought into conformity with Article 1902. The parties may request reconsideration of the panel's initial opinion within 14 days after its issuance. A final opinion is to be issued within 30 days after the request for reconsideration. If the panel recommends modifications to the offending statutory amendment, the parties are to consult with one another in an effort to remedy the nonconformity. As part of their consultations, the parties may draft remedial legislation that must be enacted within nine months after the consultations are concluded, absent some other agreement. Unless the remedial legislation is enacted, the aggrieved party may either retaliate through comparable legislative or executive action, or terminate the Agreement.

In sum, although the commitment to refrain from enacting protectionist AD or CVD statutory amendments may lack a hard edge, the remedial provisions that can be invoked following the enactment of such amendments do have potential sting. Whether the threat to terminate the Agreement or to retaliate in kind with reciprocal legislative or executive action will be credible, or even effective if carried out, remains to be seen. One thing is certain, however: Chapter 19 has set the stage for high-stakes brinkmanship.

## **2. Article 1904 Binational Panel Review of Final AD and CVD Determinations**

The second dispute settlement forum created under Chapter 19 is the binational panel for reviewing final AD and CVD administrative determinations. Its function is simply stated: Binational panel review replaces judicial review of final AD and CVD determinations. Its composition and procedures are identical to those of Article 1903 panels. The applicable substantive law, the standard of review, and general legal principles are those of the importing party. This body of law includes the AD and CVD statutes, their legislative history, administrative regulations, administrative practice, rules of statutory construction, and case law to the extent such sources of law would be considered by a reviewing court of the importing party.<sup>205</sup> The parties are to adopt rules of procedure for the panel based upon judicial rules of appellate procedure, further judicializing the process. Private parties have the same standing and right to panel review as they do to

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<sup>205</sup> Article 1904, paragraphs 2-3.

judicial review under domestic law. Panel proceedings are to be conducted under an expedited time schedule so that panel decisions issue within 315 days from the date of the initial request for panel review.<sup>206</sup> Decisions of the panel are binding and ordinarily final, subject to extraordinary challenge only (1) where a panelist is guilty of gross misconduct, bias, or serious conflict of interest, where a panel has seriously departed from a fundamental procedural rule, or where the panel has exceeded its Article 1904 powers; and (2) any of those occurrences materially affected the panel's decision and threatens the integrity of the binational panel review process.<sup>207</sup>

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<sup>206</sup> Article 1904, paragraph 14.

<sup>207</sup> Article 1904, paragraph 13. The extraordinary challenge panel consists of three members selected from a roster of judges and former judges from the U.S. federal bench and from Canadian courts of superior jurisdiction. Annex 1904.13, paragraph 1.

## **PART FOUR**

### **PROPOSED LEGISLATIVE REVISIONS**

A guiding principle when considering the adoption of international commercial arbitration legislation should be clarity of procedural direction for the arbitrating parties. The current Michigan arbitration statute does not address many important procedural issues. By contrast, the Model Law is a far more fully-articulated body of law. For example, whereas the Michigan arbitration law does not address the use of experts, section 26 of the Model Law authorizes the arbitral tribunal, unless otherwise agreed to by the parties, to appoint experts to report on specific issues and to require the parties to submit relevant information to the experts. Article 12 of the Model Law provides a specific procedure for challenging an arbitrator. The Michigan statute is silent on this point. Model Law Article 16 vests the arbitral tribunal with power to rule on its own jurisdiction. Article 23 of the Model Law directs the claimant to state the facts supporting its claim and requires the respondent to state its defense to each of those allegations. Article 25 of the Model Law sets forth a detailed default procedure. Article 28 guides the arbitral tribunal in choosing the applicable law, absent agreement of the parties on this question. Article 30 directs the arbitral tribunal to reduce a settlement to an award and gives it the same status as an award on the merits. Article 31 specifies the form and content that an award must take. Again, the Michigan arbitration statute does not address any of these issues.<sup>208</sup>

The choice seems to be between enacting patchwork revisions to the Michigan arbitration statute or enacting a new international commercial arbitration statute that is based on the Model Law. My tentative proposal is that the Michigan legislature adopt the UNCITRAL Model Law, including the conciliation provisions found in the California and Texas statutes. The Model Law could be added as a new chapter that supersedes the Michigan arbitration statute only with respect to international commercial arbitration. This approach would follow Florida's lead of adopting international arbitration legislation that does not supersede the domestic arbitration law. Although the Model Law could easily perform simultaneous service for all types of arbitration, its draft text is specifically restricted to arbitration of an international commercial nature, with the result that it can be adopted without modifying existing law regarding arbitration of a purely local character. In this way, the *raison d'être* for enacting the Model Law -- filling the procedural gaps of the Michigan arbitration statute and thereby making Michigan a more attractive forum for international

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<sup>208</sup> These procedural lacunae are also present in the Federal Arbitration Act.

commercial arbitration -- would be met without disturbing the domestic arbitration scheme in Michigan.

Adoption of the Model Law, together with the conciliation provisions of the California and Texas statutes, should be especially attractive to Asian businesses which prefer non-adversarial methods of dispute resolution. Inclusion of the conciliation provisions may aid in preserving a business relationship after an initial disagreement, thus keeping future business within Michigan that could otherwise likely be lost in the fallout of litigation. More importantly for Michigan, given Canada's wholesale adoption of the Model Law at both the federal and provincial levels, adoption of the Model Law in Michigan will inject a degree of predictability needed by business in the resolution of international commercial disputes. The resulting uniformity on both sides of the Canadian-Michigan border will not only provide the benefit of predictability in the field of international commercial arbitration, it will also increase the precedential value in Michigan courts of Canadian, California, Connecticut, and Texas court decisions interpreting the new law. Growing international business expectations with regard to commercial dispute resolution will conform to the Model Law, especially in Canada. By adopting the Model Law, Michigan may be viewed more favorably by Canadian and other foreign counsel as a forum for arbitration, which may in turn increase foreign trade between it and other nations.

The Model Law was drafted by arbitration experts from both civil law and common law jurisdictions in an effort to meet expectations from all legal traditions. The Model Law introduces some balance to the poor international image of the United States with respect to the adversarial nature of its litigation, its broad scope of discovery, and its unpredictable jury awards. Michigan's adoption of the Model Law would send a message that Michigan is hospitable to arbitration as an alternative to litigation for resolving commercial disputes.

The Model Law complements a currently accepted body of arbitration rules, the 1976 UNCITRAL Arbitration Rules. These procedural rules are used by many arbitration institutions and are frequently included in agreements for international arbitration. As noted, the Inter-American Convention incorporates those rules by reference. In addition, the Iran-United States Claims Tribunal operates under the UNCITRAL Arbitration Rules. As a consequence, more U.S. lawyers and arbitrators are gaining familiarity with this set of procedural rules, making it easier for parties to an international commercial arbitration situated in Michigan to find acceptable and knowledgeable arbitrators.

A requirement should be added to the Model Law that the courts consult the travaux preparatoires (the legislative histories of the Model Law) as an



interpretive guide. This requirement should increase the likelihood of a uniform interpretation of the Model Law, allay fears that Michigan courts might give the Model Law a parochial or unusual interpretation, and thus make Michigan a more attractive international arbitral forum. The Canadian Parliament and the provinces have added a provision to their respective adoptions of the Model Law which expressly permits recourse to the travaux préparatoires for this purpose. Furthermore, since the Model Law and the travaux préparatoires are published in six languages and available internationally, many of foreign counsel's questions are likely to be answered with some ease.

In addition, two provisions should be included which are not part of the Model Law, one that gives arbitrators immunity from suit, and the other that makes participation in an arbitral proceeding constitutes consent to the exercise of personal jurisdiction in Michigan for purposes of confirming or vacating the arbitral award.

Finally, the lurking issue of preemption will persist. My reading of the Supreme Court case law in this area, in particular the Volt Information Sciences decision, is that if the Model Law has no corresponding provision in the Federal Arbitration Act, the New York Convention, or the Inter-American Convention, there will be no preemption problem. Conversely, to the extent there is a provision in the Model Law that corresponds to a provision in the federal laws, the Model Law provision will still not be preempted provided it is at least as hospitable to arbitration as the corresponding federal law. In short, as long as application of the Model Law would not undermine or be inconsistent with the goals of the Federal Arbitration Act, the New York Convention, or the Inter-American Convention, none of the federal arbitration laws precludes the enforcement of an agreement to arbitrate under different rules than those set forth in these three federal laws.

## APPENDIX A

### Michigan Arbitration Act; Michigan Court Rule 3.602; Uniform Arbitration Act

#### MICHIGAN ARBITRATION ACT

##### 600.5001. Arbitration agreements; parties; award

Sec. 5001. (1) **Parties.** All persons, except infants and persons of unsound mind, may, by an instrument in writing, submit to the decision of 1 or more arbitrators, any controversy existing between them, which might be the subject of a civil action, except as herein otherwise provided, and may, in such submission, agree that a judgment of any circuit court shall be rendered upon the award made pursuant to such submission.

(2) **Enforcement; rescission.** A provision in a written contract to settle by arbitration under this chapter, a controversy thereafter arising between the parties to the contract, with relation thereto, and in which it is agreed that a judgment of any circuit court may be rendered upon the award made pursuant to such agreement, shall be valid, enforceable and irrevocable save upon such grounds as exist at law or in equity for the rescission or revocation of any contract. Such an agreement shall stand as a submission to arbitration of any controversy arising under said contract not expressly exempt from arbitration by the terms of the contract. Any arbitration had in pursuance of such agreement shall proceed and the award reached thereby shall be enforced under this chapter.

(3) **Collective labor contracts excepted.** The provisions of this chapter shall not apply to collective contracts between employers and employees or associations of employees in respect to terms or conditions of employment.

##### 600.5005. Arbitration agreements; real estate

Sec. 5005. A submission to arbitration shall not be made respecting the claim of any person to any estate, in fee, or for life, in real estate, except as provided in Act No. 59 of the Public Acts of 1978, as amended, being sections 559.101 to 559.272 of the Michigan Compiled Laws. However, a claim to an interest for a term of years, or for 1 year or less, in real estate, and controversies respecting the partition of lands between joint tenants or tenants in common, concerning the boundaries of lands, or concerning the admeasurement of dower, may be submitted to arbitration.

Amended by P.A.1982, No. 496, § 1, Eff. Jan. 17, 1983.

##### 600.5011. Arbitration agreements; revocation

Sec. 5011. Neither party shall have power to revoke any agreement or submission made as provided in this chapter without the consent of the other party; and if either party neglects to appear before the arbitrators after due notice, the arbitrators may nevertheless proceed to hear and determine the matter submitted to them upon the evidence produced by the other party. The court may order the parties to proceed with arbitration.

**600.5015. Arbitration agreements: appointment of arbitrators**

Sec. 5015. If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint 1 or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

**600.5021. Arbitration agreements: conduct of arbitration**

Sec. 5021. The arbitration shall be conducted in accordance with the rules of the supreme court.

**600.5025. Arbitration agreements: circuit courts, enforcement, judgment on award**

Sec. 5025. Upon the making of an agreement described in section 5001,<sup>1</sup> the circuit courts have jurisdiction to enforce the agreement and to render judgment on an award thereunder. The court may render judgment on the award although the relief given is such that it could not or would not be granted by a court of law or equity in an ordinary civil action.

<sup>1</sup> Section 600.5001.

**600.5031. Arbitration agreements: venue**

Sec. 5031. All proceedings in court under this chapter shall be had in the circuit court of the county provided in the agreement. In the absence of such provision proceedings shall be had

(1) in the circuit court of the county where the adverse party resides or has a place of business, or

(2) if he has no residence or place of business in this state, in the circuit court of the county where the applicant resides or has a place of business, or

(3) if the arbitration involves real property, in the circuit court of the county in which the property, or any part thereof, is located, or

(4) if neither (1), (2), nor (3) is applicable, in the circuit court of any county. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

**600.5033. Foreign arbitration awards**

Sec. 5033. (1) A court of competent jurisdiction may confirm an arbitration award rendered in another state and enter judgment thereon.

(2) The court may modify, correct, or refuse to confirm the award as provided by law or court rule.

**600.5035. Construction of chapter: equity**

Sec. 5035. Nothing contained in this chapter shall be construed to impair, diminish, or in any manner to affect the equitable power and authority of any court over arbitrators, awards, or the parties thereto; nor to impair or affect any action upon any award, or upon any bond or other engagement to abide an award.

## MICHIGAN COURT RULE 3.602

### RULE 3.602 ARBITRATION

(A) **Applicability of Rule.** This rule governs statutory arbitration under MCL 600.5001-600.5035; MSA 27A.5001-27A.5035. Subrules (I)-(N) apply to proceedings under the malpractice arbitration act. MCL 600.5040-600.5065; MSA 27A.5040-27A.5065.

(B) **Proceedings to Compel or to Stay Arbitration.**

(1) In a pending action an application to the court for an order under this rule must be by motion, which shall be heard in the manner and on the notice provided by these rules for motions. An initial application for an order under this rule, other than in a pending action, must be made by filing a complaint as in other civil actions.

(2) On application of a party showing an agreement to arbitrate that conforms to the arbitration statute, and the opposing party's refusal to arbitrate, the court may order the parties to proceed with arbitration and to take other steps necessary to carry out the arbitration agreement and the arbitration statute. If the opposing party denies the existence of an agreement to arbitrate, the court shall summarily determine the issues and may order arbitration or deny the application.

(3) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. If there is a substantial and good faith dispute, the court shall summarily try the issue and may enter a stay or direct the parties to proceed to arbitration.

(4) An application to compel arbitration may not be denied on the ground that the claim sought to be arbitrated lacks merit or is not filed in good faith, or because fault or grounds for the claim have not been shown.

(C) **Action Involving Issues Subject to Arbitration; Stay.** Subject to MCR 3.310(E), an action or proceeding involving an issue subject to arbitration must be stayed if an order for arbitration or an application for such an order has been made under this rule. If the issue subject to arbitration is severable, the stay may be limited to that issue. If an application for an order compelling arbitration is made in the action or proceeding in which the issue is raised, an order for arbitration must include a stay.

(D) **Hearing; Time; Place; Adjournment.**

(1) The arbitrator shall set the time and place for the hearing, and may adjourn it as necessary.

(2) On a party's request for good cause, the arbitrator may postpone the hearing to a time not later than the day set for rendering the award.

(E) **Oath of Arbitrator and Witnesses.**

(1) Before hearing testimony, the arbitrator must be sworn to hear and fairly consider the matters submitted and to make a just award according to his or her best understanding.

(2) The arbitrator has the power to administer oaths to the witnesses.

(F) **Subpoena; Depositions.**

(1) MCR 2.506 applies to arbitration hearings.

(2) On a party's request, the arbitrator may permit the taking of a deposition, for use as evidence, of a witness who cannot be subpoenaed or is unable to attend the hearing. The arbitrator may designate the manner of and the terms for taking the deposition.

(G) **Representation by Attorney.** A party has the right to be represented by an attorney at a proceeding or hearing under this rule. A waiver of the right before the proceeding or hearing is ineffective.

(H) **Award by Majority; Absence of Arbitrator.** If the arbitration is by a panel of arbitrators, the hearing shall be conducted by all of them, but a majority may decide any question and render a final award unless the concurrence of all of the arbitrators is expressly required by the agreement to submit to arbitration. If, during the course of the hearing, an arbitrator ceases to act for any reason, the remaining arbitrator or arbitrators may continue with the hearing and determine the controversy.

(I) **Award; Confirmation by Court.** An arbitration award filed with the clerk of the court designated in the agreement or statute within one year after the award was rendered may be confirmed by the court, unless it is vacated, corrected, or modified, or a decision is postponed, as provided in this rule.

(J) **Vacating Award.**

(1) On application of a party, the court shall vacate an award if:

(a) the award was procured by corruption, fraud, or other undue means;

(b) there was evident partiality by an arbitrator appointed as a neutral, corruption of an arbitrator, or misconduct prejudicing a party's rights;

(c) the arbitrator exceeded his or her powers; or

(d) the arbitrator refused to postpone the hearing on a showing of sufficient cause, refused to hear evidence material to the controversy, or otherwise conducted the hearing to prejudice substantially a party's rights.

The fact that the relief could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(2) An application to vacate an award must be made within 21 days after delivery of a copy of the award to the applicant, except that if it is predicated on corruption, fraud, or other undue means, it must be made within 21 days after the grounds are known or should have been known.

(3) In vacating the award, the court may order a rehearing before a new arbitrator chosen as provided in the agreement, or, if there is no such provision, by the court. If the award is vacated on grounds stated in subrule (J)(1)(c) or (d), the court may order a rehearing before the arbitrator who made the award. The time within which the agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(4) If the application to vacate is denied and there is no motion to modify or correct the award pending, the court shall confirm the award.

(K) **Modification or Correction of Award.**

(1) On application made within 21 days after delivery of a copy of the award to the applicant, the court shall modify or correct the award if:

(a) there is an evident miscalculation of figures or an evident mistake in the description of a person, a thing, or property referred to in the award;

(b) the arbitrator has awarded on a matter not submitted to the arbitrator, and the award may be corrected without affecting the merits of the decision on the issues submitted; or

(c) the award is imperfect in a matter of form, not affecting the merits of the controversy.

(2) If the application is granted, the court shall modify and correct the award to effect its intent and shall confirm the award as modified and corrected. Otherwise, the court shall confirm the award as made.

(3) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

(L) **Judgment.** The court shall render judgment giving effect to the award as corrected, confirmed, or modified. The judgment has the same force and effect, and may be enforced in the same manner, as other judgments.

(M) **Costs.** The costs of the proceedings may be taxed as in civil actions, and, if provision for the fees and expenses of the arbitrator has not been made in the award, the court may allow compensation for the arbitrator's services as it deems just. The arbitrator's compensation is a taxable cost in the action.

(N) **Appeals.** Appeals may be taken as from orders or judgments in other civil actions.

**§ 1. Validity of Arbitration Agreement**

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit to arbitration any controversy thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract. This act also applies to arbitration agreements between employers and employees or between their respective representatives [unless otherwise provided in the agreement].

**§ 2. Proceedings to Compel or Stay Arbitration**

(a) On application of a party showing an agreement described in Section 1, and the opposing party's refusal to arbitrate, the Court shall order the parties to proceed with arbitration, but if the opposing party denies the existence of the agreement to arbitrate, the Court shall proceed summarily to the determination of the issue so raised and shall order arbitration if found for the moving party, otherwise, the application shall be denied.

(b) On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

(c) If an issue referable to arbitration under the alleged agreement is involved in an action or proceeding pending in a court having jurisdiction to hear applications under subdivision (a) of this Section, the application shall be made therein. Otherwise and subject to Section 18, the application may be made in any court of competent jurisdiction.

(d) Any action or proceeding involving an issue subject to arbitration shall be stayed if an order for arbitration or an application therefor has been made under this section or, if the issue is severable, the stay may be with respect thereto only. When the application is made in such action or proceeding, the order for arbitration shall include such stay.

(e) An order for arbitration shall not be refused on the ground that the claim in issue lacks merit or bona fides or because any fault or grounds for the claim sought to be arbitrated have not been shown.

### **§ 3. Appointment of Arbitrators by Court**

If the arbitration agreement provides a method of appointment of arbitrators, this method shall be followed. In the absence thereof, or if the agreed method fails or for any reason cannot be followed, or when an arbitrator appointed fails or is unable to act and his successor has not been duly appointed, the court on application of a party shall appoint one or more arbitrators. An arbitrator so appointed has all the powers of one specifically named in the agreement.

### **§ 4. Majority Action by Arbitrators**

The powers of the arbitrators may be exercised by a majority unless otherwise provided by the agreement or by this act.

### **§ 5. Hearing**

Unless otherwise provided by the agreement:

(a) The arbitrators shall appoint a time and place for the hearing and cause notification to the parties to be served personally or by registered

mail not less than five days before the hearing. Appearance at the hearing waives such notice. The arbitrators may adjourn the hearing from time to time as necessary and, on request of a party and for good cause, or upon their own motion may postpone the hearing to a time not later than the date fixed by the agreement for making the award unless the parties consent to a later date. The arbitrators may hear and determine the controversy upon the evidence produced notwithstanding the failure of a party duly notified to appear. The court on application may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard, to present evidence material to the controversy and to cross-examine witnesses appearing at the hearing.

(c) The hearing shall be conducted by all the arbitrators but a majority may determine any question and render a final award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

### **§ 6. Representation by Attorney**

A party has the right to be represented by an attorney at any proceeding or hearing under this act. A waiver thereof prior to the proceeding or hearing is ineffective.

## **§ 7. Witnesses, Subpoenas, Depositions**

(a) The arbitrators may issue (cause to be issued) subpoenas for the attendance of witnesses and for the production of books, records, documents and other evidence, and shall have the power to administer oaths. Subpoenas so issued shall be served, and upon application to the Court by a party or the arbitrators, enforced, in the manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) On application of a party and for use as evidence, the arbitrators may permit a deposition to be taken, in the manner and upon the terms designated by the arbitrators, of a witness who cannot be subpoenaed or is unable to attend the hearing.

(c) All provisions of law compelling a person under subpoena to testify are applicable.

(d) Fees for attendance as a witness shall be the same as for a witness in the ..... Court.

## **§ 8. Award**

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy to each party personally or by registered mail, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within such time as the court orders on application of a party. The parties may extend the time in writing either before or after the expiration thereof. A party waives the objection that an award was not made within the time required unless he notifies the arbitrators of his objection prior to the delivery of the award to him.

## **§ 9. Change of Award by Arbitrators**

On application of a party or, if an application to the court is pending under Sections 11, 12 or 13, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in paragraphs (1) and (3) of subdivision (a) of Section 13, or for the purpose of clarifying the award. The application shall be made within twenty days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating he must serve his objections thereto, if any, within ten days from the notice. The award so modified or corrected is subject to the provisions of Sections 11, 12 and 13.

## **§ 10. Fees and Expenses of Arbitration**

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award.



## § 11. Confirmation of an Award

Upon application of a party, the Court shall confirm an award, unless within the time limits hereinafter imposed grounds are urged for vacating or modifying or correcting the award, in which case the court shall proceed as provided in Sections 12 and 13.

## § 12. Vacating an Award

(a) Upon application of a party, the court shall vacate an award where:

(1) The award was procured by corruption, fraud or other undue means;

(2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party;

(3) The arbitrators exceeded their powers;

(4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of Section 5, as to prejudice substantially the rights of a party; or

(5) There was no arbitration agreement and the issue was not adversely determined in proceedings under Section 2 and the party did not participate in the arbitration hearing without raising the objection; but the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(b) An application under this Section shall be made within ninety days after delivery of a copy of the award to the applicant, except that, if predicated upon corruption, fraud or other undue means, it shall be made within ninety days after such grounds are known or should have been known.

(c) In vacating the award on grounds other than stated in clause (5) of Subsection (a) the court may order a rehearing before new arbitrators chosen as provided in the agreement, or in the absence thereof, by the court in accordance with Section 3, or if the award is vacated on grounds set forth in clauses (3) and (4) of Subsection (a) the court may order a rehearing before the arbitrators who made the award or their successors appointed in accordance with Section 3. The time within which the

agreement requires the award to be made is applicable to the rehearing and commences from the date of the order.

(d) If the application to vacate is denied and no motion to modify or correct the award is pending, the court shall confirm the award. As amended Aug. 1956.

### **§ 13. Modification or Correction of Award**

(a) Upon application made within ninety days after delivery of a copy of the award to the applicant, the court shall modify or correct the award where:

(1) There was an evident miscalculation of figures or an evident mistake in the description of any person, thing or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) If the application is granted, the court shall modify and correct the award so as to effect its intent and shall confirm the award as so modified and corrected. Otherwise, the court shall confirm the award as made.

(c) An application to modify or correct an award may be joined in the alternative with an application to vacate the award.

### **§ 14. Judgment or Decree on Award**

Upon the granting of an order confirming, modifying or correcting an award, judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree. Costs of the application and of the proceedings subsequent thereto, and disbursements may be awarded by the court.

### **§ 15. Judgment Roll, Docketing**

(a) On entry of judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

(1) The agreement and each written extension of the time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying or correcting the award; and

(4) A copy of the judgment or decree.

(b) The judgment or decree may be docketed as if rendered in an action.

### **§ 16. Applications to Court**

Except as otherwise provided, an application to the court under this act shall be by motion and shall be heard in the manner and upon the notice provided by law or rule of court for the making and hearing of motions. Unless the parties have agreed otherwise, notice of an initial application for an order shall be served in the manner provided by law for the service of a summons in an action.

## **§ 17. Court, Jurisdiction**

The term "court" means any court of competent jurisdiction of this State. The making of an agreement described in Section 1 providing for arbitration in this State confers jurisdiction on the court to enforce the agreement under this Act and to enter judgment on an award thereunder.

## **§ 18. Venue**

An initial application shall be made to the court of the [county] in which the agreement provides the arbitration hearing shall be held or, if the hearing has been held, in the county in which it was held. Otherwise the application shall be made in the [county] where the adverse party resides or has a place of business or, if he has no residence or place of business in this State, to the court of any [county]. All subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

## **§ 19. Appeals**

(a) An appeal may be taken from:

(1) An order denying an application to compel arbitration made under Section 2;

(2) An order granting an application to stay arbitration made under Section 2(b);

(3) An order confirming or denying confirmation of an award;

(4) An order modifying or correcting an award;

(5) An order vacating an award without directing a rehearing; or

(6) A judgment or decree entered pursuant to the provisions of this act.

(b) The appeal shall be taken in the manner and to the same extent as from orders or judgments in a civil action.

## **§ 20. Act Not Retroactive**

This act applies only to agreements made subsequent to the taking effect of this act.

## **§ 21. Uniformity of Interpretation**

This act shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

## **§ 22. Constitutionality**

If any provision of this act or the application thereof to any person or circumstance is held invalid, the invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

## **§ 23. Short Title**

This act may be cited as the Uniform Arbitration Act.

## **§ 24. Repeal**

All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed.

## **§ 25. Time of Taking Effect**

This act shall take effect .....

## APPENDIX B

# THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

### I. UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION (A/40/17, ANNEX 1)

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

#### CHAPTER I. GENERAL PROVISIONS

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

- (1) This Law applies to international commercial\*\* arbitration, subject to any agreement in force between this State and any other State or States.
- (2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
  - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
  - (b) one of the following places is situated outside the State in which the parties have their places of business:
    - (1) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

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

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

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

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

For the purposes of this Law:

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

#### Article 3. Receipt of written communications

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

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

Article 4. Waiver of right to object

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

Article 5. Extent of court intervention

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

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

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

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

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

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

Article 8. Arbitration agreement and substantive claim before court

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

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

Article 9. Arbitration agreement and interim measures by court

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

### CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

#### Article 10. Number of arbitrators

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

#### Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.

- (3) Failing such agreement,

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

(b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.

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

(a) a party fails to act as required under such procedure, or

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

(c) a third party, including an institution, fails to perform any function entrusted to it under such procedure,

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

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

#### Article 12. Grounds for challenge.

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

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

#### Article 13. Challenge procedure.

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

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

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

#### Article 14. Failure of impossibility to act

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

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

#### Article 15. Appointment of substitute arbitrator

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

### CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

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

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



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

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

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

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

### CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

#### Article 18. Equal treatment of parties

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

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

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

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

#### Article 20. Place of arbitration

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

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

#### Article 21. Commencement of arbitral proceedings

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

## Article 22. Language

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

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

## Article 23. Statements of claim and defence

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

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

## Article 24. Hearings and written proceedings

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

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

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

## Article 25. Default of a party

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

(a) the claimant fails to communicate his statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;

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

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

Article 26. Expert appointed by arbitral tribunal

- (1) Unless otherwise agreed by the parties, the arbitral tribunal
  - (a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;
  - (b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for his inspection.
- (2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue.

Article 27. Court assistance in taking evidence

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

CHAPTER VI. MAKING AN AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

- (1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.
- (2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
- (3) The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so.
- (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 29. Decision making by panel of arbitrators

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

Article 30. Settlement

- (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.
- (2) An award on agreed terms shall be made in accordance with the provisions of article 31 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

Article 31. Form and contents of award

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

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

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

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

Article 32. Termination of proceedings

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

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

(a) the claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) the parties agree on the termination of the proceedings;

(c) the arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

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

Article 33. Correction and interpretation of award; additional award

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

(a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

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

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

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

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

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

#### CHAPTER VII. RECOURSE AGAINST AWARD

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

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

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

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

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

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

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

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

(b) the court finds that:

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

(ii) the award is in conflict with the public policy of this State.

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

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

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35. Recognition and enforcement

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

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

Article 36. Grounds for refusing recognition or enforcement

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

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

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

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

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not 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

\*\*\*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.

(11) 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 C

### CALIFORNIA ARBITRATION AND CONCILIATION OF INTERNATIONAL DISPUTES STATUTE

Cal. Code of Civil Procedure, §§1297.11-1297.432

#### TITLE 9.3. ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES

Chapter	Section
1. Application and Interpretation .....	1297.11
2. Arbitration Agreements and Judicial Measures in Aid of Arbitration .....	1297.71
3. Composition of Arbitral Tribunals .....	1297.101
4. Jurisdiction of Arbitral Tribunals .....	1297.161
5. Manner and Conduct of Arbitration .....	1297.181
6. Making of Arbitral Award and Termination of Proceedings .....	1297.281
7. Conciliation .....	1297.341

*Title 9.3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

*For another Title 9.3, Real Estate Contract Arbitration, consisting of § 1298 et seq., see Title 9.3, post.*

**Additions or changes indicated by underline; deletions by asterisks \* \* \***

#### CHAPTER 1. APPLICATION AND INTERPRETATION

Article	Section
1. Scope of Application .....	1297.11
2. Interpretation .....	1297.21
3. Receipt of Written Communications .....	1297.31
4. Waiver of Right to Object .....	1297.41
5. Extent of Judicial Intervention .....	1297.51
6. Functions .....	1297.61

*Chapter 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### ARTICLE 1. SCOPE OF APPLICATION

Section
1297.11. Application of title, subject to certain agreements.
1297.12. Application of title, California as place of arbitration or conciliation.
1297.13. International status of agreement; requirements.
1297.14. Place of business; habitual residence.
1297.15. One state; United States and District of Columbia.
1297.16. Commercial agreements; nature of relationships.
1297.17. Effect on other laws; supersession.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### Law Review Commentaries

California's new International Arbitration and Conciliation Code. Albert S. Golbert and Daniel M. Kolkey, 11 L.A.Law. 46 (Nov. 1988).



**§ 1297.11. Application of title; subject to certain agreements**

This title applies to international commercial arbitration and conciliation, subject to any agreement which is in force between the United States and any other state or states.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.12. Application of title; California as place of arbitration or conciliation**

This title, except Article 2 (commencing with Section 1297.81) of Chapter 2 and Article 3 (commencing with Section 1297.91) of Chapter 2, applies only if the place of arbitration or conciliation is in the State of California.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.13. International status of agreement; requirements**

An arbitration or conciliation agreement is international if any of the following applies:

(a) The parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different states.

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

(i) The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement.

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed.

(iii) The place with which the subject matter of the dispute is most closely connected.

(c) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state.

(d) The subject matter of the arbitration or conciliation agreement is otherwise related to commercial interests in more than one state.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

State policy, encouragement of conciliation, see  
§ 1297.341.

**§ 1297.14. Place of business; habitual residence**

For the purposes of Section 1297.13, if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and if a party does not have a place of business, reference is to be made to his habitual residence.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.15. One state; United States and District of Columbia**

For the purposes of Section 1297.13, the states of the United States, including the District of Columbia, shall be considered one state.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.16. Commercial agreements; nature of relationships**

An arbitration or conciliation agreement is commercial if it arises out of a relationship of a commercial nature including, but not limited to, any of the following:

(a) A transaction for the supply or exchange of goods or services.

(b) A distribution agreement.

(c) A commercial representation or agency.

- (d) An exploitation agreement or concession.
  - (e) A joint venture or other, related form of industrial or business cooperation.
  - (f) The carriage of goods or passengers by air, sea, rail, or road.
  - (g) Construction.
  - (h) Insurance.
  - (i) Licensing.
  - (j) Factoring.
  - (k) Leasing.
  - (l) Consulting.
  - (m) Engineering.
  - (n) Financing.
  - (o) Banking.
  - (p) The transfer of data or technology.
  - (q) Intellectual or industrial property, including trademarks, patents, copyrights and software programs.
  - (r) Professional services.
- (Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.17. Effect on other laws; supersession**

This title shall not affect any other law in force in California by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with provisions other than those of this title. Notwithstanding the foregoing, this title supersedes Sections 1280 to 1284.2, inclusive, with respect to international commercial arbitration and conciliation.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 2. INTERPRETATION**

**Section**

- 1297.21. Definition.
- 1297.22. Freedom of parties to determine issue; third party.
- 1297.23. Agreements of parties as including arbitration or conciliation rules.
- 1297.24. Claim; counterclaim; defense.

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.21. Definitions**

For the purposes of this title:

- (a) "Arbitral award" means any decision of the arbitral tribunal on the substance of the dispute submitted to it and includes an interim, interlocutory, or partial arbitral award.
- (b) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators.
- (c) "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution.
- (d) "Conciliation" means any conciliation whether or not administered by a permanent conciliation institution.
- (e) "Chief Justice" means the Chief Justice of California or his or her designee.
- (f) "Court" means a body or an organ of the judicial system of a state.
- (g) "Party" means a party to an arbitration or conciliation agreement.

(h) "Superior court" means the superior court in the county in this state selected pursuant to Section 1297.61.

(i) "Supreme Court" means the Supreme Court of California.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Library References**

Words and Phrases (Perm. Ed.)

**§ 1297.22. Freedom of parties to determine issue; third party**

Where a provision of this title, except Article 1 (commencing with Section 1297.281) of Chapter 6, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.23. Agreement of parties as including arbitration or conciliation rules**

Where a provision of this title refers to the fact that the parties have agreed or that they may agree, or in any other way refers to an agreement of the parties, such agreement shall be deemed to include any arbitration or conciliation rules referred to in that agreement.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.24. Claim; counterclaim; defense**

Where this title, other than Article 8 (commencing with Section 1297.251) of Chapter 5, Article 5 (commencing with Section 1297.321) of Chapter 6, or subdivision (a) of Section 1297.322, refers to a claim, it also applies to a counterclaim, and where it refers to a defense, it also applies to a defense to that counterclaim.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 3. RECEIPT OF WRITTEN COMMUNICATIONS**

**Section**

- 1297.31. Receipt if delivered to addressee personally, at place of business, habitual residence or mailing address on day of delivery.  
1297.32. Receipt if delivered to last known address if not found after reasonable inquiry.  
1297.33. Court proceedings; inapplicability of this article to written communications.

*Article 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.31. Receipt if delivered to addressee personally, at place of business, habitual residence or mailing address on day of delivery**

Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence, or mailing address, and the communication is deemed to have been received on the day it is so delivered.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.32. Receipt if delivered to last known address if not found after reasonable inquiry**

If none of the places referred to in Section 1297.31 can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence, or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.33. Court proceedings; inapplicability of this article to written communications**

This article does not apply to written communications in respect of court proceedings.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 4. WAIVER OF RIGHT TO OBJECT

### Section

1297.41. Failure to state objection without delay; waiver.

1297.42. Any provision of this title, defined.

*Article 4 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.41. Failure to state objection without delay; waiver

A party who knows that any provision of this title, or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his or her objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to object.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.42. Any provision of this title, defined

For purposes of Section 1297.41, "any provision of this title" means any provision of this title in respect of which the parties may otherwise agree.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 5. EXTENT OF JUDICIAL INTERVENTION

### Section

1297.51. Prohibition against intervention unless provided for in title or federal law.

*Article 5 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.51. Prohibition against intervention unless provided for in title or federal law

In matters governed by this title, no court shall intervene except where so provided in this title, or applicable federal law.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 6. FUNCTIONS

### Section

1297.61. Superior court; performance of duties.

*Article 6 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.61. Superior court; performance of duties

The functions referred to in Sections 1297.114, 1297.115, 1297.116, 1297.134, 1297.135, 1297.136, 1297.165, 1297.166, and 1297.167 shall be performed by the superior court of the county in which the place of arbitration is located. The functions referred to in Section 1297.81 shall be performed by the superior court selected pursuant to Article 2 (commencing with Section 1292) of Chapter 5 of Title 9.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## CHAPTER 2. ARBITRATION AGREEMENTS AND JUDICIAL MEASURES IN AID OF ARBITRATION

Article	Section
1. Definition and Form of Arbitration Agreements .....	1297.71
2. Stay of Proceedings .....	1297.81
3. Interim Measures .....	1297.91

*Chapter 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### ARTICLE 1. DEFINITION AND FORM OF ARBITRATION AGREEMENTS

#### Section

1297.71. Arbitration agreement, defined; form.

1297.72. Writing; signed document, exchange of communications, statements of claim and defense or reference in contract.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### § 1297.71. Arbitration agreement, defined; form

An "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.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### § 1297.72. Writing; signed document, exchange of communications, statements of claim and defense or reference in contract

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### ARTICLE 2. STAY OF PROCEEDINGS

#### Section

1297.81. Commencement of judicial proceedings by one party; right of other party to stay proceedings and compel arbitration.

1297.82. Timely request; grant.

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### Cross References

Inapplicability of Article 2, place of arbitration or conciliation, see § 1297.12.

#### § 1297.81. Commencement of judicial proceedings by one party; right of other party to stay proceedings and compel arbitration

When a party to an international commercial arbitration agreement as defined in this title commences judicial proceedings seeking relief with respect to a matter covered by the agreement to arbitrate, any other party to the agreement may apply to the superior court for an order to stay the proceedings and to compel arbitration.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.82. Timely request; grant**

A timely request for a stay of judicial proceedings made under Section 1297.81 shall be granted. (Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 3. INTERIM MEASURES**

**Section**

**1297.91. Request for interim protection; incompatibility with arbitration agreement.**

**1297.92. Tribunal's award to take interim measure of protection, request to superior court for enforcement.**

**1297.93. Measures which court may grant.**

**1297.94. Considerations by court on request for interim relief; public policy.**

**1297.95. Absence of ruling by tribunal to objection to its jurisdiction; independent finding by court; effect.**

*Article 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Inapplicability of Article 3, place of arbitration or conciliation, see § 1297.12.

**§ 1297.91. Request for interim protection; incompatibility with arbitration agreement**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.92. Tribunal's award to take interim measure of protection, request to superior court for enforcement**

Any party to an arbitration governed by this title may request from the superior court enforcement of an award of an arbitral tribunal to take any interim measure of protection of an arbitral tribunal pursuant to Article 2 (commencing with Section 1297.171) of Chapter 4. Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested. (Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.93. Measures which court may grant**

Measures which the court may grant in connection with a pending arbitration include, but are not limited to:

(a) An order of attachment issued to assure that the award to which applicant may be entitled is not rendered ineffectual by the dissipation of party assets.

(b) A preliminary injunction granted in order to protect trade secrets or to conserve goods which are the subject matter of the arbitral dispute.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.94. Considerations by court on request for interim relief; public policy**

In considering a request for interim relief, the court shall give preclusive effect to any and all findings of fact of the arbitral tribunal including the probable validity of the claim which is the subject of the award for interim relief and which the arbitral tribunal has previously granted in the proceeding in question, provided that such interim award is consistent with public policy.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.95. Absence of ruling by tribunal to objection to its jurisdiction; independent finding by court; effect**

Where the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim measures of relief shall be denied. Such a ruling by the court

that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceeding.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### CHAPTER 3. COMPOSITION OF ARBITRAL TRIBUNALS

Article	Section
1. Number of Arbitrators .....	1297.101
2. Appointment of Arbitrators .....	1297.111
3. Grounds for Challenge .....	1297.121
4. Challenge Procedure .....	1297.131
5. Failure or Impossibility to Act .....	1297.141
6. Termination of Mandate and Substitution of Arbitrators .....	1297.151

*Chapter 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### ARTICLE 1. NUMBER OF ARBITRATORS

##### Section

1297.101. Agreement by parties if more than one arbitrator.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

##### § 1297.101. Agreement by parties if more than one arbitrator

The parties may agree on the number of arbitrators. Otherwise, there shall be one arbitrator.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### ARTICLE 2. APPOINTMENT OF ARBITRATORS

##### Section

1297.111. Nationality of arbitrator.

1297.112. Procedure.

1297.113. Appointment of third arbitrator by two party-appointed arbitrators.

1297.114. Three arbitrator tribunal; failure to appoint arbitrator; appointment by court.

1297.115. Sole arbitrator tribunal; failure of agreement; appointment by court.

1297.116. Measures to be taken by court to secure appointment.

1297.117. Decision by court; finality; not subject to appeal.

1297.118. Superior court; considerations in appointing arbitrators.

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

##### § 1297.111. Nationality of arbitrator

A person of any nationality may be an arbitrator.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

##### § 1297.112. Procedure

Subject to Sections 1297.115 and 1297.116, the parties may agree on a procedure for appointing the arbitral tribunal.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

##### § 1297.113. Appointment of third arbitrator by two party-appointed arbitrators

Failing such agreement referred to in Section 1297.112, in an arbitration with three arbitrators and two parties, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.114. Three arbitrator tribunal; failure to appoint arbitrator; appointment by court**

If the appointment procedure in Section 1297.113 applies and either a party fails to appoint an arbitrator within 30 days after receipt of a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days after their appointment, the appointment shall be made, upon request of a party, by the superior court.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.115. Sole arbitrator tribunal; failure of agreement; appointment by court**

Failing any agreement referred to in Section 1297.112, in an arbitration with a sole arbitrator, if the parties fail to agree on the arbitrator, the appointment shall be made, upon request of a party, by the superior court.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.116. Measures to be taken by court to secure appointment**

The superior court, upon the request of a party, may take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment, where, under an appointment procedure agreed upon by the parties, any of the following occurs:

- (a) A party fails to act as required under that procedure.
- (b) The parties, or two appointed arbitrators, fail to reach an agreement expected of them under that procedure.
- (c) A third party, including an institution, fails to perform any function entrusted to it under that procedure.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.117. Decision by court; finality; not subject to appeal**

A decision on a matter entrusted to the superior court pursuant to Sections 1297.114, 1297.115, and 1297.116 is final and is not subject to appeal.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.118. Superior court; considerations in appointing arbitrators**

The superior court, in appointing an arbitrator, shall have due regard to all of the following:

- (a) Any qualifications required of the arbitrator by the agreement of the parties.
- (b) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.
- (c) In the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 3. GROUNDS FOR CHALLENGE**

**Section**

1297.121. Disclosure of information questioning impartiality; circumstances.

1297.122. Mandatory obligation to disclose information; waiver.



**Section**

- 1297.123. Disclosure by arbitrator of circumstances not previously disclosed; time.  
1297.124. Challenge for doubts as to independence, impartiality or qualifications.  
1297.125. Challenge only for reasons aware of after appointment.

*Article 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.121. Disclosure of information questioning impartiality; circumstances**

Except as otherwise provided in this title, all persons whose names have been submitted for consideration for appointment or designation as arbitrators or conciliators, or who have been appointed or designated as such, shall, within 15 days, make a disclosure to the parties of any information which might cause their impartiality to be questioned including, but not limited to, any of the following instances:

(a) The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(b) The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or he or she has been a material witness concerning it.

(c) The person served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding.

(d) The person, individually or a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(e) The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:

(i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.

(ii) The person is acting or has acted as a lawyer in the proceeding.

(iii) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.

(iv) The person is likely to be a material witness in the proceeding.

(f) The person has a close personal or professional relationship with a person who meets any of the following conditions:

(i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.

(ii) The person is acting or has acted as a lawyer or representative in the proceeding.

(iii) The person is or expects to be nominated as an arbitrator or conciliator in the proceedings.

(iv) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.

(v) The person is likely to be a material witness in the proceeding.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.122. Mandatory obligation to disclose information; waiver**

The obligation to disclose information set forth in Section 1297.121 is mandatory and cannot be waived as to the parties with respect to persons serving either as the sole arbitrator or sole conciliator or as the chief or prevailing arbitrator or conciliator. The parties may otherwise agree to waive such disclosure.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.123. Disclosure by arbitrator of circumstances not previously disclosed; time**

From the time of appointment and throughout the arbitral proceedings, an arbitrator, shall, without delay, disclose to the parties any circumstances referred to in Section 1297.121 which were not previously disclosed.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.124. Challenge for doubts as to independence, impartiality or qualifications**

Unless otherwise agreed by the parties or the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or as to his or her possession of the qualifications upon which the parties have agreed.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.125. Challenge only for reasons aware of after appointment**

A party may challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 4. CHALLENGE PROCEDURE**

**Section**

1297.131. Agreement on procedure; finality of decision.

1297.132. Reasons for challenge; statement to tribunal; time.

1297.133. Decision by tribunal.

1297.134. Unsuccessful challenge; superior court; decision on challenge; sustaining challenge.

1297.135. Finality of superior court decision; no appeal.

1297.136. Continuation of arbitral proceedings while court request pending.

*Article 4 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Withdrawal of arbitrator from office, termination of mandate, see § 1297.151.

**§ 1297.131. Agreement on procedure; finality of decision**

The parties may agree on a procedure for challenging an arbitrator and the decision reached pursuant to that procedure shall be final.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.132. Reasons for challenge; statement to tribunal; time**

Failing any agreement referred to in Section 1297.131, a party which intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sections 1297.124 and 1297.125, whichever shall be later, send a written statement of the reasons for the challenge to the arbitral tribunal.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.133. Decision by tribunal**

Unless the arbitrator challenged under Section 1297.132 withdraws from his or her office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.134. Unsuccessful challenge; superior court; decision on challenge; sustaining challenge**

If a challenge following the procedure under Section 1297.133 is not successful, the challenging party may request the superior court, within 30 days after having received notice of the decision rejecting the challenge, to decide on the challenge. If a challenge is based upon the grounds set forth in Section 1297.121, and the superior court determines that the facts support a finding that such ground or grounds fairly exist, then the challenge should be sustained.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.135. Finality of superior court decision; no appeal**

The decision of the superior court under Section 1297.134 is final and is not subject to appeal.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.136. Continuation of arbitral proceedings while court request pending**

While a request under Section 1297.134 is pending, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings and make an arbitral award.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**ARTICLE 5. FAILURE OR IMPOSSIBILITY TO ACT**

**Section**

- 1297.141. Termination of arbitrator's mandate; circumstances.
- 1297.142. Remaining controversy; decision by superior court; request of party.
- 1297.143. Decision of superior court not appealable.
- 1297.144. Withdrawal of arbitrator or termination of mandate; effect on validity of grounds for challenge.

*Article 5 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Withdrawal of arbitrator from office, termination of mandate, see § 1297.151.

**§ 1297.141. Termination of arbitrator's mandate; circumstances**

The mandate of an arbitrator terminates if he becomes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, and he withdraws from his or her office or the parties agree to the termination of his or her mandate.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.142. Remaining controversy; decision by superior court; request of party**

If a controversy remains concerning any of the grounds referred to in Section 1297.141, a party may request the superior court to decide on the termination of the mandate.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.143. Decision of superior court not appealable**

A decision of the superior court under Section 1297.142 is not subject to appeal.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.144. Withdrawal of arbitrator or termination of mandate; effect on validity of grounds for challenge.**

If, under this section or Section 1297.132, an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in Section 1297.132.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 6. TERMINATION OF MANDATE AND SUBSTITUTION OF ARBITRATORS

### Section

- 1297.151. Withdrawal of arbitrator from office or by agreement of parties.  
1297.152. Substitute arbitrator; appointment.  
1297.153. Repetition of previous hearings; agreement of parties or discretion of tribunal.  
1297.154. Order or ruling of tribunal prior to replacement of arbitrator; effect.

*Article 6 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.151. Withdrawal of arbitrator from office or by agreement of parties

In addition to the circumstances referred to under Article 4 (commencing with Section 1297.131) and Article 5 (commencing with Section 1297.141) of this chapter, the mandate of an arbitrator terminates upon his or her withdrawal from office for any reason, or by or pursuant to agreement of the parties.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.152. Substitute arbitrator; appointment

Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.153. Repetition of previous hearings; agreement of parties or discretion of tribunal

Unless otherwise agreed by the parties:

(a) Where the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated.

(b) Where an arbitrator other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.154. Order or ruling of tribunal prior to replacement of arbitrator; effect

Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid because there has been a change in the composition of the tribunal.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## CHAPTER 4. JURISDICTION OF ARBITRAL TRIBUNALS

Article	Section
1. Competence of an Arbitral Tribunal to Rule on Its Jurisdiction .....	1297.161
2. Interim Measures Ordered by Arbitral Tribunals .....	1297.171

*Chapter 4 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

## ARTICLE 1. COMPETENCE OF AN ARBITRAL TRIBUNAL TO RULE ON ITS JURISDICTION

### Section

- 1297.161. Authority to rule on jurisdiction and arbitration agreement; treatment and effect of arbitration clause.  
1297.162. Plea of lack of jurisdiction; effect if party participated in appointment of arbitrator.  
1297.163. Plea of exceeding scope of authority; time.  
1297.164. Admission of later plea if delay justified.  
1297.165. Ruling on plea as a preliminary question or in award on merits.  
1297.166. Ruling on plea as a preliminary question; request to superior court; waiver.  
1297.167. Continuation of arbitral proceedings while court request pending.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.161. Authority to rule on jurisdiction and arbitration agreement; treatment and effect of arbitration clause**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.162. Plea of lack of jurisdiction; effect if party participated in appointment of arbitrator**

A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. However, a party is not precluded from raising such a plea by the fact that he or she has appointed, or participated in the appointment of, an arbitrator.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.163. Plea of exceeding scope of authority; time**

A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.164. Admission of later plea if delay justified**

The arbitral tribunal may, in either of the cases referred to in Sections 1297.162 and 1297.163, admit a later plea if it considers the delay justified.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.165. Ruling on plea as a preliminary question or in award on merits**

The arbitral tribunal may rule on a plea referred to in Sections 1297.162 and 1297.163 either as a preliminary question or in an award on the merits.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.166. Ruling on plea as a preliminary question; request to superior court; waiver**

If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party shall request the superior court, within 30 days after having received notice of that ruling, to decide the matter or shall be deemed to have waived objection to such finding.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

**§ 1297.167. Continuation of arbitral proceedings while court request pending**

While a request under Section 1297.166 is pending, the arbitral tribunal may continue with the arbitral proceedings and make an arbitral award.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Function under this section by court of county of place of arbitration, see § 1297.61.

## ARTICLE 2. INTERIM MEASURES ORDERED BY ARBITRAL TRIBUNALS

### Section

1297.171. Interim measure of protection; order by tribunal.

1297.172. Requiring party to provide security.

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.171. Interim measure of protection; order by tribunal

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### Cross References

Interim measures, see § 1297.91 et seq.

### § 1297.172. Requiring party to provide security

The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under Section 1297.171.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## CHAPTER 5. MANNER AND CONDUCT OF ARBITRATION

Article	Section
1. Equal Treatment of Parties .....	1297.181
2. Determination of Rules of Procedure .....	1297.191
3. Place of Arbitration .....	1297.201
4. Commencement of Arbitral Proceedings .....	1297.211
5. Language .....	1297.221
6. Statements of Claim and Defense .....	1297.231
7. Hearings and Written Proceedings .....	1297.241
8. Default of a Party .....	1297.251
9. Expert Appointed by Arbitral Tribunal .....	1297.261
10. Court Assistance in Taking Evidence and Consolidating Arbitrations .....	1297.271

*Chapter 5 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

## ARTICLE 1. EQUAL TREATMENT OF PARTIES

### Section

1297.181. Equal treatment and opportunity to present case.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.181. Equal treatment and opportunity to present case

The parties shall be treated with equality and each party shall be given a full opportunity to present his or her case.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 2. DETERMINATION OF RULES OF PROCEDURE

### Section

1297.191. Agreement of parties.

1297.192. Conduct of arbitration by tribunal.

1297.193. Evidentiary questions; determination by tribunal.

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.191. Agreement of parties**

Subject to this title, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.192. Conduct of arbitration by tribunal**

Failing any agreement referred to in Section 1297.191, the arbitral tribunal may, subject to this title, conduct the arbitration in the manner it considers appropriate.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.193. Evidentiary questions: determination by tribunal**

The power of the arbitral tribunal under Section 1297.192 includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 3. PLACE OF ARBITRATION**

**Section**

1297.201. Agreement of parties.

1297.202. Determination by tribunal upon failure of parties to agree.

1297.203. Meetings at place tribunal considers appropriate.

*Article 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.201. Agreement of parties**

The parties may agree on the place of arbitration.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Form and content of award, see § 1297.314.

**§ 1297.202. Determination by tribunal upon failure of parties to agree**

Failing any agreement referred to in Section 1297.201, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.203. Meetings at place tribunal considers appropriate**

Notwithstanding Section 1297.201, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of documents, goods, or other property.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 4. COMMENCEMENT OF ARBITRAL PROCEEDINGS**

**Section**

1297.211. Date on which arbitration referral received by respondent.

*Article 4 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.211. Date on which arbitration referral received by respondent**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 5. LANGUAGE

### Section

- 1297.221. Agreement by parties.  
1297.222. Determination by tribunal.  
1297.223. Application of agreement of parties or determination by tribunal.  
1297.224. Documentary evidence; accompaniment by translation; order by tribunal.

*Article 5 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### § 1297.221. Agreement by parties

The parties may agree upon the language or languages to be used in the arbitral proceedings.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### § 1297.222. Determination by tribunal

Failing any agreement referred to in Section 1297.221, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### § 1297.223. Application of agreement of parties or determination by tribunal

The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing, and any arbitral award, decision, or other communication by the arbitral tribunal.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### § 1297.224. Documentary evidence; accompaniment by translation; order by tribunal

The arbitral tribunal may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 6. STATEMENTS OF CLAIM AND DEFENSE

### Section

- 1297.231. Statement of claim by claimant; statement of defense by respondent; time.  
1297.232. Submission of documents with statement.  
1297.233. Amendment or supplement to claim or defense; exception.

*Article 6 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### § 1297.231. Statement of claim by claimant; statement of defense by respondent; time

Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his or her claim, the points at issue, and the relief or remedy sought, and the respondent shall state his or her defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### Cross References

Failure to communicate.  
Statement of claim, termination of proceedings, see  
§ 1297.251.

Statement of defense, continuance of proceedings, see  
§ 1297.252.

#### § 1297.232. Submission of documents with statement

The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)



#### **Cross References**

Failure to communicate,  
Statement of claim, termination of proceedings, see  
§ 1297.251.

Statement of defense, continuance of proceedings, see  
§ 1297.252.

#### **§ 1297.233. Amendment or supplement to claim or defense; exception**

Unless otherwise agreed by the parties, either party may amend or supplement his or her claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### **ARTICLE 7. HEARINGS AND WRITTEN PROCEEDINGS**

#### **Section**

- 1297.241. Oral or written presentation of evidence; agreement or decision.
- 1297.242. Oral hearings.
- 1297.243. Notice of hearings and meetings.
- 1297.244. Statements, documents, etc. by one party to tribunal; communication to other party.
- 1297.245. Oral hearings and meetings in camera.

*Article 7 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

#### **§ 1297.241. Oral or written presentation of evidence; agreement or decision**

Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### **§ 1297.242. Oral hearings**

Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate state of the proceedings, if so requested by a party.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### **§ 1297.243. Notice of hearings and meetings**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### **§ 1297.244. Statements, documents, etc. by one party to tribunal; communication to other party**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

#### **§ 1297.245. Oral hearings and meetings in camera**

Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings shall be held in camera.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### **ARTICLE 8. DEFAULT OF A PARTY**

#### **Section**

- 1297.251. Claimant's failure to communicate statement of claim; termination of proceedings.
- 1297.252. Respondent's failure to communicate statement of defense; continuance of proceedings.
- 1297.253. Failure to appear at hearing or produce evidence.

*Article 8 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Reference to claim as reference to counterclaim, exception under this article. see § 1297.24.

**§ 1297.251. Claimant's failure to communicate statement of claim; termination of proceedings**

Unless otherwise agreed by the parties, where, without showing sufficient cause, the claimant fails to communicate his or her statement of claim in accordance with Sections 1297.231 and 1297.232, the arbitral tribunal shall terminate the proceedings.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.252. Respondent's failure to communicate statement of defense; continuance of proceedings**

Unless otherwise agreed by the parties, where, without showing sufficient cause, the respondent fails to communicate his or her statement of defense in accordance with Sections 1297.231 and 1297.232, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the claimant's allegations.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.253. Failure to appear at hearing or produce evidence**

Unless otherwise agreed by the parties, where, without showing sufficient cause, a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue with the proceedings and make the arbitral award on the evidence before it.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 9. EXPERT APPOINTED BY ARBITRAL TRIBUNAL**

**Section**

- 1297.261. Appointment of expert; requirement of party to furnish information, documents, etc.  
1297.262. Participation of expert in oral hearing.

*Article 9 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.261. Appointment of expert; requirement of party to furnish information, documents, etc.**

Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for his or her inspection.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.262. Participation of expert in oral hearing**

Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his or her written or oral report, participate in an oral hearing where the parties have the opportunity to question the expert and to present expert witnesses on the points at issue.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 10. COURT ASSISTANCE IN TAKING EVIDENCE AND CONSOLIDATING ARBITRATIONS.**

**Section**

- 1297.271. Request of superior court for assistance on taking evidence: subpoena, witness compensation.  
1297.272. Consolidations of arbitrations: actions of superior court.  
1297.273. Consolidations of arbitrations: agreement of parties.

*Article 10 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.271. Request of superior court for assistance on taking evidence; subpoena, witness compensation**

The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the superior court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence. In addition, a subpoena may issue as provided in Section 1282.6, in which case the witness compensation provisions of Section 1283.2 shall apply.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.272. Consolidations of arbitrations; actions of superior court**

Where the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the superior court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

(a) Order the arbitrations to be consolidated on terms the court considers just and necessary.

(b) Where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with Section 1297.118.

(c) Where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.273. Consolidations of arbitrations; agreement of parties**

Nothing in this article shall be construed to prevent the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**CHAPTER 6. MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS**

Article	Section
1. Rules Applicable to Substance of Dispute .....	1297.181
2. Decisionmaking by Panel of Arbitrators .....	1297.291
3. Settlement .....	1297.301
4. Form and Content of Arbitral Award .....	1297.311
5. Termination of Proceedings .....	1297.321
6. Correction and Interpretation of Awards and Additional Awards .....	1297.331

*Chapter 6 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**ARTICLE 1. RULES APPLICABLE TO SUBSTANCE OF DISPUTE**

Section
1297.281. Rules of law designated by parties.
1297.282. Designation by parties of substantive and not conflict of law rules.
1297.283. Application of appropriate law by tribunal if parties fail to designate law.
1297.284. Decision ex aequo et bono or as amiable compositeur if authorized.
1297.285. Decision of tribunal in accord with terms of contract and usages of trade.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Freedom of parties to determine issue, see § 1297.22.

**§ 1297.281. Rules of law designated by parties**

The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.282. Designation by parties of substantive and not conflict of law rules**

Any designation by the parties of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.283. Application of appropriate law by tribunal if parties fail to designate law**

Failing any designation of the law under Section 1297.282 by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.284. Decision ex aequo et bono or as amiable compositeur if authorized**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.285. Decision of tribunal in accord with terms of contract and usages of trade**

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.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 2. DECISIONMAKING BY PANEL OF ARBITRATORS**

**Section**

**1297.291. Majority vote in proceedings with more than one arbitrator; decisions on procedural questions by presiding arbitrator.**

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.291. Majority vote in proceedings with more than one arbitrator; decisions on procedural questions by presiding arbitrator**

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all of its members.

Notwithstanding this section, if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by a presiding arbitrator.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 3. SETTLEMENT**

**Section**

**1297.301. Encouragement of settlement; mediation, conciliation, etc.**

**1297.302. Termination of proceedings; record of award.**

**1297.303. Arbitral award on agreed terms; law governing.**

**1297.304. Arbitral award on agreed terms; status and effect.**

*Article 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.301. Encouragement of settlement; mediation, conciliation, etc.**

It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.302. Termination of proceedings; record of award**

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

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.303. Arbitral award on agreed terms; law governing**

An arbitral award on agreed terms shall be made in accordance with Article 4 (commencing with Section 1297.311) of this chapter and shall state that it is an arbitral award.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.304. Arbitral award on agreed terms; status and effect**

An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 4. FORM AND CONTENT OF ARBITRAL AWARD**

**Section**

- 1297.311. Award in writing; signatures.
- 1297.312. Signatures; majority of members; reasons for omitted signatures.
- 1297.313. Basis for award; statement of reasons; exceptions.
- 1297.314. Date of award and place of arbitration.
- 1297.315. Signed copy; delivery to each party.
- 1297.316. Interim award; enforcement.
- 1297.317. Interest.
- 1297.318. Costs; inclusions.

*Article 4 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Application of this article to correction or interpretation of award or an additional award, see § 1297.337.

**§ 1297.311. Award in writing; signatures**

An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.312. Signatures; majority of members; reasons for omitted signatures**

For the purposes of Section 1297.311, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.313. Basis for award; statement of reasons; exceptions**

The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given, or the award is an arbitral award on agreed terms under Article 3 (commencing with Section 1297.301) of this chapter.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.314. Date of award and place of arbitration**

The arbitral award shall state its date and the place of arbitration as determined in accordance with Article 3 (commencing with Section 1297.201) of Chapter 5 and the award shall be deemed to have been made at that place.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.315. Signed copy; delivery to each party**

After the arbitral award is made, a signed copy shall be delivered to each party.  
(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.316. Interim award; enforcement**

The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. The interim award may be enforced in the same manner as a final arbitral award.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.317. Interest**

Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.318. Costs; inclusions**

(a) Unless otherwise agreed by the parties, the costs of an arbitration shall be at the discretion of the arbitral tribunal.

(b) In making an order for costs, the arbitral tribunal may include as costs any of the following:

(1) The fees and expenses of the arbitrators and expert witnesses.

(2) Legal fees and expenses.

(3) Any administration fees of the institution supervising the arbitration, if any.

(4) Any other expenses incurred in connection with the arbitral proceedings.

(c) In making an order for costs, the arbitral tribunal may specify any of the following:

(1) The party entitled to costs.

(2) The party who shall pay the costs.

(3) The amount of costs or method of determining that amount.

(4) The manner in which the costs shall be paid.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 5. TERMINATION OF PROCEEDINGS**

**Section**

1297.321. Means; finality of award.

1297.322. Order for termination; circumstances.

1297.323. Mandate of tribunal; termination.

*Article 5 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**Cross References**

Reference to claim or reference to counterclaim, exception under this article, see § 1297.24.

**§ 1297.321. Means; finality of award**

The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under Section 1297.322. The award shall be final upon the expiration of the applicable periods in Article 6 (commencing with Section 1297.331) of this chapter.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.322. Order for termination; circumstances**

The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where any of the following occurs:

(a) The claimant withdraws his or her claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute.

(b) The parties agree on the termination of the proceedings.

(c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Reference to claim or reference to counterclaim, exception under this section, see § 1297.24.

**§ 1297.323. Mandate of tribunal; termination**

Subject to Article 6 (commencing with Section 1297.331) of this chapter, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 6. CORRECTION AND INTERPRETATION OF AWARDS  
AND ADDITIONAL AWARDS**

**Section**

1297.331. Correction of errors; interpretations; time.

1297.332. Duty of tribunal to correct or interpret award; time.

1297.333. Correction of errors by tribunal on its own initiative; time.

1297.334. Request for additional award; time.

1297.335. Additional award; time.

1297.336. Extension of time for tribunal action under this article.

1297.337. Construction with other laws.

*Article 6 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.331. Correction of errors; interpretations; time**

Within 30 days after receipt of the arbitral award, unless another period of time has been agreed upon by the parties:

(a) A party may request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors, or any other errors of a similar nature.

(b) A party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**Cross References**

Finality of award, see § 1297.321.

**§ 1297.332. Duty of tribunal to correct or interpret award; time**

If the arbitral tribunal considers any request made under Section 1297.331 to be justified, it shall make the correction or give the interpretation within 30 days after receipt of the request and the interpretation shall form part of the arbitral award.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.333. Correction of errors by tribunal on its own initiative; time**

The arbitral tribunal may correct any error of the type referred to in subdivision (a) of Section 1297.331, on its own initiative, within 30 days after the date of the arbitral award.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.334. Request for additional award; time**

Unless otherwise agreed by the parties, a party may request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to the claims presented in the arbitral proceedings but omitted from the arbitral award.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**1297.335. Additional award; time**

If the arbitral tribunal considers any request made under Section 1297.334 to be justified, it shall make the additional arbitral award within 60 days after receipt of the request.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.336. Extension of time for tribunal action under this article**

The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, give an interpretation, or make an additional arbitral award under Section 1297.331 or 1297.334.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.337. Construction with other laws**

Article 4 (commencing with Section 1297.311) of this chapter applies to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**CHAPTER 7. CONCILIATION**

<b>Article</b>		<b>Section</b>
1.	<b>Appointment of Conciliators</b> .....	<b>1297.341</b>
2.	<b>Representation and Assistance</b> .....	<b>1297.351</b>
3.	<b>Report of Conciliators</b> .....	<b>1297.361</b>
4.	<b>Confidentiality</b> .....	<b>1297.371</b>
5.	<b>Stay of Arbitration and Resort to Other Proceedings</b> .....	<b>1297.381</b>
6.	<b>Termination</b> .....	<b>1297.391</b>
7.	<b>Enforceability of Decree</b> .....	<b>1297.401</b>
8.	<b>Costs</b> .....	<b>1297.411</b>
9.	<b>Effect on Jurisdiction</b> .....	<b>1297.421</b>
10.	<b>Immunity of Conciliators and Parties</b> .....	<b>1297.431</b>

*Chapter 7 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**ARTICLE 1. APPOINTMENT OF CONCILIATORS**

**Section**

- 1297.341. State policy; resolution of disputes by conciliation.  
1297.342. Principles, rights, obligations, etc. or guides for conciliators.  
1297.343. Conduct of proceedings; criteria; other codes.

*Article 1 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.341. State policy; resolution of disputes by conciliation**

It is the policy of the State of California to encourage parties to an international commercial agreement or transaction which qualifies for arbitration or conciliation pursuant to Section 1297.13, to resolve disputes arising from such agreements or transactions through conciliation. The parties may select or permit an arbitral tribunal or other third party to select one or more persons to serve as the conciliator or conciliators who shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.342. Principles, rights, obligations, etc. or guides for conciliators**

The conciliator or conciliators shall be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous practices between the parties.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)



**§ 1297.343. Conduct of proceedings; criteria; other codes**

The conciliator or conciliators may conduct the conciliation proceedings in such a manner as they consider appropriate, taking into account the circumstances of the case, the wishes of the parties, and the desirability of a speedy settlement of the dispute. Except as otherwise provided in this title, other provisions of this code, the Evidence Code, or the California Rules of Court, shall not apply to conciliation proceedings brought under this title.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 2. REPRESENTATION AND ASSISTANCE**

**Section**

1297.351. Choice of parties; qualification.

*Article 2 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.351. Choice of parties; qualification**

The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 3. REPORT OF CONCILIATORS**

**Section**

1297.361. Draft conciliation settlement; contents; copies.

1297.362. Acceptance of settlement not required.

*Article 3 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.361. Draft conciliation settlement; contents; copies**

At any time during the proceedings, the conciliator or conciliators may prepare a draft conciliation settlement which may include the assessment and apportionment of costs between the parties, and send copies to the parties, specifying the time within which they must signify their approval.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.362. Acceptance of settlement not required**

No party may be required to accept any settlement proposed by the conciliator or conciliators.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 4. CONFIDENTIALITY**

**Section**

1297.371. Admissibility of evidence; nondisclosure; exception.

*Article 4 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.371. Admissibility of evidence; nondisclosure; exception**

When persons agree to participate in conciliation under this title:

(a) Evidence of anything said or of any admission made in the course of the conciliation is not admissible in evidence, and disclosure of any such evidence shall not be compelled, in any civil action in which, pursuant to law, testimony may be compelled to be given. However, this subdivision does not limit the admissibility of evidence if all parties participating in conciliation consent to its disclosure.

(b) In the event that any such evidence is offered in contravention of this section, the arbitration tribunal or the court shall make any order which it considers to be appropriate to deal with the matter, including, without limitation, orders restricting the introduction of evidence, or dismissing the case without prejudice.

(c) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the conciliation, or any copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any arbitration or civil action in which, pursuant to law, testimony may be compelled to be given.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 5. STAY OF ARBITRATION AND RESORT TO OTHER PROCEEDINGS

### Section

1297.381. Agreement to stay judicial or arbitral proceedings; time period.

1297.382. Limitations; tolling.

*Article 5 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.381. Agreement to stay judicial or arbitral proceedings; time period

The agreement of the parties to submit a dispute to conciliation shall be deemed an agreement between or among those parties to stay all judicial or arbitral proceedings from the commencement of conciliation until the termination of conciliation proceedings.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.382. Limitations; tolling

All applicable limitation periods including periods of prescription shall be tolled or extended upon the commencement of conciliation proceedings to conciliate a dispute under this title and all limitation periods shall remain tolled and periods of prescription extended as to all parties to the conciliation proceedings until the 10th day following the termination of conciliation proceedings. For purposes of this article, conciliation proceedings are deemed to have commenced as soon as (a) a party has requested conciliation of a particular dispute or disputes, and (b) the other party or parties agree to participate in the conciliation proceeding.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 6. TERMINATION

### Section

1297.391. Circumstances.

1297.392. Particular parties.

1297.393. Conciliator as arbitrator; ineligibility for appointment: exception.

1297.394. Nonwaiver of rights or remedies by submission to conciliation.

*Article 6 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.391. Circumstances

The conciliation proceedings may be terminated as to all parties by any of the following:

(a) A written declaration of the conciliator or conciliators, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration.

(b) A written declaration of the parties addressed to the conciliator or conciliators to the effect that the conciliation proceedings are terminated, on the date of the declaration.

(c) The signing of a settlement agreement by all of the parties, on the date of the agreement.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.392. Particular parties

The conciliation proceedings may be terminated as to particular parties by either of the following:

(a) A written declaration of a party to the other party and the conciliator or conciliators, if appointed, to the effect that the conciliation proceedings shall be terminated as to that particular party, on the date of the declaration.

(b) The signing of a settlement agreement by some of the parties, on the date of the agreement.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.393. Conciliator as arbitrator; ineligibility for appointment; exception**

No person who has served as conciliator may be appointed as an arbitrator for, or take part in any arbitral or judicial proceedings in, the same dispute unless all parties manifest their consent to such participation or the rules adopted for conciliation or arbitration otherwise provide.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.394. Nonwaiver of rights or remedies by submission to conciliation**

By submitting to conciliation, no party shall be deemed to have waived any rights or remedies which that party would have had if conciliation had not been initiated, other than those set forth in any settlement agreement which results from the conciliation.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 7. ENFORCEABILITY OF DECREE**

**Section**

**1297.401. Written conciliation agreement as arbitration award; effect.**

*Article 7 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.401. Written conciliation agreement as arbitration award; effect**

If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of this state, and shall have the same force and effect as a final award in arbitration.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**ARTICLE 8. COSTS**

**Section**

**1297.411. Costs; inclusions.**

**1297.412. Equality of costs among parties; expenses.**

*Article 8 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

**§ 1297.411. Costs; inclusions**

Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. As used in this article, "costs" includes only the following:

(a) A reasonable fee to be paid to the conciliator or conciliators.

(b) The travel and other reasonable expenses of the conciliator or conciliators.

(c) The travel and other reasonable expenses of witnesses requested by the conciliator or conciliators with the consent of the parties.

(d) The cost of any expert advice requested by the conciliator or conciliators with the consent of the parties.

(e) The cost of any court.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

**§ 1297.412. Equality of costs among parties; expenses**

These costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 9. EFFECT ON JURISDICTION

### Section

1297.421. No consent to court jurisdiction upon failure of conciliation.

*Article 9 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.421. No consent to court jurisdiction upon failure of conciliation

Neither the request for conciliation, the consent to participate in the conciliation proceedings, the participation in such proceedings, nor the entering into a conciliation agreement or settlement shall be deemed as consent to the jurisdiction of any court in this state in the event conciliation fails.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## ARTICLE 10. IMMUNITY OF CONCILIATORS AND PARTIES

### Section

1297.431. Service of process; immunity of participants in conciliation.

1297.432. Action for damages; nonliability of conciliators.

*Article 10 was added by Stats.1988, c. 23, § 1, eff. March 7, 1988.*

### § 1297.431. Service of process; immunity of participants in conciliation

Neither the conciliator or conciliators, the parties, nor their representatives shall be subject to service of process on any civil matter while they are present in this state for the purpose of arranging for or participating in conciliation pursuant to this title.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

### § 1297.432. Action for damages; nonliability of conciliators

No person who serves as a conciliator shall be held liable in an action for damages resulting from any act or omission in the performance of his or her role as a conciliator in any proceeding subject to this title.

(Added by Stats.1988, c. 23, § 1, eff. March 7, 1988.)

## APPENDIX D

# CONNECTICUT UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION STATUTE

Conn.Gen.Stat. §§50a-100-50a-136

Section		Section	
50a-100.	Short title.	50a-119.	Determination of rules of procedure.
50a-101.	Scope of application.	50a-120.	Place of arbitration.
50a-102.	Definitions and rules of interpretation.	50a-121.	Commencement of arbitral proceedings.
50a-103.	Receipt of written communications.	50a-122.	Language used in arbitral proceedings.
50a-104.	Waiver of right to object.	50a-123.	Statements of claim and defense.
50a-105.	Extent of court intervention.	50a-124.	Hearings and written proceedings.
50a-106.	Performance of certain functions by superior court.	50a-125.	Default of a party.
50a-107.	Definition and form of arbitration agreement.	50a-126.	Expert appointed by arbitral tribunal.
50a-108.	Arbitration agreement and substantive claim before court.	50a-127.	Court assistance in taking evidence.
50a-109.	Arbitration agreement and interim measures by court.	50a-128.	Rules applicable to substance of dispute.
50a-110.	Number of arbitrators.	50a-129.	Decision-making by panel of arbitrators.
50a-111.	Appointment of arbitrators.	50a-130.	Settlement.
50a-112.	Grounds for challenge.	50a-131.	Form and contents of award.
50a-113.	Challenge procedure.	50a-132.	Termination of proceedings.
50a-114.	Inability or failure to act.	50a-133.	Correction and interpretation of award. Additional award.
50a-115.	Appointment of substitute arbitrator.	50a-134.	Application for setting aside as exclusive remorsse against arbitral award.
50a-116.	Competence of arbitral tribunal to rule on its jurisdiction.	50a-135.	Recognition and enforcement of award.
50a-117.	Power of arbitral tribunal to order interim measures.	50a-136.	Grounds for refusing recognition or enforcement of award.
50a-118.	Equal treatment of parties.		

### § 50a-100. Short title

This chapter may be cited as the UNCITRAL<sup>1</sup> Model Law on International Commercial Arbitration.

(1989, P.A. 89-179, § 37.)

<sup>1</sup> United States Commission on International Trade Law.

### § 50a-101. Scope of application

(1) This chapter applies to international commercial arbitration, subject to any agreement in force between the United States of America, including all territories and possessions, and any other country or countries.

(2) The provisions of this chapter, except sections 50a-108, 50a-109, 50a-135 and 50a-136, apply only to arbitration agreements entered into on or after October 1, 1989, and if the place of arbitration is in this state.

(3) An arbitration is international if:

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

(b) One of the following places is situated outside the country in which the parties have their places of business: (i) The place of arbitration if determined in, or pursuant to, the arbitration agreement; (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of subsection (3) of this section:

(a) If a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) If a party does not have a place of business, reference is to be made to his habitual residence.

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

(1989, P.A. 89-179, § 1.)

#### **§ 50a-102. Definitions and rules of interpretation**

For the purposes of this chapter:

(a) "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "Court" means a body or organ of the judicial system of a country or any political subdivision thereof;

(d) Where a provision of this chapter, except section 50a-128, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) Where a provision of this chapter refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) Where a provision of this chapter, other than in subsection (a) of section 50a-125 and subdivision (a) of subsection (2) of section 50a-132, refers to a claim, it also applies to a counter-claim, and where it refers to a defense, it also applies to a defense to such counter-claim.

(1989, P.A. 89-179, § 2.)

#### **Library References**

##### **Words and Phrases**

Words and Phrases (Perm.Ed.)

#### **§ 50a-103. Receipt of written communications**

(1) Unless otherwise agreed by the parties:

(a) Any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's

last-known place of business, habitual residence or mailing address by registered mail or any other means reasonably calculated to give the addressee actual notice, which provides a record of the attempt to deliver it;

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

(2) The provisions of this section do not apply to communications in court proceedings.  
(1989, P.A. 89-179, § 3.)

#### **§ 50a-104. Waiver of right to object**

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

(1989, P.A. 89-179, § 4.)

#### **§ 50a-105. Extent of court intervention**

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

(1989, P.A. 89-179, § 5.)

#### **§ 50a-106. Performance of certain functions by superior court**

The functions referred to in subsections (3) and (4) of section 50a-111, subsection (3) of section 50a-113, section 50a-114, subsection (3) of section 50a-116 and subsection (2) of section 50a-134 shall be performed by the superior court.

(1989, P.A. 89-179, § 6.)

#### **§ 50a-107. Definition and form of arbitration agreement**

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

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

(1989, P.A. 89-179, § 7.)

#### **Library References**

##### **Words and Phrases**

Words and Phrases (Perm. Ed.)

#### **§ 50a-108. Arbitration agreement and substantive claim before court**

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

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

(1989, P.A. 89-179, § 8.)

**§ 50a-109. Arbitration agreement and interim measures by court**

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

(1989, P.A. 89-179, § 9.)

**§ 50a-110. Number of arbitrators**

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

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

(1989, P.A. 89-179, § 10.)

**§ 50a-111. Appointment of arbitrators**

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

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

(3) Failing such agreement:

(a) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment the appointment shall be made, upon request of a party, by the court specified in section 50a-106;

(b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator within thirty days of receipt of a request for arbitration, the arbitrator shall be appointed, upon request of a party, by the court specified in section 50a-106;

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

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

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

(c) A third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court specified in section 50a-106 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by subsection (3) or (4) of this section to the court specified in section 50a-106 shall not be subject to appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

(1989, P.A. 89-179, § 11.)



#### **§ 50a-112. Grounds for challenge**

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

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

(1989, P.A. 89-179, § 12.)

#### **§ 50a-113. Challenge procedure**

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

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in subsection (2) of section 50a-112, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection (2) of this section is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court specified in section 50a-106 to decide on the challenge, which decision shall not be subject to appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award.

(1989, P.A. 89-179, § 13.)

#### **§ 50a-114. Inability or failure to act**

(1) If an arbitrator becomes de jure or de facto unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court specified in section 50a-106 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this section or subsection (2) of section 50a-113, an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or subsection (2) of section 50a-112.

(1989, P.A. 89-179, § 14.)

#### **§ 50a-115. Appointment of substitute arbitrator**

Where the mandate of an arbitrator terminates under section 50a-113 or 50a-114 or because of his withdrawal from office for any other reason or because of the revocation of his mandate by agreement of the parties or in any other case of termination of his mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

(1989, P.A. 89-179, § 15.)

**§ 50a-116. Competence of arbitral tribunal to rule on its jurisdiction**

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

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

(3) The arbitral tribunal may rule on a plea referred to in subsection (2) of this section either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in section 50a-106 to decide the matter, which decision shall not be subject to appeal: while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

(1989, P.A. 89-179, § 16.)

**§ 50a-117. Power of arbitral tribunal to order interim measures**

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

(1989, P.A. 89-179, § 17.)

**§ 50a-118. Equal treatment of parties**

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

(1989, P.A. 89-179, § 18.)

**§ 50a-119. Determination of rules of procedure**

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

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

(1989, P.A. 89-179, § 19.)

**§ 50a-120. Place of arbitration**

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

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

(1989, P.A. 89-179, § 20.)

**§ 50a-121. Commencement of arbitral proceedings**

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

(1989, P.A. 89-179, § 21.)

**§ 50a-122. Language used in arbitral proceedings**

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

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

(1989, P.A. 89-179, § 22.)

**§ 50a-123. Statements of claim and defense**

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

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

(1989, P.A. 89-179, § 23.)

**§ 50a-124. Hearings and written proceedings**

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

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

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

(1989, P.A. 89-179, § 24.)

**§ 50a-125. Default of a party**

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

(a) The claimant fails to communicate his statement of claim in accordance with subsection (1) of section 50a-123, the arbitral tribunal shall terminate the proceedings;

(b) The respondent fails to communicate his statement of defense in accordance with subsection (1) of section 50a-123, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

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

(1989, P.A. 89-179, § 25.)

**§ 50a-126. Expert appointed by arbitral tribunal**

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

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

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

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

(1989, P.A. 89-179, § 26.)

**§ 50a-127. Court assistance in taking evidence**

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

(1989, P.A. 89-179, § 27.)

**§ 50a-128. Rules applicable to substance of dispute**

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

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

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

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

(1989, P.A. 89-179, § 28.)

**§ 50a-129. Decision-making by panel of arbitrators**

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

(1989, P.A. 89-179, § 29.)

**§ 50a-130. Settlement**

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

(2) An award on agreed terms shall be made in accordance with the provisions of section 50a-131 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

(1989, P.A. 89-179, § 30.)

**§ 50a-131. Form and contents of award**

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

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 50a-130.

(3) The award shall state its date and the place of arbitration as determined in accordance with subsection (1) of section 50a-120. The award shall be deemed to have been made at that place.

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

(1989, P.A. 89-179, § 31.)

**§ 50a-132. Termination of proceedings**

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

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

(a) The claimant withdraws his claim, unless the respondent objects thereto and the arbitral tribunal recognizes a legitimate interest on his part in obtaining a final settlement of the dispute;

(b) The parties agree on the termination of the proceedings;

(c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of section 50a-133 and subsection (4) of section 50a-134.

(1989, P.A. 89-179, § 32.)

**§ 50a-133. Correction and interpretation of award. Additional award**

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

(a) A party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;

(b) If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award. If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

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

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

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

(5) The provisions of section 50a-131 shall apply to a correction or interpretation of the award or to an additional award.

(1989, P.A. 89-179, § 33.)

**§ 50a-134. Application for setting aside as exclusive recourse against arbitral award**

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

(2) An arbitral award may be set aside by the court specified in section 50a-106 only if:

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

(i) A party to the arbitration agreement referred to in section 50a-107 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state; or

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

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

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this chapter, or, failing such agreement, was not in accordance with this chapter; or

(b) The court finds that:

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

(ii) The award is in conflict with the public policy of this state.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application received the award or, if a request was made under section 50a-133, from the date on which that request was disposed of by the arbitral tribunal.

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

(1989, P.A. 89-179, § 34.)

**§ 50a-135. Recognition and enforcement of award**

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this section and of section 50a-136.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in section 50a-107 or a duly certified copy thereof.

(1989, P.A. 89-179, § 35.)

**§ 50a-136. Grounds for refusing recognition or enforcement of award**

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

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

(i) A party to the arbitration agreement referred to in section 50a-107 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

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

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

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

(b) If the court finds that:

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

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

(2) If an application for setting aside or suspension of an award has been made to a court referred to in subparagraph (v) of subdivision (a) of subsection (1) of this section, 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.

(1989, P.A. 89-179, § 36.)

## APPENDIX E

### FLORIDA INTERNATIONAL ARBITRATION ACT

Fla.Stat. §§684.01-684.35

#### CHAPTER 684 ARBITRATION: INTERNATIONAL RELATIONSHIPS

##### PART I. TITLE, POLICY, SCOPE, AND DEFINITIONS

###### 684.01 Short title

This chapter shall be known and may be cited as the "Florida International Arbitration Act."

###### Derivation

Laws 1986, c. 86-266, § 1.

###### 684.02 Policy

(1) It is the policy of the Legislature to encourage the use of arbitration to resolve disputes arising out of international relationships and to assure access to the courts of this state for legal proceedings ancillary to, or otherwise in aid of, such arbitration.

(2) Any person may enter into a written undertaking to arbitrate any dispute then existing or thereafter arising between that person and another. If the dispute is within the scope of this chapter, the undertaking shall be enforced by the courts of this state in accordance with § 684.22 without regard to the justiciable character of the dispute. In addition, if the undertaking is governed by the law of this state, it shall be valid and enforceable in accordance with ordinary principles of contract law.

###### Derivation

Laws 1986, c. 86-266, § 1.

###### 684.03 Scope of this chapter

(1) This chapter shall only apply to the arbitration of disputes between:

(a) Two or more persons at least one of whom is a nonresident of the United States; or

(b) Two or more persons all of whom are residents of the United States if the dispute:

1. Involves property located outside the United States;

2. Relates to a contract or other agreement which envisages performance or enforcement in whole or in part outside the United States;

3. Involves an investment outside the United States or the ownership, management, or operation of a business entity through which such an investment is effected, or any agreement pertaining to any interest in such an entity; or

4. Bears some other relation to one or more foreign countries.

(2) Notwithstanding the provisions of subsection (1), this chapter shall not apply to the arbitration of:

(a) Any dispute pertaining to the ownership, use, development, or possession of, or a lien of record upon, real property located in this state, unless the parties in writing expressly submit the arbitration of that dispute to this chapter; or

(b) Any dispute involving domestic relations or of a political nature between two or more governments.

(3) If, in any arbitration within the scope of this chapter, reference must, under applicable conflict of laws principles, be made to the arbitration law of this state, such reference shall be to this chapter.

(4) This chapter shall not apply to conciliation or mediation proceedings except as provided in § 684.10.

###### Derivation

Laws 1986, c. 86-266, § 1.

###### 684.04 Definitions

As used in this chapter:

(1) The term "person" shall have the meaning set forth in § 1.01(3) and shall include a government or any agency, instrumentality, or subdivision thereof.

(2) The term "resident of the United States" means:

(a) A natural person who maintains his sole residence within a state, possession, or territory of the United States or within the District of Columbia; or

(b) Any other person organized or incorporated under the laws of the United States or any state, possession, or territory thereof or of the District of Columbia.

(3) The term "nonresident of the United States" means any person not a resident of the United States as defined in subsection (2).

(4) Any reference to a "written undertaking to arbitrate" shall be to that writing by which a person undertakes to submit a dispute to arbitration, without regard to whether that undertaking is sufficient to sustain a valid and enforceable contract or is subject to defenses. A written undertaking to arbitrate may be part of a contract, or may be a separate writing, and may be contained in correspondence, telegrams, telexes, or any other form of written communication.

###### Derivation

Laws 1986, c. 86-266, § 1.



## **PART II. CONDUCT OF ARBITRATIONS**

### **684.05 Scope of part**

This part shall apply to any arbitration within the scope of this chapter, without regard to whether the place of arbitration is within or without this state, if:

(1) The written undertaking to arbitrate expressly provides, or the parties otherwise agree, that the law of this state shall apply;

(2) In the absence of a choice of law provision applicable to the written undertaking to arbitrate, that undertaking forms part of a contract the interpretation of which is to be governed by the law of this state; or

(3) In any other case, the arbitral tribunal decides under applicable conflict of laws principles that the arbitration shall be conducted in accordance with the law of this state.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

### **684.06 Conduct of the arbitration**

(1) Except as provided in this chapter or in the written undertaking to arbitrate, the arbitral tribunal shall conduct the arbitration as it deems appropriate, including determination of the language to be used.

(2) The arbitral tribunal shall have the power to rule on all challenges to its jurisdiction. This shall include, without limitation, challenges based on the claim that the written undertaking to arbitrate does not exist or does not give rise to a valid and enforceable agreement, challenges asserting that the dispute is not within the scope of the questions referable to arbitration or is otherwise nonarbitrable, and challenges to the composition of, or method used in forming, the tribunal.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

### **684.07 Freedom of parties to fix rules for arbitration**

(1) The parties may at any time agree in writing to conduct the arbitration in accordance with such rules as they may select, including any system of rules incorporated by reference in the written undertaking to arbitrate. In determining those rules, the parties may elect to exclude from the arbitration one or more provisions of this part. The provisions of this part shall not apply except to the extent consistent with and subject to the rules adopted by the parties. As used in this part, the term "written undertaking to arbitrate" includes any system of rules selected by the parties.

(2) If any provision of this part or of the written undertaking to arbitrate is not complied with, any party who nevertheless proceeds with the arbitration without stating his objection without undue delay or, if a time limit is provided for stating such objection, within such time period may be deemed to have waived or be estopped from any right to object.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

### **684.08 Notice commencing arbitration; answer and notices during arbitration**

(1) A party desiring to arbitrate a dispute pursuant to a written undertaking to arbitrate shall give or cause to be given to all parties to that undertaking written notice of the commencement of the arbitration. The notice shall set forth the nature of the dispute, the names and addresses of the parties, a reference to the written undertaking to arbitrate, a demand that the dispute be referred to arbitration under that undertaking, and a statement of the relief sought, including the amount claimed, if any. The notice may also include a proposal for the method of appointing the arbitral tribunal, if that method has not already been agreed upon, or may give notice of the appointment of an arbitrator.

(2) The notice commencing arbitration shall be served upon the other parties to the written undertaking to arbitrate in the manner provided in that undertaking or, in the absence of such a provision, in a manner reasonably designed to give other parties actual notice of the proposed proceedings.

(3) If a party to a written undertaking to arbitrate dies or if a committee of the person or property of a party to such an undertaking is appointed, an arbitration under that undertaking may be commenced or continued by, or upon notice to, the personal representative or administrator of the deceased party; the committee of the person or property of that party; or, where the proceedings relate to real property, any distributee or devisee who has succeeded to the deceased party's interest in the property.

(4) Following its appointment, the arbitral tribunal shall fix a time within which any party served with a notice commencing arbitration must file with the tribunal such written answer, counterclaim, or cross-claim as that party determines appropriate. Such answer, counterclaim, or cross-claim shall also be served upon the other parties to the arbitration in the manner provided in the written undertaking to arbitrate or, in the absence thereof, in the manner fixed by the arbitral tribunal. Failure to file an answer shall constitute a general denial of the claim set forth in the notice commencing the arbitration.

(5) If in the course of an arbitration it becomes necessary or advisable for any party to give notice to or serve documents upon the arbitral tribunal or one or more parties to the arbitration, it shall do so in the manner provided in the written undertaking to arbitrate or, in the absence thereof, in the manner fixed by the tribunal.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

### **684.09 Appointment of the arbitral tribunal**

If the parties in the written undertaking to arbitrate or otherwise agree upon a method for appointing the arbitral tribunal or any member thereof or successor thereto, that method shall be followed. If, notwithstanding that undertaking, the parties agree upon named arbitrators, the arbitrators so named shall constitute the tribunal.

If the parties shall fail to agree upon such a method or if the method selected shall fail and the parties shall not have otherwise named the tribunal, such appointment may be made as provided in § 684.23(1). Unless the parties otherwise agree, the tribunal shall consist of a single arbitrator.

**Derivation**

Laws 1986, c. 86-266, § 1.

**684.10 Mediation, conciliation, and settlement**

(1) If during the arbitral proceedings a party claims in writing that one or more of the parties has not complied with an agreement to submit a dispute to mediation or conciliation, the arbitral tribunal shall determine the validity and timeliness of that claim and, upon finding it valid and timely, shall hold the arbitral proceedings in abeyance pending submission of the dispute to mediation or conciliation as agreed. Thereafter, the tribunal shall proceed to arbitrate the dispute when satisfied that the attempt at mediation or conciliation has failed.

(2) If before a final award is issued the parties agree to settle their dispute, the arbitral tribunal shall either issue an order terminating the arbitral proceeding or, if requested by the parties and accepted by the tribunal, record the agreed settlement in the form of a final award.

**Derivation**

Laws 1986, c. 86-266, § 1.

**684.11 Majority action by the arbitral tribunal**

If the arbitral tribunal consists of more than one arbitrator, its powers shall be exercised by a majority of its members, except that the tribunal may authorize the presiding arbitrator to decide matters of procedure subject to review by the full tribunal.

**Derivation**

Laws 1986, c. 86-266, § 1.

**684.12 Consolidation of arbitrations**

(1) If two or more disputes have common questions of law or fact or arise out of a single transaction or enterprise and if at least one of those disputes is to be arbitrated under this chapter, the disputes may be consolidated and determined by one arbitral tribunal if consolidation is not prohibited by the arbitral law or the rules otherwise applicable to the separate disputes and:

(a) All affected parties agree to the consolidation; or

(b) All of the disputes are to be submitted to the same tribunal, and the tribunal determines that consolidation will serve the interests of justice and the expeditious resolution of the disputes.

(2) The consolidated proceedings shall be conducted under such rules as the parties agree upon or, in the absence of agreement, as determined by the arbitral tribunal.

**Derivation**

Laws 1986, c. 86-266, § 1.

**684.13 Hearings; place of arbitration**

(1) At the request of a party or upon its own initiative, the arbitral tribunal shall conduct one or more hearings for the purpose of examining witnesses, inspecting documents or other evidence, or entertaining oral arguments; however, if the parties shall request more than one hearing, the determination as to whether any hearings shall be held subsequent to the first hearing shall be made by the tribunal. A hearing may be held at any place within or without this state that the tribunal determines appropriate, whether or not that place is the place of arbitration. In the absence of a request for a hearing, the tribunal may proceed on the basis of documents and other materials. If a hearing is to be conducted, the tribunal shall cause notice to be given to each party not less than 14 days before the hearing, unless notice proves impossible after efforts reasonably designed to give actual notice. Appearance at a hearing without timely objection shall constitute a waiver of the notice requirement.

(2) Prior to a date certain established by the arbitral tribunal, any party may amend a claim, answer, counterclaim, or cross-claim previously filed by it or may assert additional claims, counterclaims, or cross-claims. After that date, all such additions and amendments shall be at the discretion of the tribunal.

(3) The place of arbitration, whether within or without this state, shall be determined by the parties or, in the absence of such determination, by the arbitral tribunal having regard to the circumstances of the arbitration. Selection of the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration.

(4) The arbitral tribunal may hold meetings at any place, whether or not it is the place of arbitration, and may use any means of communication it deems appropriate.

(5) The arbitral tribunal may adjourn its proceedings from time to time upon its own initiative and shall do so upon the request of a party for good cause shown; however, no adjournment shall extend the proceedings beyond the date fixed by the parties for issuance of a final award unless the parties extend that date.

(6) The arbitral tribunal may dismiss any claim, counterclaim, or cross-claim which the moving party fails to prosecute with reasonable diligence as determined by the tribunal. If a person against whom a claim, counterclaim, or cross-claim is filed fails to appear or proceed with a defense against that claim without good cause shown, the tribunal shall decide the claim, counterclaim, or cross-claim on the basis of the evidence before it. No award shall issue based solely upon the default of a party, and the failure of any party to appear, proceed, or defend shall not in itself be treated as an admission.

**Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.14 Representation by counsel**

A party to an arbitration shall have the right to be represented by counsel in any arbitral proceeding. A waiver of that right prior to any proceeding is ineffective.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.15 Evidence; witnesses; subpoenas; depositions**

(1) The arbitral tribunal shall determine the relevance and materiality of the evidence and need not follow formal rules of evidence. The tribunal may take into account its own experience and any customs, usages of trade, or other facts and circumstances which it deems relevant. The tribunal may utilize any lawful method it deems appropriate to obtain evidence additional to that produced by the parties, and the parties shall comply with any request of the tribunal for additional evidence.

(2) The arbitral tribunal may issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents, and other evidence, may administer oaths, may order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located, and may appoint one or more experts to report to it.

(3) The arbitral tribunal may fix such fees for the attendance of witnesses as it deems appropriate.

(4) In exercising the powers conferred upon it by this section, the arbitral tribunal may apply for assistance from any court, tribunal, or governmental authority in any jurisdiction.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.16 Interim relief**

(1) Upon application by a party and after all other parties have been notified and given an opportunity to comment, unless notice proves impossible after efforts reasonably designed to give actual notice, the arbitral tribunal may grant such interim relief as it considers appropriate and, in so doing, may require the applicant to post bond or give other security. The power herein conferred upon the tribunal is without prejudice to the right of a party under applicable law to request interim relief directly from any court, tribunal, or other governmental authority, within or without this state, and to do so without prior authorization of the arbitral tribunal. Unless otherwise provided in the written undertaking to arbitrate, such a request shall not be deemed incompatible with, nor a waiver of, that undertaking.

(2) In lieu of an order granting interim relief, or in aid of any order granted, the arbitral tribunal may itself apply or may authorize a party to apply to any court, tribunal, or other governmental authority within or without this state for such assistance in securing the objectives intended by the order or request for interim relief as the arbitral tribunal determines appropriate.

(3) If the arbitral tribunal determines that participation by one or more parties in its review of an application for interim relief might jeopardize the effectiveness of the relief requested, it shall, notwithstanding the requirements of subsection (1), make its decision without notice to, and in the absence of, such parties and shall also, without notice to such parties, take any action authorized by subsection (2); provided that immediately following the issuance of an order for interim relief by the arbitral tribunal or by a court, tribunal, or other governmental authority, whichever is the last to occur, the arbitral tribunal shall extend to all parties not notified of the application for interim relief adequate opportunity to seek termination or modification of any relief granted.

(4) The arbitral tribunal may at any time modify or terminate any interim relief granted by it.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.17 Applicable law**

The arbitral tribunal shall decide the merits of the dispute before it according to the law or other decisional principles provided for in the written undertaking to arbitrate, including acting *ex aequo et bono* or as *amiables compositeurs*. In the absence of such stipulation, the tribunal shall decide the merits of the dispute according to the law, including equitable principles, which it determines should control. In making that determination, the tribunal shall be free to employ the conflict of laws principles which it deems most appropriate to the circumstances of the arbitration.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.18 Interest**

The arbitral tribunal may award interest as agreed to in writing by the parties or, in the absence of such agreement, as the tribunal deems appropriate.

##### **Derivation**

Laws 1986, c. 86-266, § 1

#### **684.19 Awards**

(1) The arbitral tribunal shall issue its final award within such time as is specified by the parties in writing or, in the absence of such specification, within such time as the tribunal determines appropriate. In addition to a final award, a tribunal may issue interim, interlocutory, or partial awards. Each award shall be in writing, shall state the date and place of issuance, and shall be signed prior to issuance by each member of the tribunal unless, in the case of a tribunal consisting of more than one member, the award is signed by a majority of the members and an explanation for each missing signature is given. Members' signatures need not be affixed at the place of arbitration.

(2) The arbitral tribunal shall deliver, either personally or by registered or certified mail, a signed counterpart of the award to each party to the arbitration, unless such delivery proves impossible after efforts reasonably designed to assure actual delivery.

(3) A written statement of the reasons for an award shall be issued only if all parties agree to the issuance thereof or the tribunal determines that a failure to do so could prejudice recognition or enforcement of the award. An award may be made public by the tribunal or by a party only if:

(a) All parties to the arbitration consent thereto in writing;

(b) Disclosure is required by law; or

(c) Disclosure is necessary in connection with any judicial or other official proceeding concerning the award.

(4) The arbitral tribunal may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel, to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.20 Change of award**

Upon application by a party filed within 30 days of the issuance of an award, the arbitral tribunal may vacate, clarify, correct, or amend an award. A copy of the application shall be delivered to all parties to the arbitration personally or by registered or certified mail, unless such delivery proves impossible after efforts reasonably designed to assure actual delivery. Thereafter, the parties shall be given adequate opportunity to respond in writing. In reaching its decision, the tribunal may hold further hearings, take additional evidence, and accept written submissions from the parties.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

### **PART III. COURT PROCEEDINGS IN CONNECTION WITH ARBITRATION**

#### **684.21 Scope of this part**

This part shall apply to any arbitration within the scope of this chapter, whether or not the arbitration is subject to the provisions of part II of this chapter.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.22 Court proceedings to compel arbitration and to stay certain court proceedings**

(1) A person may apply to a circuit court of this state for an order compelling arbitration if that person claims that another party to a dispute has entered into a written undertaking to arbitrate that dispute and after notice has refused or otherwise failed to arbitrate in accordance with the undertaking. If the court, sitting without a jury, finds that the party refusing or otherwise failing to arbitrate has, in fact, given the

undertaking claimed, the order compelling arbitration shall issue without regard to whether the place of arbitration is within or without this state or the arbitration is subject to part II of this chapter, unless the court finds:

(a) That there was fraud in the inducement of the written undertaking to arbitrate;

(b) That submission of the dispute to arbitration would be contrary to the public policy of this state or of the United States; or

(c) That an arbitral tribunal empaneled in accordance with the written undertaking to arbitrate has previously determined that the dispute is not arbitrable or that the undertaking is invalid or unenforceable.

All other questions, including whether the dispute is arbitrable or whether the written undertaking to arbitrate is subject to defenses or is otherwise invalid or unenforceable, shall be for the arbitral tribunal to decide. If any part of a dispute which cannot be submitted to arbitration for the reasons stated in paragraphs (a)—(c) is severable from the remainder of the dispute, the court may order arbitration to proceed with regard to the remainder.

(2) Upon timely application by a party, an action or proceeding in a court of this state involving a dispute that is subject to arbitration shall be stayed by the court if an order compelling arbitration of the dispute could issue under subsection (1). Upon application by a party, the stay may be accompanied by an order compelling arbitration. This subsection shall not apply to any court proceeding pursuant to § 684.23 or § 684.24.

(3) Upon timely application by a party, a circuit court of this state may enjoin another party from proceeding with an action before any court within or without this state involving a dispute that is subject to arbitration if an order compelling arbitration of the dispute could issue under subsection (1). The injunction may, upon application by a party, be accompanied by an order compelling arbitration. This subsection shall not apply to any court proceeding pursuant to § 684.23 or § 684.24.

(4) Upon timely application by a party, a circuit court of this state may stay the arbitration of a dispute if an order compelling arbitration could not issue under subsection (1). Such stay shall issue whether the place of arbitration is within or without this state.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.23 Court proceedings during arbitration**

(1) Upon application by a party to a written undertaking to arbitrate, a circuit court of this state may appoint an arbitral tribunal or any member thereof or successor thereto, if the parties have failed to agree upon a method of appointment or if the method agreed upon fails or cannot be followed and, in either case, the parties have not otherwise agreed upon a named

arbitrator or arbitrators. Any arbitrator so appointed shall exercise all powers and functions provided for in the written undertaking to arbitrate.

(2) Upon application by an arbitral tribunal or by a party authorized by the tribunal, a circuit court of this state:

(a) Shall enforce any subpoena, demand, or order of the tribunal for:

1. The attendance of witnesses,
2. The production of books, records, documents, or other evidence,
3. The taking of depositions, or
4. The obtaining of other discovery,

in the manner provided by law for the enforcement of subpoenas, demands, or other such orders in civil actions; and

(b) Shall, to the extent of its powers, render such other assistance as the movant may request, including issuance of letters rogatory or other requests for foreign judicial assistance.

(3) Upon application by an arbitral tribunal or by a party authorized by a tribunal to make the application, a circuit court of this state may grant any interim relief, including, without limitation, temporary restraining orders, preliminary injunctions, attachments, garnishment, or writs of replevin, which it is empowered by law to grant. All actions under this subsection shall be subject to such procedural requirements and other conditions as would apply in a comparable action not pertaining to an arbitration.

(4) The provisions of subsection (3) are without prejudice to the right of a party to an arbitration to seek interim relief directly from any court of competent jurisdiction, provided that no such relief shall be granted by the courts of this state unless the moving party shows that an application to the arbitral tribunal for that relief would prejudice the party's rights and that interim relief from the court is necessary to protect those rights. The tribunal shall be deemed a party in interest in any such action. Any court of this state that issues an order for interim relief as provided in this subsection shall, upon application by the tribunal, modify or terminate its order as appropriate.

(5) Upon application by a party showing that the arbitral tribunal has unduly delayed issuance of its final award, a circuit court of this state may fix a time within which a final award must issue, but only if the place of arbitration is within this state or the arbitration is subject to part II of this chapter. The tribunal shall be deemed a party in interest in any such action.

(6) The powers conferred upon the courts by this section may be exercised without regard to whether the place of arbitration is within or without this state, unless otherwise expressly provided.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.24 Court proceedings upon final awards**

(1) Any party to an arbitration within the scope of this chapter may apply to a circuit court

of this state for an order to confirm or vacate any final award or to declare that the award is not entitled to confirmation by the courts of this state. The court shall dispose of all such applications as provided in paragraphs (a)—(c) without regard to the law of the place of arbitration, the law governing the award, or whether a court of law or equity would apply the law or decisional principles applied by the arbitral tribunal or would grant the relief provided for in the award.

(a) The court shall confirm the award without regard to the place of arbitration unless one or more of the grounds set forth in § 684.25 is established by way of an affirmative defense. If such a defense is established and the conditions set forth in paragraph (b) are met, the court, upon application, shall vacate the award without regard to any time limit contained in paragraph (3)(b); otherwise, it shall issue an order declaring that the award is not entitled to confirmation by the courts of this state.

(b) The court shall grant an application to vacate the award if:

1. The applicant establishes one or more of the grounds set forth in § 684.25; and
2. Either the place of arbitration was in this state or the arbitration was subject to part II of this chapter.

If the applicant fails to establish one or more of the grounds set forth in § 684.25, the court, upon application by any party, shall enter an order confirming the award.

(c) The court shall declare that the award is not entitled to confirmation by the courts of this state if the applicant establishes one or more of the grounds set forth in § 684.25, but the place of arbitration was outside this state and the arbitration was not subject to part II of this chapter.

(2) In any action under subsection (1), the judgment of a court in a foreign country determining whether one or more of the grounds set forth in § 684.25 is established shall be accorded the effect normally given the judgment of a court in a foreign country by the courts of this state.

(3) The applications referred to in subsection (1) shall be brought within the following time limits:

(a) An application to confirm an award shall be brought within the time provided in § 95.051(1) for the enforcement of judgments.

(b) An application to vacate an award or for a declaration that the award is not entitled to confirmation by the courts of this state shall be brought within 90 days of receipt of the final award by the applicant or, in the case of an application based on § 684.25(1)(d) or (e), within 90 days of the date when the circumstances giving rise to the application were discovered or, with the exercise of due diligence, should have been discovered by the applicant.

(c) If any party to an arbitration shall die or become incompetent, a court may extend the foregoing time limits.

(4) In considering an application filed under subsection (1), a court may request the arbitral tribunal to clarify its award and may modify or correct the award for any evident miscalculation or mistake in the description of any person or property or for any imperfection of form not affecting the merits.

(5) A judgment or decree of a court of this state confirming an award may, upon application, be vacated at any time on the grounds set forth in § 684.25 (1)(d) and (e), provided the application is made within 90 days of the date when the circumstances giving rise to the application were first discovered or, with the exercise of due diligence, should have been discovered by the applicant.

(6) If a final award has been reduced to judgment or made the subject of official action by any court, tribunal, or other governmental authority outside the United States, the courts of this state shall, except as provided in subsection (2), confirm, vacate, or declare the award not entitled to confirmation by the courts of this state without regard to any term or condition of the foreign judgment or official action and without regard to whether the award may be deemed merged into the judgment.

(7) For purposes of this section and of § 684.25, an arbitral award shall be deemed a final award unless:

(a) It is expressly designated an interim or interlocutory award or by its terms is not final;

(b) An application to vacate, clarify, correct, or amend the award is pending before the arbitral tribunal; or

(c) Under the rules applicable to the arbitration, it is subject to further review by any arbitral authority.

For purposes of the law of this state, an award which is final as described above shall be deemed final regardless of whether judicial confirmation or other official action is necessary to render that award final within the contemplation of any foreign law which may be applicable to the arbitration.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.25 Grounds for vacating an award or declaring it not entitled to confirmation**

(1) A final award shall be vacated or declared not entitled to confirmation by the courts of this state only if one or more of the following grounds is established:

(a) There was no written undertaking to arbitrate, there was fraud in the inducement of that undertaking, or an arbitral tribunal empaneled in accordance with the undertaking had previously determined that the dispute was nonarbitrable or that the undertaking was invalid or unenforceable, unless the party challenging the award participated on the merits in the arbitral proceedings leading to the award without first having submitted such questions to the arbitral tribunal;

(b) The party challenging the award was not given notice of the appointment of the arbitral tribunal or of the arbitral proceedings, unless notice proved impossible after efforts reasonably designed to give actual notice of such party waived notice or participated in those proceedings on the merits of the dispute;

(c) The arbitral tribunal conducted its proceedings so unfairly as to substantially prejudice the rights of the party challenging the award;

(d) The award was obtained by corruption, fraud, or undue influence or is contrary to the public policy of the United States or of this state;

(e) Any neutral arbitrator had a material conflict of interest with the party challenging the award, unless that party had timely notice of the conflict and proceeded without objection to arbitrate the dispute;

(f) The award resolves a dispute which the parties did not agree to refer to the arbitral tribunal, unless the party objecting shall have arbitrated the dispute without objection, and the tribunal's decision that such dispute was referred to it for arbitration was clearly erroneous, provided that a court may determine instead to vacate or to declare not entitled to confirmation only that portion of the award dealing with the excluded dispute; or

(g) The arbitral tribunal was not constituted in accordance with the agreement of the parties, unless the party challenging the award waived the irregularity or participated in the arbitral proceedings without first objecting thereto.

(2) The courts of this state shall not make an independent factual determination concerning whether the grounds described in paragraph (1)(c), paragraph (1)(f), or paragraph (1)(g) are present if the arbitration leading to the award was conducted under the rules of, or was subject to supervision by, an arbitral authority and such grounds were submitted to such authority as a basis for challenging the validity of the award or the conduct of the arbitration. In such a case, the determination of the arbitral authority concerning such grounds shall be final. In addition, if under the rules applicable to an arbitration the grounds described in paragraph (1)(c), paragraph (1)(f), or paragraph (1)(g) could have been but were not submitted to an arbitral authority as a basis for challenging the validity of the award or the conduct of the arbitration, the courts of this state shall not declare an award not entitled to confirmation or vacate that award or deny it confirmation on such grounds.

(3) A court issuing an order to vacate an award or to declare that an award is not entitled to confirmation by the courts of this state may also order that all or part of the dispute between the parties be resubmitted to the same or a new arbitral tribunal as it deems appropriate.

#### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.26 Award in a foreign currency**

The courts of this state shall confirm a final award, notwithstanding the fact that it grants relief in a currency other than United States dollars. In such case, the court shall, in addition to entering the order in the foreign currency designated by the award, upon application by a party also enter that order in United States dollars determined by reference to the market rate of exchange prevailing in this state on the date the award was issued, unless the award itself fixes some other date. If no such market rate of exchange is available the court shall fix the rate it deems appropriate. Judgment or decree may be entered upon such an order as provided in § 684.27.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.27 Judgment or decree on a final award**

Once an order confirming or vacating an award or declaring that an award is not entitled to confirmation by the courts of this state has been rendered, a judgment or decree shall be entered in conformity with that order to be enforced like any other judgment or decree. Upon entry of a judgment or decree, the court may also, in its discretion, award costs and disbursements.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.28 Judgment roll; docketing**

(1) Upon entry of a judgment or decree, the clerk shall prepare the judgment roll consisting, to the extent filed, of the following:

- (a) The final award;
  - (b) A copy of the order; and
  - (c) A copy of the judgment or decree.
- (2) The judgment or decree may be docketed as if rendered in a civil action.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.29 Application to circuit court; form and process**

An application to a circuit court of this state pursuant to this chapter shall be by motion and shall be heard in the manner provided by law or rule of the court for the making and hearing of motions. Process in connection with such an application shall be served as provided in § 48.196.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.30 Consent to jurisdiction**

The conduct of an arbitration within this state, or the making of a written undertaking to arbitrate which provides for arbitration within this state or subject to part II of this chapter, shall constitute a consent to the exercise of in personam jurisdiction by the courts of this state in any action authorized by this part.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.31 Venue**

An application under this chapter shall be made to the circuit court for the county in which any party to the arbitration resides or has a place of business or in which the place of arbitration is located. If no such party resides or has a place of business within this state and if the place of arbitration is outside this state, then the application may be made to any circuit court of

this state. All applications made subsequent to an initial application under this chapter shall be made to the court hearing the initial application, unless it shall order otherwise.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.32 Appeals**

(1) An appeal may be taken from any of the following:

(a) An order under § 684.22 granting or denying an application to compel or to stay arbitration or to stay judicial proceedings.

(b) An order granting or denying an application under § 684.23(2) for assistance in obtaining evidence or an application under § 684.23(3) for interim relief.

(c) An order under § 684.24 confirming or vacating a final award or declaring that an award is not entitled to confirmation by the courts of this state.

(d) A judgment or decree entered pursuant to § 684.27.

(2) Appeals shall be taken in the same manner and be subject to the same scope of review as appeals from orders or judgments in civil actions. All appeals shall be confined to questions within the competence conferred by this chapter upon the court from which the appeal is taken or to the question of whether such court exceeded that competence.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.33 Transitional rule**

This chapter shall apply to all written undertakings to arbitrate within the scope of this chapter, whether entered into before or after October 1, 1986; however, part III of this chapter shall not apply to any judicial proceeding commenced prior to that date, and part II of this chapter shall not apply to any arbitration commenced prior to that date unless the parties agree to the contrary in writing.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.34 Severability and characterization**

(1) If any provision of this chapter or its application to any particular person or circumstance is held invalid, that provision or its application shall be deemed severable and shall not affect the validity of other provisions or applications of this chapter.

(2) If in any arbitral, judicial, or other official proceeding within or without this state it shall become necessary to classify any provision of this chapter as substantive or procedural within the meaning of those terms in the conflict of laws, all provisions of this chapter relating to the obligation of the parties to arbitrate, to the conduct of the arbitral proceedings, and to the validity of arbitral awards shall be classified as substantive.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

#### **684.35 Immunity for arbitrators**

No person may sue in the courts of this state or assert a cause of action under the law of this state against any arbitrator when such suit or action arises from the performance of such arbitrator's duties.

##### **Derivation**

Laws 1986, c. 86-266, § 1.

## APPENDIX F

### GEORGIA ARBITRATION CODE

Georgia Code §§9-9-1 to 9-9-43

#### CHAPTER 9

#### ARBITRATION

Article 1		Sec.	
General Provisions		9-9-14.	Modification of award by court; application; grounds; subsequent confirmation of award.
PART 1		9-9-15.	Judgment on award.
ARBITRATION CODE		9-9-16.	Appeals authorized.
Sec.		9-9-17.	Arbitrators' fees and expenses.
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9-9-2.	Applicability; exclusive method.		
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		9-9-37.	Language to be used in arbitral proceedings; translation.
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		9-9-39.	Written statement of reasons for award; interpretation of award; fees and expenses.
		9-9-40.	Confirmation or vacation of final award.
		9-9-41.	Confirmation or vacation of award reduced to judgment or made subject of official action outside United States.
		9-9-42.	Reciprocity in recognition and enforcement of award.
		9-9-43.	Modification of time periods in Part 1.



### **9-9-1. Short title.**

This part shall be known and may be cited as the "Georgia Arbitration Code." (Code 1933, § 7-301, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-80; Code 1981, § 9-9-1, as redesignated by Ga. L. 1988, p. 903, § 1.)

### **9-9-2. Applicability; exclusive method.**

(a) Part 3 of Article 2 of this chapter, as it existed prior to July 1, 1988, applies to agreements specified in subsection (b) of this Code section made between July 1, 1978, and July 1, 1988. This part applies to agreements specified in subsection (b) of this Code section made on or after July 1, 1988, and to disputes arising on or after July 1, 1988, in agreements specified in subsection (c) of this Code section.

(b) Part 3 of Article 2 of this chapter, as it existed prior to July 1, 1988, shall apply to construction contracts, contracts of warranty on construction, and contracts involving the architectural or engineering design of any building or the design of alterations or additions thereto made between July 1, 1978, and July 1, 1988, and on and after July 1, 1988, this part shall apply as provided in subsection (a) of this Code section and shall provide the exclusive means by which agreements to arbitrate disputes arising under such contracts can be enforced.

(c) This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply:

(1) Agreements coming within the purview of Article 2 of this chapter, relating to arbitration of medical malpractice claims;

(2) Any collective bargaining agreements between employers and labor unions representing employees of such employers;

(3) Any contract of insurance, as defined in paragraph (1) of Code Section 33-1-2;

(4) Any other subject matters currently covered by an arbitration statute;

(5) Any loan agreement or consumer financing agreement in which the amount of indebtedness is \$25,000.00 or less at the time of execution;

(6) Any contract for the purchase of consumer goods, as defined in Title 11, the "Uniform Commercial Code," under subsection (1) of Code Section 11-2-105 and subsection (1) of Code Section 11-9-109;

(7) Any contract involving consumer acts or practices or involving consumer transactions as such terms are defined in paragraphs (2) and (3) of subsection (a) of Code Section 10-1-392, relating to definitions in the "Fair Business Practices Act of 1975";

(8) Any sales agreement or loan agreement for the purchase or financing of residential real estate unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement. This exception shall not restrict agreements between or among real estate brokers or agents;

(9) Any contract relating to terms and conditions of employment unless the clause agreeing to arbitrate is initialed by all signatories at the time of the execution of the agreement;

(10) Any agreement to arbitrate future claims arising out of personal bodily injury or wrongful death based on tort. (Code 1933, § 7-302, enacted by Ga. L. 1978, p. 2270, § 1; Ga. L. 1979, p. 393, § 1; Code 1981, § 9-9-81; Code 1981, § 9-9-2, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-3. Effect of arbitration agreement.**

A written agreement to submit any existing controversy to arbitration or a provision in a written contract to submit any controversy thereafter arising to arbitration is enforceable without regard to the justiciable character of the controversy and confers jurisdiction on the courts of the state to enforce it and to enter judgment on an award. (Code 1933, § 7-303, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-82; Code 1981, § 9-9-3, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-4. Application to court; venue; service of papers; scope of court's consideration; application for order of attachment or preliminary injunction.**

(a) (1) Any application to the court under this part shall be made to the superior court of the county where venue lies, unless the application is made in a pending court action, in which case it shall be made to the court hearing that action. Subsequent applications shall be made to the court hearing the initial application unless the court otherwise directs.

(2) All applications shall be by motion and shall be heard in the manner provided by law and rule of court for the making or hearing of motions, provided that the motion shall be filed in the same manner as a complaint in a civil action.

(b) Venue for applications to the court shall lie:

(1) In the county where the agreement provides for the arbitration hearing to be held; or

(2) If the hearing has already been held, in the county where it was held; or

(3) In the county where any party resides or does business; or

(4) If there is no county as described in paragraph (1), (2), or (3) of this subsection, in any county.

(c) (1) A demand for arbitration shall be served on the other parties by registered or certified mail, return receipt requested.

(2) The initial application to the court shall be served on the other parties in the same manner as a complaint under Chapter 11 of this title.

(3) All other papers required to be served by this part shall be served in the same manner as pleadings subsequent to the original complaint and other papers are served under Chapter 11 of this title.

(d) In determining any matter arising under this part, the court shall not consider whether the claim with respect to which arbitration is sought is tenable nor otherwise pass upon the merits of the dispute.

(e) The superior court in the county in which an arbitration is pending, or, if not yet commenced, in a county specified in subsection (b) of this Code section, may entertain an application for an order of attachment or for a preliminary injunction in connection with an arbitrable controversy, but only upon the ground that the award to which the applicant may be entitled may be rendered ineffectual without such provisional relief. (Code 1933, § 7-305, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-84; Code 1981, § 9-9-4, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-5. Limitation of time as bar to arbitration.**

(a) If a claim sought to be arbitrated would be barred by limitation of time had the claim sought to be arbitrated been asserted in court, a party may apply to the court to stay arbitration or to vacate the award, as provided in this part. The court has discretion in deciding whether to apply the bar. A party waives the right to raise limitation of time as a bar to arbitration in an application to stay arbitration by that party's participation in the arbitration.

(b) Failure to make this application to the court shall not preclude a party from asserting before the arbitrators limitation of time as a bar to the arbitration. The arbitrators, in their sole discretion, shall decide whether to apply the bar. This exercise of discretion shall not be subject to review of the court on an application to confirm, vacate, or modify the award except upon the grounds hereafter specified in this part for vacating or modifying an award. (Code 1933, § 7-306, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-85; Code 1981, § 9-9-5, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-6. Application to compel or stay arbitration; demand for arbitration; consolidation of proceedings.**

(a) A party aggrieved by the failure of another to arbitrate may apply for an order compelling arbitration. If the court determines there is no substantial issue concerning the validity of the agreement to submit to arbitration or compliance therewith and the claim sought to be arbitrated is not barred by limitation of time, the court shall order the parties to arbitrate. If a substantial issue is raised or the claim is barred by limitation of time, the court shall summarily hear and determine that issue and, accordingly, grant or deny the application for an order to arbitrate. If an issue claimed to be arbitrable is involved in an action pending in a court having jurisdiction to hear a motion to compel arbitration, the application shall be made by motion in that action. If the application is granted, the order shall operate to stay a pending or subsequent action, or so much of it as is referable to arbitration.

(b) Subject to subsections (c) and (d) of this Code section, a party who has not participated in the arbitration and who has not made an application to compel arbitration may apply to stay arbitration on the grounds that:

- (1) No valid agreement to submit to arbitration was made;
  - (2) The agreement to arbitrate was not complied with; or
  - (3) The arbitration is barred by limitation of time.
- (c) A party may serve upon another party a demand for arbitration. This demand shall specify:

- (1) The agreement pursuant to which arbitration is sought;
- (2) The name and address of the party serving the demand;
- (3) That the party served with the demand shall be precluded from denying the validity of the agreement or compliance therewith or from asserting limitation of time as a bar in court unless he makes application to the court within 30 days for an order to stay arbitration; and
- (4) The nature of the dispute or controversy sought to be arbitrated; provided, however, that the demand for arbitration may be amended by either party to include disputes arising under the same agreement after the original demand is served.

(d) After service of the demand, or any amendment thereof, the party served must make application within 30 days to the court for a stay of arbitration or he will thereafter be precluded from denying the validity of the agreement or compliance therewith or from asserting limitation of time as a bar in court. Notice of this application shall be served on the other parties. The right to apply for a stay of arbitration may not be waived, except as provided in this Code section.

(e) Unless otherwise provided in the arbitration agreement, a party to an arbitration agreement may petition the court to consolidate separate arbitration proceedings, and the court may order consolidation of separate arbitration proceedings when:

- (1) Separate arbitration agreements or proceedings exist between the same parties or one party is a party to a separate arbitration agreement or proceeding with a third party;
- (2) The disputes arise from the same transactions or series of related transactions; and
- (3) There is a common issue or issues of law or fact creating the possibility of conflicting rulings by more than one arbitrator or panel of arbitrators.

(f) If all the applicable arbitration agreements name the same arbitrator, arbitration panel, or arbitration tribunal, the court, if it orders consolidation under subsection (e) of this Code section, shall order all matters to be heard before the arbitrator, panel, or tribunal agreed to by the parties. If the applicable arbitration agreements name separate arbitrators, panels, or tribunals, the court, if it orders consolidation under subsection (e) of this Code section, shall, in the absence of an agreed method of selection by all parties to the consolidated arbitration, appoint an arbitrator.

(g) In the event that the arbitration agreements in proceedings consolidated under subsection (e) of this Code section contain inconsistent provisions, the court shall resolve such conflicts and determine the rights and duties of various parties.

(h) If the court orders consolidation under subsection (e) of this Code section, the court may exercise its discretion to deny consolidation of separate arbitration proceedings only as to certain issues, leaving other issues to be resolved in separate proceedings. (Code 1933, § 7-307, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-86; Code 1981, § 9-9-6, as redesignated by Ga. L. 1988, p. 903. § 1.)

#### **9-9-7. Appointment of arbitrators.**

(a) If the arbitration agreement provides for a method of appointment of arbitrators, that method shall be followed. If there is only one arbitrator, the term "arbitrators" shall apply to him.

(b) The court shall appoint one or more arbitrators on application of a party if:

- (1) The agreement does not provide for a method of appointment;
- (2) The agreed method fails;
- (3) The agreed method is not followed for any reason; or
- (4) The arbitrators fail to act and no successors have been appointed.

(c) An arbitrator appointed pursuant to subsection (b) of this Code section shall have all the powers of one specifically named in the agreement. (Code 1933, § 7-308, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-87; Code 1981, § 9-9-7, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-8. Time and place for hearing; notice; application for prompt hearing; conduct of hearing; right to counsel; record; waiver.**

(a) The arbitrators, in their discretion, shall appoint a time and place for the hearing notwithstanding the fact that the arbitration agreement designates the county in which the arbitration hearing is to be held and shall notify the parties in writing, personally or by registered or certified mail, not less than ten days before the hearing. The arbitrators may adjourn or postpone the hearing. The court, upon application of any party, may direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

(b) The parties are entitled to be heard; to present pleadings, documents, testimony, and other matters; and to cross-examine witnesses. The arbitrators may hear and determine the controversy upon the pleadings, documents, testimony, and other matters produced notwithstanding the failure of a party duly notified to appear.

(c) A party has the right to be represented by an attorney and may claim such right at any time as to any part of the arbitration or hearings which have not taken place. This right may not be waived. If a party is represented by an attorney, papers to be served on the party may be served on the attorney.

(d) The hearing shall be conducted by all the arbitrators unless the parties otherwise agree; but a majority may determine any question and render and change an award, as provided in this part. If during the

course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator or arbitrators appointed to act as neutrals may continue with the hearing and determination of the controversy.

(e) The arbitrators shall maintain a record of all pleadings, documents, testimony, and other matters introduced at the hearing. The arbitrators or any party to the proceeding may have the proceedings transcribed by a court reporter.

(f) Except as provided in subsection (c) of this Code section, a requirement of this Code section may be waived by written consent of the parties or by continuing with the arbitration without objection. (Code 1933, § 7-309, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-88; Code 1981, § 9-9-8, as redesignated by Ga. L. 1988, p. 903, § 1.)

**9-9-9. Power of subpoena; enforcement; use of discovery; opportunity to examine documents; compensation of witnesses.**

(a) The arbitrators may issue subpoenas for the attendance of witnesses and for the production of books, records, documents, and other evidence. These subpoenas shall be served and, upon application to the court by a party or the arbitrators, enforced in the same manner provided by law for the service and enforcement of subpoenas in a civil action.

(b) Notices to produce books, writings, and other documents or tangible things; depositions; and other discovery may be used in the arbitration according to procedures established by the arbitrators.

(c) A party shall have the opportunity to obtain a list of witnesses and to examine and copy documents relevant to the arbitration.

(d) Witnesses shall be compensated in the same amount and manner as witnesses in the superior courts. (Code 1933, § 7-310, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-89; Code 1981, § 9-9-9, as redesignated by Ga. L. 1988, p. 903, § 1.)

**9-9-10. Award to be in writing; copies furnished; time of making award; waiver.**

(a) The award shall be in writing and signed by the arbitrators joining in the award. The arbitrators shall deliver a copy of the award to each party personally or by registered or certified mail, return receipt requested, or as provided in the agreement.

(b) An award shall be made within the time fixed therefor by the agreement or, if not so fixed, within 30 days following the close of the hearing or within such time as the court orders. The parties may extend in writing the time either before or after its expiration. A party waives the objection that an award was not made within the time required unless he notifies in writing the arbitrators of his objection prior to the delivery of the award to him. (Code 1933, § 7-311, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-90; Code 1981, § 9-9-10, as redesignated by Ga. L. 1988, p. 903, § 1.)

**9-9-11. When award changed; application for change; objection thereto; time for disposition of application.**

(a) Pursuant to the procedure described in subsection (b) of this Code section, the arbitrators may change the award upon the following grounds:

(1) There was a miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award;

(2) The arbitrators have awarded upon a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a matter of form, not affecting the merits of the controversy.

(b) (1) An application to the arbitrators for a change in the award shall be made by a party within 20 days after delivery of the award to the applicant. Written notice of this application shall be served upon the other parties.

(2) Objection to a change in the award by the arbitrators must be made in writing to the arbitrators within ten days of service of the application to change. Written notice of this objection shall be served upon the other parties.

(3) The arbitrators shall dispose of any application made under this Code section in a written, signed order within 30 days after service upon them of objection to change or upon the expiration of the time for service of this objection. The parties may extend, in writing, the time for this disposition by the arbitrators either before or after its expiration.

(4) An award changed under this Code section shall be subject to the provisions of this part concerning the confirmation, vacation, and modification of awards by the court. (Code 1933, § 7-312, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-91; Code 1981, § 9-9-11, as redesignated by Ga. L. 1988, p. 903, § 1.)

**9-9-13. Vacation of award by court; application; grounds; rehearing; appeal of order.**

(a) An application to vacate an award shall be made to the court within three months after delivery of a copy of the award to the applicant.

(b) The award shall be vacated on the application of a party who either participated in the arbitration or was served with a demand for arbitration if the court finds that the rights of that party were prejudiced by:

(1) Corruption, fraud, or misconduct in procuring the award;

(2) Partiality of an arbitrator appointed as a neutral;

(3) An overstepping by the arbitrators of their authority or such imperfect execution of it that a final and definite award upon the subject matter submitted was not made; or

(4) A failure to follow the procedure of this part, unless the party applying to vacate the award continued with the arbitration with notice of this failure and without objection.

(c) The award shall be vacated on the application of a party who neither participated in the arbitration nor was served with a demand for arbitration or order to compel arbitration if the court finds that:

(1) The rights of the party were prejudiced by one of the grounds specified in subsection (b) of this Code section;

(2) A valid agreement to arbitrate was not made;

(3) The agreement to arbitrate has not been complied with; or

(4) The arbitrated claim was barred by limitation of time, as provided by this part.

(d) The fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.

(e) Upon vacating an award, the court may order a rehearing and determination of all or any of the issues either before the same arbitrators or before new arbitrators appointed as provided by this part. In any provision of an agreement limiting the time for a hearing or award, time shall be measured from the date of such order or rehearing, whichever is appropriate, or a time may be specified by the court. The court's ruling or order under this Code section shall constitute a final judgment and shall be subject to appeal in accordance with the appeal provisions of this part. (Code 1933, § 7-314, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-93; Code 1981, § 9-9-13, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-14. Modification of award by court; application; grounds; subsequent confirmation of award.**

(a) An application to modify the award shall be made to the court within three months after delivery of a copy of the award to the applicant.

(b) The court shall modify the award if:

(1) There was a miscalculation of figures or a mistake in the description of any person, thing, or property referred to in the award;

(2) The arbitrators awarded on a matter not submitted to them and the award may be corrected without affecting the merits of the decision upon the issues submitted; or

(3) The award is imperfect in a manner of form, not affecting the merits of the controversy.

(c) If the court modifies the award, it shall confirm the award as modified. If the court denies modification, it shall confirm the award made by the arbitrators. (Code 1933, § 7-315, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-94; Code 1981, § 9-9-14, as redesignated by Ga. L. 1988, p. 903, § 1.)



#### **9-9-15. Judgment on award.**

(a) Upon confirmation of the award by the court, judgment shall be entered in the same manner as provided by Chapter 11 of this title and be enforced as any other judgment or decree.

(b) The judgment roll shall consist of the following:

(1) The agreement and each written extension of time within which to make the award;

(2) The award;

(3) A copy of the order confirming, modifying, or correcting the award; and

(4) A copy of the judgment. (Code 1933, § 7-316, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-95; Code 1981, § 9-9-15, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-16. Appeals authorized.**

Any judgment or any order considered a final judgment under this part may be appealed pursuant to Chapter 6 of Title 5. (Code 1933, § 7-317, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-96; Code 1981, § 9-9-16, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-17. Arbitrators' fees and expenses.**

Unless otherwise provided in the agreement to arbitrate, the arbitrators' expenses and fees, together with other expenses, not including counsel fees, incurred in the conduct of the arbitration, shall be paid as provided in the award. (Code 1933, § 7-318, enacted by Ga. L. 1978, p. 2270, § 1; Code 1981, § 9-9-97; Code 1981, § 9-9-17, as redesignated by Ga. L. 1988, p. 903, § 1.)

#### **9-9-18. Commencement or continuation of proceedings upon death or incompetency of party.**

Where a party dies or becomes incompetent after making a written agreement to arbitrate, the proceedings may be begun or continued upon the application of, or upon notice to, his executor or administrator or trustee or guardian or, where it relates to real property, his distributee or devisee who has succeeded to his interest in the real property. Upon the death or incompetency of a party, the court may extend the time within which an application to confirm, vacate, or modify the award or to stay arbitration must be made. Where a party has died since an award was delivered, the proceedings thereupon are the same as where a party dies after a verdict. (Code 1981, § 9-9-18, enacted by Ga. L. 1988, p. 903, § 1.)

### **9-9-30. Provisions supplementary to Part 1.**

In order to encourage the use of arbitration in the resolution of conflicts arising out of international transactions effectuating the policy of the state to provide a conducive environment for international business and trade, this part supplements Part 1 of this article and shall be used concurrently with the provisions of Part 1 of this article whenever an arbitration is within the scope of this part. (Code 1981, § 9-9-30, enacted by Ga. L. 1988, p. 903, § 2.)

### **9-9-31. Applicability of part.**

(a) This part shall apply to arbitrations within its scope notwithstanding provisions in Part 1 of this article to the contrary.

(b) This part shall apply only to the arbitration of disputes between:

(1) Two or more persons at least one of whom is domiciled or established outside the United States; or

(2) Two or more persons all of whom are domiciled or established in the United States if the dispute bears some relation to property, contractual performance, investment, or other activity outside the United States.

(c) Notwithstanding the provisions of subsection (b) of this Code section, this part shall not apply to the arbitration of any of the exceptions set forth in Part 1 of this article. (Code 1981, § 9-9-31, enacted by Ga. L. 1988, p. 903, § 2.)

### **9-9-32. When agreement in writing; contract reference constituting arbitration agreement.**

For purposes of this part, in particular, an agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract. (Code 1981, § 9-9-32, enacted by Ga. L. 1988, p. 903, § 2.)

### **9-9-33. Nationality not to preclude acting as arbitrator.**

No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties. (Code 1981, § 9-9-33, enacted by Ga. L. 1988, p. 903, § 2.)

#### **9-9-34. Ruling on jurisdiction; independence of arbitration clause.**

The arbitrators may rule on their own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitrators that the contract is null and void shall not thereby invalidate the arbitration clause. (Code 1981, § 9-9-34, enacted by Ga. L. 1988, p. 903, § 2.)

#### **9-9-35. Interim relief.**

The arbitrators may grant such interim relief as they consider appropriate and, in so doing, may require a party to post bond or give other security. The power conferred in this Code section upon the arbitrators is without prejudice to the right of a party to request interim relief directly from any court, tribunal, or other governmental authority, inside or outside this state, and to do so without prior authorization of the arbitrators. (Code 1981, § 9-9-35, enacted by Ga. L. 1988, p. 903, § 2.)

#### **9-9-36. Effect of selecting state as place of arbitration.**

Selection of this state as the place of arbitration shall not in itself constitute selection of the procedural or substantive law of that place as the law governing the arbitration. (Code 1981, § 9-9-36, enacted by Ga. L. 1988, p. 903, § 2.)

#### **9-9-37. Language to be used in arbitral proceedings; translation.**

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

(b) The arbitrators may order that any documentary evidence shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitrators. (Code 1981, § 9-9-37, enacted by Ga. L. 1988, p. 903, § 2.)

#### **9-9-38. Reports by experts; hearing.**

(a) Unless otherwise agreed by the parties, the arbitrators:

(1) May appoint one or more experts to report on specific issues to be determined by the arbitrators; and

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

(b) Unless otherwise agreed by the parties, if a party so requests or if the arbitrators consider it necessary, the expert shall, after delivery of his written or oral report, participate in a hearing where the parties have the opportunity to put questions to him and to present expert witnesses in order to testify on the points at issue. (Code 1981, § 9-9-38, enacted by Ga. L. 1988, p. 903, § 2.)

**9-9-39. Written statement of reasons for award; interpretation of award; fees and expenses.**

(a) A written statement of the reasons for an award shall be issued if the parties agree to the issuance thereof or the arbitrators determine that a failure to do so could prejudice recognition or enforcement of the award.

(b) If so agreed by the parties, a party, with notice to the other party, may request the arbitrators to give an interpretation of a specific point or part of the award. The interpretation shall form part of the award.

(c) The arbitrators may award reasonable fees and expenses actually incurred, including, without limitation, fees and expenses of legal counsel to any party to the arbitration and shall allocate the costs of the arbitration among the parties as it determines appropriate. (Code 1981, § 9-9-39, enacted by Ga. L. 1988, p. 903, § 2.)

**9-9-40. Confirmation or vacation of final award.**

The courts of this state shall confirm or vacate a final award, notwithstanding the fact that it grants relief in a currency other than United States dollars. (Code 1981, § 9-9-40, enacted by Ga. L. 1988, p. 903, § 2.)

**9-9-41. Confirmation or vacation of award reduced to judgment or made subject of official action outside United States.**

If a final award has been reduced to judgment or made the subject of official action by any court, tribunal, or other governmental authority outside the United States, the courts of this state shall confirm or vacate the award without regard to any term or condition of the foreign judgment or official action and without regard to whether the award may be deemed merged into judgment. (Code 1981, § 9-9-41, enacted by Ga. L. 1988, p. 903, § 2.)

**9-9-42. Reciprocity in recognition and enforcement of award.**

An arbitration award irrespective of where it was made, on the basis of reciprocity, shall be recognized as binding and shall be enforceable in the courts of this state subject to the grounds for vacating an award under Part 1 of this article and providing that the award is not contrary to the public policy of this state with respect to international transactions. Reciprocity in the recognition and enforcement of foreign arbitral awards shall be in accordance with applicable federal laws, international conventions, and treaties. (Code 1981, § 9-9-42, enacted by Ga. L. 1988, p. 903, § 2.)

### **9-9-43. Modification of time periods in Part 1.**

For arbitrations arising under this part, time periods set forth in the following Code sections of Part 1 of this article shall be modified as follows:

(1) The time periods referred to in subsections (c) and (d) of Code Section 9-9-6 and in Code Section 9-9-11 shall be doubled;

(2) The time period contained in subsection (b) of Code Section 9-9-10 shall not be applicable; and

(3) The ten-day time period in subsection (a) of Code Section 9-9-8 shall be 30 days. (Code 1981, § 9-9-43, enacted by Ga. L. 1988, p. 903, § 2.)

## APPENDIX G

### HAWAII INTERNATIONAL ARBITRATION, MEDIATION, AND CONCILIATION ACT

Hawaii Rev.Stat. §§658D-1-658-9

Sec.

658D-1. Short title.

658D-2. Statement of findings and declaration  
of purposes.

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Sec.

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tional commercial disputes reso-  
lution.

658D-8. Arbitral tribunal or panel; powers.

658D-9. Enforcement.

#### [§ 658D-1]. Short title.

This chapter shall be known and may be cited as the "Hawaii International Arbitration, Mediation, and Conciliation Act." [L 1988, c 186, § 1]

**Effective date.** — This chapter became ef-  
fective June 7, 1988.

#### [§ 658D-2]. Statement of findings and declaration of purposes.

The legislature hereby finds and declares that:

(1) The rapid expansion of international business, trade, and commerce among nations in the Pacific region provides important opportunities for the State of Hawaii to participate in such business, trade, and commerce;

(2) There will inevitably arise, from time to time, disagreements and disputes arising from such business, trade, and commercial relations and transactions that are amenable to resolution by means of international arbitration, mediation, conciliation, and other forms of dispute resolution in lieu of international litigation;

(3) It is the policy of this State to encourage the use of arbitration, mediation, and conciliation to reduce disputes arising out of international business, trade, commercial, and other relationships;

(4) It is declared that the objective of encouraging the development of Hawaii as an international center for the resolution of international business, commercial, trade, and other disputes be supported through the establishment of certain legal authorities as set forth in this chapter. [L 1988, c 186, § 1]

**Editor's note.** — This section is printed as  
set out above to harmonize with the Hawaii  
Revised Statutes.

#### [§ 658D-3]. Policy.

It is the policy of the State of Hawaii to encourage the use of arbitration, mediation, and conciliation to resolve disputes arising out of international relationships and to maximize private autonomy over such proceedings by limiting court involvement therein to:

(1) The enforcement of decisions, awards and settlements; and

(2) Ancillary matters in aid of such proceedings. [L 1988, c 186, § 1]

**Editor's note.** — This section is printed as set out above to harmonize with the Hawaii Revised Statutes.

**[§ 658D-4]. Scope.**

(a) This chapter shall apply only to the arbitration, mediation, or conciliation of disputes between:

(1) Two or more persons at least one of whom is a nonresident of the United States; or

(2) Two or more persons all of whom are residents of the United States if the dispute:

(i) Involves property located outside the United States;

(ii) Relates to a contract which envisages enforcement or performance in whole or in part outside the United States; or

(iii) Bears some other relation to one or more foreign countries.

(b) Notwithstanding subsection (a), this chapter shall not apply to the arbitration, mediation, or conciliation of:

(1) Any dispute pertaining to the ownership, use, development, or possession of, or a lien of record upon, real property located in this State, unless the parties in writing expressly submit the resolution of that dispute to this chapter; or

(2) Any dispute involving domestic (family) relations.

(c) If in any arbitration within the scope of this chapter reference must, under applicable conflict of laws principles, be made to the arbitration law of this State, such reference shall be to this chapter.

(d) This chapter shall apply to any arbitration within the scope of this chapter, without regard to whether the place of arbitration is within or without this State:

(1) If the written undertaking to arbitrate expressly provides that the law of this State shall apply; or

(2) In the absence of a choice of law provision applicable to the written undertaking to arbitrate, if that undertaking forms part of a contract the interpretation of which is to be governed by the laws of this State; or

(3) In any other case, any arbitral tribunal or other panel established pursuant to section 658D-7 decides under applicable conflict of laws principles that the arbitration shall be conducted in accordance with the laws of this State. [L 1988, c 186, § 1]

**Editor's note.** — This section is printed as set out above to harmonize with the Hawaii Revised Statutes.

**[§ 658D-5]. Definitions.**

As used in this chapter:

"Arbitration" shall also encompass, as appropriate, mediation, conciliation, and other forms of dispute resolution as an alternative to international litigation.

"Center" means any center organized as an independent nonprofit educational corporation duly established under the laws of this State, whose principal purpose is to facilitate the resolution of international business, trade, commercial, and other disputes between persons by means of arbitration, mediation, conciliation, and other means as an alternative to the resort to litigation.

**"Person"** means not only individuals, but corporations, firms, associations, societies, communities, assemblies, inhabitants of a district, or neighborhood, or persons known or unknown, and the public generally and shall include a government or any agency, instrumentality, or subdivision thereof where it appears, from the subject matter, the sense and connection in which such words are used, that such construction is intended.

**"Resident of the United States"** means:

(1) A natural person who maintains sole residence within a state, possession, commonwealth, or territory of the United States or within the District of Columbia; or

(2) Any other person organized or incorporated under the laws of the United States, any state, possession, commonwealth, or territory thereof, or the District of Columbia.

**"Nonresident of the United States"** means any person not a "resident of the United States".

**"Written undertaking to arbitrate"** shall mean a writing in which a person undertakes to submit a dispute to arbitration, without regard to whether that undertaking is sufficient to sustain a valid and enforceable contract or is subject to defenses. A written undertaking may be part of a contract, may be a separate writing, and may be contained in correspondence, telegrams, telexes, or any other form of written communication. [L 1988, c 186, § 1]

#### **[§ 658D-6]. Consent to jurisdiction.**

Conducting arbitration in this State, or making a written agreement to arbitrate which provides for arbitration within this State subject to this chapter, shall constitute a consent by the parties to that arbitration or undertaking to the exercise of in personam jurisdiction by the circuit courts of this State but only for the purposes of such arbitration. [L 1988, c 186, § 1]

#### **[§ 658D-7]. Certain legal authorities for international commercial disputes resolution.**

(a) A center shall not be considered a department, agency, or public instrumentality of this State, and shall not be subject to the laws of this State applying to departments, agencies, and public instrumentalities of this State, except that a center shall be subject to all of the laws of this State pertaining to nonprofit corporations.

(b) A center shall permit the participants to an arbitration to select any body of rules and procedures for the conduct, administration, and facilitation of that proceeding, whether such rules and procedures have been prepared by private arbitral organizations, created by the participants themselves, or by the center.

(c) A center shall have the authority pursuant to this chapter to establish from time to time such rules and procedures for the conduct, administration, and facilitation of the resolution, whether by arbitration, mediation, conciliation, or otherwise, of all disputes subject to this chapter.

(d) In furtherance of the foregoing, a center shall have the authority pursuant to this chapter to adopt rules providing, without limitation and by way of illustration only, that any arbitral tribunal or other panel established pursuant to such rules shall:

(1) Determine the relevance and materiality of the evidence without the need to follow formal rules of evidence;

(2) Be able to utilize any lawful method that it deems appropriate to obtain evidence additional to that produced by the parties;



(3) Issue subpoenas or other demands for the attendance of witnesses or for the production of books, records, documents, and other evidence;

(4) Be empowered to administer oaths, order depositions to be taken or other discovery obtained, without regard to the place where the witness or other evidence is located, and appoint one or more experts to report to it;

(5) Fix such fees for the attendance of witnesses as it deems appropriate;

(6) Make awards of interest, reasonable attorney's fees and costs of the arbitration, mediation, or conciliation as agreed to in writing by the parties, or in the absence of such agreement, as it deems appropriate; and

(e) In exercising the powers conferred upon it by this chapter, such arbitral tribunal, or other panel may apply for assistance from any court, tribunal or governmental authority in any jurisdiction. Any application to a court hereunder shall be made and heard in a summary way in the manner provided for the making and hearing of motions, except as otherwise herein expressly provided. [L 1988, c 186, § 1]

#### **[§ 658D-8]. Arbitral tribunal or panel; powers.**

The arbitral tribunal or panel established pursuant to section 658A-7 of this chapter or a majority of them, may summon in writing any person to attend before it or any of them as a witness and in a proper case to bring certain described books, papers, records and documents. The fees for attendance shall be the same as the fees of witnesses before the circuit courts of this State. The summons shall issue in the name of the arbitral tribunal or panel and be signed by a majority of them, shall be directed to such person, and shall be served in the same manner as subpoenas to testify before a court of record. If any person so summoned to testify refuses or neglects to obey the summons, upon petition the circuit court may compel the attendance of such person before the arbitral tribunal or panel, or punish such person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the circuit court. [L 1988, c 186, § 1]

#### **[§ 658D-9]. Enforcement.**

(a) Arbitral or other awards or settlements issued pursuant to this chapter by the center shall be enforced by the circuit courts of this State as permitted by law and consistent with the United States Arbitration Act, 9 U.S.C. § 201, et seq., and the enforcement provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by 9 U.S.C. § 201, et seq., unless subsection (b) below is applicable.

(b) Where the parties specifically submit to jurisdiction of this chapter pursuant to section 658A-6, the center may require those parties residing in countries not signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, as implemented by 9 U.S.C. § 201 et seq., and not having sufficient assets otherwise within the jurisdiction of the circuit courts of this State, to post such bonds or other security as the center shall deem appropriate to assure reasonable likelihood of enforcement of any award or other relief ultimately ordered by the center in the proceeding. [L 1988, c 186, § 1]

## APPENDIX H

### MARYLAND INTERNATIONAL COMMERCIAL ARBITRATION ACT

Md.Cts. & Jud.Proc. Code §§3-2B-01 to 3-2B-09

#### *Subtitle 2B. International Commercial Arbitration.*

##### **§ 3-2B-01. Definitions.**

(a) *In general.* — In this subtitle, the following terms have the meanings indicated.

(b) *International commercial arbitration.* — (1) "International commercial arbitration" means an arbitration in which:

(i) The relevant place of business of at least 1 of the parties to the agreement is in a country other than the United States; or

(ii) If none of the parties has a relevant place of business in a country other than the United States, the relationship between any of the parties to an arbitration agreement involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with 1 or more foreign countries.

(2) (i) If a party has more than 1 place of business, the relevant place of business shall be the place of business:

1. That has the closest relationship to the arbitration agreement; or

2. Designated by the agreement of the parties.

(ii) If a party does not have a place of business, the party's habitual residence shall be deemed the place of business.

(c) *Arbitral tribunal.* — "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators. (1990, ch. 333.)

##### **§ 3-2B-02. Purpose.**

The purpose of this subtitle is to:

(1) Promote international commercial arbitration in this State;

(2) Enforce arbitration agreements by parties in international commercial transactions;

(3) Facilitate the prompt and efficient resolution by arbitration of disputes in international commercial agreements and transactions; and

(4) Promote uniformity in the law of international commercial arbitration in the United States. (1990, ch. 333.)

##### **§ 3-2B-03. Applicable laws; construction.**

(a) *Applicable laws.* — In all matters relating to the process and enforcement of international commercial arbitration and awards, the laws of Maryland shall be the arbitration statutes and laws of the United States.

(b) *Construction.* — This subtitle shall be interpreted and construed as to promote uniformity in the law of international commercial arbitration in the United States. (1990, ch. 333.)

### **§ 3-2B-04. Jurisdiction of courts.**

The circuit courts of this State shall have jurisdiction:

- (1) To enforce agreements and orders providing for international commercial arbitration;
- (2) To enter judgments on arbitration awards; and
- (3) To recognize and enforce in accordance with this subtitle arbitration awards rendered in foreign countries. (1990, ch. 333.)

### **§ 3-2B-05. Filing of complaints.**

(a) *Pursuant to agreement or where hearing held.* — Any complaint filed in circuit court with respect to international commercial arbitration shall be filed with the court in the county:

- (1) As provided by the agreement; or
- (2) Where the arbitration hearing was held.

(b) *Where not covered by agreement or hearing not held.* — If the agreement does not provide for a county in which a complaint shall be filed or if the hearing has not been held, the complaint shall be filed with the court:

- (1) In the county where the adverse party resides;
- (2) In the county where the adverse party has a place of business or owns real property; or
- (3) If the adverse party has neither a residence nor a place of business or property in the State, in Baltimore City. (1990, ch. 333; 1991, ch. 55, § 1.)

### **§ 3-2B-06. Security.**

(a) *Grounds for requesting.* — Unless the arbitration agreement provides otherwise, the arbitral tribunal in an international commercial arbitration in this State may, at the request of a party and after an opportunity for any other party to the arbitration agreement to be heard, order any party to post security or countersecurity in a form satisfactory to the arbitral tribunal in an amount not to exceed the amount of that party's claim, cross-claim, or counterclaim (excluding attorneys' fees) if:

- (1) The party to be required to post security or countersecurity resides in a country that has not ratified and adopted the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and does not have sufficient assets in the United States to satisfy the amount of the claim or counterclaim; or

(2) The arbitral tribunal otherwise determines that there is good cause to require security or countersecurity.

(b) *Motion to vacate order.* — (1) On motion of a party to a circuit court to vacate or modify an order for security or countersecurity, a hearing shall be held promptly.

(2) Unless the party required to post security or countersecurity establishes that an order for security or countersecurity is an abuse of discretion by the arbitral tribunal, the courts of this State shall enforce orders for security or countersecurity. (1990, ch. 333; 1991, ch. 55, § 1.)

### **§ 3-2B-07. Intervention by court.**

(a) *When permitted.* — In an international commercial arbitration proceeding in this State, a court of this State may not intervene unless otherwise permitted by this subtitle and the statutes and laws incorporated by this subtitle.

(b) *Determination by court without jury.* — Notwithstanding any other provision of law, the court shall make any determination provided for in this subtitle without a jury. (1990, ch. 333; 1991, ch. 235.)

### **§ 3-2B-08. Appeal.**

(a) *Appealable orders.* — A party to an action involving international commercial arbitration may appeal:

(1) An order:

(i) Refusing a stay of any court action involving a matter referable to arbitration;

(ii) Denying a motion to order arbitration to proceed;

(iii) Denying application to compel arbitration;

(iv) Confirming or denying confirmation of an award or partial award;

or

(v) Modifying, correcting, or vacating an award;

(2) An interlocutory order granting, continuing, or modifying an injunction against arbitration; or

(3) A final decision with respect to an arbitration that is subject to this subtitle.

(b) *Nonappealable orders.* — An appeal from the circuit court in an action involving international commercial arbitration may not be taken from an interlocutory order:

(1) Granting a stay of any court action involving a matter referable to arbitration;

(2) Directing arbitration to proceed;

(3) Compelling arbitration; or

(4) Refusing to enjoin an arbitration. (1990, ch. 333.)

### **§ 3-2B-09. Short title.**

This subtitle may be cited as the Maryland International Commercial Arbitration Act. (1990, ch. 333.)

## APPENDIX I

### TEXAS ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES LAW

Tex.Rev. Civil Stat. Art. 249-1 to 249-43

#### 3. ARBITRATION AND CONCILIATION OF INTERNATIONAL COMMERCIAL DISPUTES

##### SUBDIVISION A. APPLICATION AND INTERPRETATION

###### Art. 249-1. Scope of application

Sec. 1. This part applies to international commercial arbitration and conciliation, subject to any agreement that is in force between the United States and another state or states.

Sec. 2. This part, except Articles 249-8 and 249-9, Revised Statutes, applies only to arbitration or conciliation in this state.

Sec. 3. An arbitration or conciliation agreement is international if:

(1) the parties to the agreement have their places of business in different states when the agreement is concluded;

(2) one or more of the following places is situated outside the states in which the parties have their places of business:

(A) the place of arbitration or conciliation determined pursuant to the arbitration or conciliation agreement;

(B) any place where a substantial part of the obligations of the commercial relationship is to be performed; or

(C) the place with which the subject matter of the dispute is most closely connected;

(3) the parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state; or

(4) the arbitration or conciliation agreement arises out of a legal relationship, whether or not contractual, that has another reasonable relation with more than one state.

Sec. 4. For the purposes of Section 3 of this article, if a party has more than one place of business, the party's place of business is considered to be the place that has the closest relationship to the arbitration or conciliation agreement, and if a party does not have a place of business, the party's place of business is considered to be the party's habitual residence.

Sec. 5. For the purposes of Section 3 of this article, the states of the United States and the District of Columbia are considered one state.

Sec. 6. An arbitration or conciliation agreement is commercial if it arises out of a relationship of a commercial nature, including but not limited to:

(1) a transaction for the supply or exchange of goods or services;

(2) a distribution agreement;

(3) a commercial representation or agency;

(4) an exploitation agreement or concession;

(5) a joint venture or other related form of industrial or business cooperation;

(6) the carriage of goods or passengers by air, sea, rail, or road;

(7) a relationship involving construction, insurance, licensing, factoring, leasing, consulting, engineering, financing, banking, professional services, or intellectual or industrial property, including trademarks, patents, copyrights, and software programs; or

(8) the transfer of data or technology.

Sec. 7. If a written agreement to submit an existing controversy to arbitration or a provision in a written contract to submit to arbitration a controversy thereafter arising between the parties qualifies for arbitration pursuant to this article, that written agreement or provision shall be valid, enforceable and irrevocable, save on such grounds as exist at law or in equity for the revocation of any contract.

Sec. 8. This part does not affect any other state law under which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with provisions other than this part, except that this part supersedes Articles 225 through 233, Revised Statutes, with respect to international commercial arbitration and conciliation. However, this part does not supersede Article 224 or Articles 234 through 238-6, Revised Statutes.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-2. Interpretation**

Sec. 1. In this part:

(1) "Arbitral award" means any decision of an arbitral tribunal on the substance of a dispute submitted to it and includes an interim, interlocutory, or partial award.

(2) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

(3) "Arbitration" includes any arbitration whether or not administered by a permanent arbitral institution.

(4) "Conciliation" includes any conciliation whether or not administered by a permanent conciliation institution.

(5) "District court" means the district court in the county in this state selected pursuant to Article 249-6, Revised Statutes.

(6) "Party" means a party to an arbitration or conciliation agreement.

Sec. 2. If this part, other than Article 249-28, Revised Statutes, allows the parties to determine a certain issue, the parties may authorize a third party, including an institution, to make that determination.

Sec. 3. An agreement of the parties under this part includes any arbitration or conciliation rules referred to by that agreement.

Sec. 4. In this part, other than in Section 1 of Article 249-25, Revised Statutes, or Subdivision (1) of Section 2 of Article 249-32, Revised Statutes, a reference to a claim includes a counterclaim, and a reference to a defense includes a defense to a counterclaim.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-3. Receipt of written communications**

Sec. 1. Unless otherwise agreed by the parties, a written communication is considered received if it is delivered to the addressee personally or if it is delivered at the addressee's place of business, habitual residence, or mailing address, and the communication is considered received on the day it is delivered.

Sec. 2. If none of the places referred to in Section 1 can be found after a reasonable inquiry, a written communication is considered received if it is sent to the addressee's last known place of business, habitual residence, or mailing address by registered mail or by other means that provides a record of the attempt to deliver it.

Sec. 3. This article does not apply to a written communication relating to a court proceeding.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-4. Waiver of right to object**

Sec. 1. A party who knows that a provision of this part or a requirement under the arbitration agreement has not been complied with but proceeds with the arbitration without stating an objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period, is considered to have waived the right to object.

Sec. 2. Section 1 of this article applies only to a provision of this part as to which the parties may otherwise agree.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-5. Extent of judicial intervention**

A court may not intervene in a matter governed by this part except as provided by this part or applicable federal law.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-6. Venue and jurisdiction of courts**

The functions referred to in Sections 4, 5, and 6 of Article 249-11, Revised Statutes, Section 4 of Article 249-13, Revised Statutes, Section 2 of Article 249-14, Revised Statutes, and Section 6 of Article 249-16, Revised Statutes, shall be performed by the district court of the county in which the place of arbitration is located. The functions referred to in Article 249-27, Revised Statutes, shall be performed by the district court selected as provided by Article 235, Revised Statutes. The functions referred to in Article 249-8, Revised Statutes, shall be performed by the court in which the judicial proceedings are pending. The functions referred to in Article 249-9, Revised Statutes, shall be performed by the court having jurisdiction over the measures described by that article.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

### **SUBDIVISION B. ARBITRATION AGREEMENTS AND JUDICIAL MEASURES IN AID OF ARBITRATION**

#### **Art. 249-7. Arbitration agreement**

Sec. 1. An arbitration agreement is an agreement to submit to arbitration disputes that have arisen or may arise between the parties concerning a defined legal relationship, whether or not contractual. An arbitration agreement may be an arbitration clause in a contract or a separate agreement.

Sec. 2. An arbitration agreement must be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telexes, telegrams, or other means of telecommunication that provide a record of the agreement or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement if the contract is in writing and the reference is sufficient to make that clause part of the contract.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-8. Stay of proceedings**

Sec. 1. When a party to an international commercial arbitration agreement commences judicial proceedings seeking relief with respect to a matter covered by the agreement, the court shall, if a party requests not later than the time the party submits the party's first statement on the substance of the dispute, stay the proceedings and refer the parties to arbitration, unless it finds that the agreement is void, inoperable, or incapable of being performed.

Sec. 2. Arbitral proceedings may begin or continue, and an award may be made, while an action described in Section 1 of this article is pending before the court.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-9. Interim measures**

Sec. 1. A party to an arbitration agreement may request an interim measure of protection from a district court before or during arbitral proceedings.

Sec. 2. A party to an arbitration governed by this part may request from the district court enforcement of an order of an arbitral tribunal granting an interim measure of protection under Article 249-17, Revised Statutes. Enforcement shall be granted as provided by the law applicable to the type of interim relief requested.

Sec. 3. In connection with a pending arbitration, the court may:

- (1) order an attachment issued to assure that the award to which the applicant may be entitled is not rendered ineffectual by the dissipation of party assets;
- (2) grant a preliminary injunction to protect trade secrets or to conserve goods that are the subject matter of the arbitral dispute; or

(3) take other appropriate action.

Sec. 4. In considering a request for interim relief, the court shall give preclusive effect to all findings of fact of the arbitral tribunal in the proceeding, including the probable validity of the claim that is the subject of the order for interim relief that the arbitral tribunal has granted, if the interim order is consistent with public policy.

Sec. 5. If the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the arbitral tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction under applicable law, the application for interim measures of relief shall be denied.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### SUBDIVISION C. COMPOSITION OF ARBITRAL TRIBUNALS

##### Art. 249-10. Number of arbitrators

There shall be one arbitrator unless the parties agree on a greater number of arbitrators.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

##### Art. 249-11. Appointment of arbitrators

Sec. 1. A person of any nationality may be an arbitrator.

Sec. 2. Subject to Sections 6, 7, and 8 of this article, the parties may agree on a procedure for appointing the arbitral tribunal.

Sec. 3. If an agreement is not made under Section 2 of this article, in an arbitration with three arbitrators and two parties, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator.

Sec. 4. If the appointment procedure in Section 3 of this article applies and a party fails to appoint an arbitrator within 30 days after the date of receipt of a request to do so from the other party or the two appointed arbitrators fail to agree on the third arbitrator within 30 days after the date of their appointment, the appointment shall be made, on request of a party, by the district court.

Sec. 5. If an agreement is not made under Section 2 of this article in an arbitration with a sole arbitrator and the parties fail to agree on the arbitrator, the appointment shall be made, on request of a party, by the district court.

Sec. 6. The district court, on request of a party, may take the necessary measures unless the agreement on the appointment procedure provides other means for securing the appointment, if under an appointment procedure agreed to by the parties:

- (1) a party fails to act as required under that procedure;
- (2) the parties or two appointed arbitrators fail to reach an agreement expected of them under that procedure; or
- (3) a third party, including an institution, fails to perform a function assigned to it under that procedure.

Sec. 7. A decision of the district court under Section 4, 5, or 6 of this article is final and not subject to appeal.

Sec. 8. The district court, in appointing an arbitrator, shall consider:

- (1) any qualifications required of the arbitrator by the agreement of the parties;
- (2) other considerations making more likely the appointment of an independent and impartial arbitrator; and
- (3) in the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.



#### **Art. 249-12. Grounds for challenge**

Sec. 1. Except as otherwise provided by this part, a person who has been contacted in connection with the person's possible appointment or designation as an arbitrator or conciliator or who has been appointed or designated shall, within 21 days after the date of the contact, appointment, or designation, disclose to the parties any information that might cause the person's impartiality or independence to be questioned, including but not limited to whether:

(1) the person has a personal bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) the person has served as a lawyer in the matter in controversy, is or has been associated with another who has participated in the matter during the association, or has been a material witness concerning the matter;

(3) the person has served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding;

(4) the person, individually or as a fiduciary, or the person's spouse or minor child residing in the person's household has a financial interest in the subject matter in controversy or in a party to the proceeding or any other interest that could be substantially affected by the outcome of the proceeding;

(5) the person, the person's spouse, a person within the third degree of relationship to either of them, or the spouse of such a person:

(A) is or has been a party to the proceeding or an officer, director, or trustee of a party;

(B) is acting or has acted as a lawyer in the proceeding;

(C) is known to have an interest that could be substantially affected by the outcome of the proceeding; or

(D) is likely to be a material witness in the proceeding; or

(6) the person has a close personal or professional relationship with a person who:

(A) is or has been a party to the proceeding or an officer, director, or trustee of a party;

(B) is acting or has acted as a lawyer or representative in the proceeding;

(C) is or expects to be nominated as an arbitrator or conciliator in the proceeding;

(D) is known to have an interest that could be substantially affected by the outcome of the proceeding; or

(E) is likely to be a material witness in the proceeding.

Sec. 2. The disclosure under Section 1 of this article may not be waived by the parties with respect to persons serving as the sole arbitrator or sole conciliator or as the chief or prevailing arbitrator or conciliator. The parties may otherwise agree to waive the disclosure.

Sec. 3. After appointment and throughout the arbitration or conciliation proceedings, an arbitrator or conciliator without delay shall disclose to the parties any circumstance described by Section 1 that was not previously disclosed.

Sec. 4. Unless otherwise agreed by the parties or provided by the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality, independence, or possession of qualifications on which the parties have agreed.

Sec. 5. A party may challenge an arbitrator appointed by the party or in whose appointment the party has participated only for reasons of which the party becomes aware after the appointment has been made.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-13. Challenge procedure**

Sec. 1. The parties may agree on a procedure for challenging an arbitrator, and the decision reached as provided by that procedure is final.

Sec. 2. If there is not an agreement under Section 1 of this article, a party challenging an arbitrator, within 15 days after the date the party becomes aware of the constitution of the arbitral tribunal or of any circumstances referred to in Sections 4 and 5 of Article 249-12, Revised Statutes, whichever is later, shall send a written statement of the reasons for the challenge to the arbitral tribunal.

Sec. 3. Unless the arbitrator challenged under Section 2 of this article withdraws from office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

Sec. 4. If a challenge following the procedure under Sections 2 and 3 of this article is unsuccessful, the challenging party, within 30 days after the date the party receives notice of the decision rejecting the challenge, may request the district court to decide on the challenge. If a challenge is based on grounds set forth in Section 4 of Article 249-12, Revised Statutes, and the district court determines that the facts support a finding that the grounds fairly exist, the challenge shall be sustained.

Sec. 5. The decision of the district court under Section 4 of this article is final and not subject to appeal.

Sec. 6. While a request under Section 4 of this article is pending, the arbitral tribunal, including the challenged arbitrator, may continue the proceedings and make an award.  
Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-14. Failure or impossibility to act**

Sec. 1. The mandate of an arbitrator terminates if the arbitrator becomes unable to perform the arbitrator's functions or for other reasons fails to act without undue delay and the arbitrator withdraws from office or the parties agree to the termination.

Sec. 2. If a controversy remains concerning a ground referred to in Section 1 of this article, a party may request the district court to decide on the termination of the arbitrator's mandate. The decision of the district court is not subject to appeal.

Sec. 3. If, under this article or Section 3 of Article 249-13, Revised Statutes, an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or Sections 4 and 5 of Article 249-12, Revised Statutes.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-15. Termination of mandate and substitution of arbitrator**

Sec. 1. In addition to the circumstances referred to under Articles 249-13 and 249-14, Revised Statutes, the mandate of an arbitrator terminates on withdrawal from office for any reason or when the parties agree.

Sec. 2. When the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Sec. 3. Unless otherwise agreed by the parties:

(1) if the sole or presiding arbitrator is replaced, any hearings previously held shall be repeated; and

(2) if an arbitrator other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal.

Sec. 4. Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made before the replacement of an arbitrator under this article is not invalid because there has been a change in the composition of the arbitral tribunal.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

### **SUBDIVISION D. JURISDICTION OF ARBITRAL TRIBUNALS**

#### **Art. 249-16. Competence of arbitral tribunal to rule on its jurisdiction**

Sec. 1. The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause that forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is void does not make the arbitration clause invalid.

Sec. 2. A plea that the arbitral tribunal does not have jurisdiction must be raised not later than the submission of the statement of defense. A party is not precluded from raising such a plea because the party has appointed or participated in the appointment of an arbitrator.

Sec. 3. A plea that the arbitral tribunal is exceeding the scope of its authority must be raised when the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.

Sec. 4. The arbitral tribunal, in a situation referred to in Section 2 or 3 of this article, may admit a later plea if it considers the delay justified.

Sec. 5. The arbitral tribunal may rule on a plea referred to in Section 2, 3, or 4 of this article as a preliminary question or in an award on the merits.

Sec. 6. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, a party waives objection to the ruling unless the party, within 30 days after the date the party receives notice of that ruling, requests the district court to decide the matter. The decision of the district court is not subject to appeal.

Sec. 7. While a request under Section 6 of this article is pending before the district court, the arbitral tribunal may continue the arbitral proceedings and make an award.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-17. Interim measures ordered by arbitral tribunal**

Sec. 1. Unless otherwise agreed by the parties, the arbitral tribunal, at the request of a party, may order a party to take an interim measure of protection that the arbitral tribunal considers necessary concerning the subject matter of the dispute.

Sec. 2. The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under Section 1 of this article.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

### **SUBDIVISION E. MANNER AND CONDUCT OF ARBITRATION**

#### **Art. 249-18. Equal treatment of parties**

The parties shall be treated with equality and each party shall be given a full opportunity to present the party's case.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-19. Determination of rules of procedure**

Sec. 1. Subject to this part, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

Sec. 2. If an agreement is not made under Section 1 of this article, the arbitral tribunal, subject to this part, may conduct the arbitration in the manner it considers appropriate.

Sec. 3. The power of the arbitral tribunal under Section 2 of this article includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-20. Place of arbitration**

Sec. 1. The parties may agree on the place of arbitration.

Sec. 2. If the parties do not agree under Section 1 of this article, the place of arbitration shall be determined by the arbitral tribunal having regard for the circumstances of the case, including the convenience of the parties.

Sec. 3. Notwithstanding Sections 1 and 2 of this article, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of documents, goods, or other property.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-21. Commencement of arbitral proceedings**

Unless otherwise agreed by the parties, the arbitral proceedings begin on the date on which a request for the dispute to be referred to arbitration is received by the respondent.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-22. Language**

Sec. 1. The parties may agree on the language or languages to be used in the arbitral proceedings.

Sec. 2. If the parties do not agree under Section 1 of this article, the arbitral tribunal shall determine the language or languages to be used in the proceedings.

Sec. 3. The agreement or determination, unless it provides otherwise, applies to written statements by a party, hearings, and awards, decisions, or other communications by the arbitral tribunal.

Sec. 4. The arbitral tribunal may order that documentary evidence be accompanied by a translation into the language or languages agreed on by the parties or determined by the arbitral tribunal.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-23. Statements of claim and defense**

Sec. 1. Within the period agreed on by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the claim, the points at issue, and the relief or remedy sought, and the respondent shall state the defense, unless the parties have otherwise agreed as to the required elements of those statements.

Sec. 2. A party may submit with the party's statement documents the party considers relevant or may add a reference to the documents or other evidence the party will submit.

Sec. 3. Unless otherwise agreed by the parties, a party may amend or supplement a claim or defense during the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-24. Hearings and written proceedings**

Sec. 1. Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument or whether the proceedings are to be conducted on the basis of documents and other materials.

Sec. 2. Unless the parties have agreed that oral hearings are not to be held, the arbitral tribunal shall hold oral hearings at an appropriate stage of the proceedings on request of a party.

Sec. 3. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods, or other property.

Sec. 4. All statements, documents, or other information supplied to or applications made to the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

Sec. 5. Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings shall be held in camera.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-25. Default of party**

Sec. 1. Unless otherwise agreed by the parties, if the claimant without showing sufficient cause fails to communicate the statement of claim as provided by Sections 1 and 2 of Article 249-23, Revised Statutes, the arbitral tribunal shall terminate the proceedings.

Sec. 2. Unless otherwise agreed by the parties, if the respondent without showing sufficient cause fails to communicate the statement of defense as provided by Sections 1 and 2 of Article 249-23, Revised Statutes, the arbitral tribunal shall continue the proceedings without treating that failure as an admission of the claimant's allegations.

Sec. 3. Unless otherwise agreed by the parties, if a party without showing sufficient cause fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue the proceedings and make the award based on the evidence before it.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-26. Expert appointed by arbitral tribunal**

Sec. 1. Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal and require a party to give the expert relevant information or to produce or provide access to relevant documents, goods, or other property.

Sec. 2. Unless otherwise agreed by the parties, if a party requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of a written or oral report, participate in an oral hearing at which the parties have the opportunity to question the expert and present expert witnesses on the points at issue.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-27. Court assistance in taking evidence and consolidating arbitrations**

Sec. 1. The arbitral tribunal or a party with the approval of the tribunal may request assistance from the district court in taking evidence, and the court may provide the assistance according to its rules on taking evidence. A subpoena may be issued as provided by Section C of Article 230, Revised Statutes, in which case the witness compensation provisions of Section D of that article apply.

Sec. 2. If the parties to two or more arbitration agreements agree, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those agreements, the district court, on application by one party with the consent of all the other parties to those arbitration agreements, may:

(1) order the arbitrations to be consolidated on terms the court considers just and necessary;

(2) if all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal as provided by Section 8 of Article 249-11, Revised Statutes; and

(3) if all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

Sec. 3. This article may not be construed to prevent the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**SUBDIVISION F. MAKING OF ARBITRAL AWARD AND  
TERMINATION OF PROCEEDINGS**

**Art. 249-28. Rules applicable to substance of dispute**

Sec. 1. The arbitral tribunal shall decide the dispute according to the rules of law designated by the parties as applicable to the substance of the dispute.

Sec. 2. Any designation by the parties of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

Sec. 3. If the parties do not make a designation under Section 1 of this article, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.

Sec. 4. The arbitral tribunal shall decide ex aequo et bono or as amiable compositeur, if the parties have expressly authorized it to do so.

Sec. 5. 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.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-29. Decisionmaking by panel of arbitrators**

Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all of its members. Notwithstanding this article, if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by a presiding arbitrator.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

**Art. 249-30. Settlement**

Sec. 1. An arbitral tribunal may encourage settlement of the dispute and, with the agreement of the parties, may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement.

Sec. 2. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an award on agreed terms.

Sec. 3. An award on agreed terms shall be made as provided by Article 249-31, Revised Statutes, and shall state that it is an arbitral award.

Sec. 4. An award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-31. Form and content of arbitral award**

Sec. 1. An arbitral award must be in writing and signed by the members of the arbitral tribunal.

Sec. 2. For the purposes of Section 1 of this article, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal are sufficient if the reason for any omitted signature is stated.

Sec. 3. The award must state the reasons on which it is based, unless the parties have agreed that no reasons are to be given, or the award is an award on agreed terms under Article 249-30, Revised Statutes.

Sec. 4. The award must state its date and the place of arbitration as determined under Article 249-20, Revised Statutes, and the award is considered to have been made at that place.

Sec. 5. After the award is made, a signed copy shall be delivered to each party.

Sec. 6. The arbitral tribunal may, at any time during the proceedings, make an interim award on any matter with respect to which it may make a final award. The interim award may be enforced in the same manner as a final award.

Sec. 7. Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

Sec. 8. (a) Unless otherwise agreed by the parties, the costs of an arbitration are at the discretion of the arbitral tribunal.

(b) In making an order for costs, the arbitral tribunal may include as costs:

- (1) the fees and expenses of the arbitrators and expert witnesses;
- (2) legal fees and expenses;
- (3) administration fees of the institution supervising the arbitration, if any; and
- (4) any other expenses incurred in connection with the arbitral proceedings.

(c) In making an order for costs, the arbitral tribunal may specify:

- (1) the party entitled to costs;
- (2) the party who shall pay the costs;
- (3) the amount of costs or method of determining that amount; and
- (4) the manner in which the costs shall be paid.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-32. Termination of proceedings**

Sec. 1. The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under Section 2 of this article. The award is final on the expiration of the applicable period in Article 249-33, Revised Statutes.

Sec. 2. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings if:

- (1) the claimant withdraws the claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute;
- (2) the parties agree on the termination of the proceedings; or
- (3) the arbitral tribunal finds that continuation with the proceedings has for any other reason become unnecessary or impossible.

Sec. 3. Subject to Article 249-33, Revised Statutes, the mandate of the arbitral tribunal ends with the termination of the arbitral proceedings.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-33. Correction and interpretation of awards and additional awards**

Sec. 1. Within 30 days after the date of receipt of the arbitral award, unless another period has been agreed to by the parties:

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

Sec. 2. If the arbitral tribunal considers any request made under Section 1 of this article to be justified, it shall make the correction or give the interpretation within 30 days after the date of receipt of the request, and the interpretation shall become part of the award.

Sec. 3. The arbitral tribunal may correct an error of the type referred to in Subdivision (1) of Section 1 of this article on its own initiative within 30 days after the date of the award.

Sec. 4. Unless otherwise agreed by the parties, a party, within 30 days after the date of receipt of the award, may request the arbitral tribunal to make an additional award for any claim presented in the arbitral proceedings but omitted from the award.

Sec. 5. If the arbitral tribunal considers a request made under Section 4 of this article to be justified, it shall make the additional award within 60 days after the date of receipt of the request.

Sec. 6. The arbitral tribunal may extend, if necessary, the period within which it may make a correction, give an interpretation, or make an additional award under Section 2 or 5 of this article.

Sec. 7. Article 249-31, Revised Statutes, applies to a correction or interpretation of the award or to an additional award made under this article.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### SUBDIVISION G. PROVISIONS RELATING SOLELY TO CONCILIATION

##### **Art. 249-34. Appointment of conciliators**

Sec. 1. It is the policy of this state to encourage parties to an international commercial agreement or transaction that qualifies for arbitration or conciliation under Section 3 of Article 249-1, Revised Statutes, to resolve disputes arising from those agreements or transactions through conciliation. The parties may select or permit an arbitral tribunal or other third party to select one or more persons to serve as the conciliator or conciliators who shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

Sec. 2. A conciliator shall be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned, and the circumstances surrounding the dispute, including any previous practices between the parties.

Sec. 3. The conciliator or conciliators may conduct the conciliation proceedings in a manner that the conciliator considers appropriate, considering the circumstances of the case, the wishes of the parties, and the desirability of a speedy settlement of the dispute. Except as otherwise provided by this part, other provisions of the law of this state governing procedural matters do not apply to conciliation proceedings brought under this part.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

##### **Art. 249-35. Representation and assistance**

The parties may appear in person or be represented or assisted by any person of their choice.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

##### **Art. 249-36. Report of conciliators**

Sec. 1. At any time during the proceedings, the conciliator or conciliators may prepare a draft conciliation settlement which may include the assessment and apportionment of costs between the parties and send copies to the parties, specifying the time within which they must signify their approval.

Sec. 2. A party may not be required to accept a settlement proposed by the conciliator or conciliators.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

##### **Art. 249-37. Confidentiality**

Sec. 1. (a) Evidence of anything said or of an admission made in the course of a conciliation is not admissible in evidence, and disclosure of that evidence may not be compelled in any arbitration or civil action in which, under law, testimony may be compelled to be given. However, this subsection does not limit the admissibility of evidence if all parties participating in conciliation consent to its disclosure.

(b) If evidence is offered in violation of this section, the arbitral tribunal or the court shall make any order it considers appropriate to deal with the matter, including an order restricting the introduction of evidence or dismissing the case without prejudice.

(c) Unless the document otherwise provides, a document prepared for the purpose of, in the course of, or pursuant to the conciliation or a copy of the document is not admissible in evidence, and disclosure of the document may not be compelled in any arbitration or civil action in which, under law, testimony may be compelled to be given.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-38. Stay of arbitration and resort to other proceedings**

Sec. 1. The agreement of the parties to submit a dispute to conciliation is considered an agreement between or among those parties to stay all judicial or arbitral proceedings from the beginning of conciliation until the termination of conciliation proceedings.

Sec. 2. All applicable limitation periods, including periods of prescription, are tolled or extended on the beginning of conciliation proceedings under this part as to all parties to the conciliation proceedings until the 10th day following the date of termination of the proceedings. For purposes of this article, conciliation proceedings are considered to have begun when a party has requested conciliation of a particular dispute or disputes and the other party or parties agree to participate in the conciliation proceedings.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-39. Termination**

Sec. 1. A conciliation proceeding may be terminated as to all parties by:

(1) a written declaration of the conciliator or conciliators, after consultation with the parties, that further efforts at conciliation are no longer justified, on the date of the declaration;

(2) a written declaration of the parties addressed to the conciliator or conciliators that the conciliation proceedings are terminated, on the date of the declaration; or

(3) the signing of a settlement agreement by all of the parties, on the date of the agreement.

Sec. 2. The conciliation proceedings may be terminated as to particular parties by:

(1) a written declaration of a party to the other party or parties and the conciliator or conciliators, if appointed, that the conciliation proceedings are to be terminated as to that party, on the date of the declaration; or

(2) the signing of a settlement agreement by some of the parties, on the date of the agreement.

Sec. 3. A person who has served as conciliator may not be appointed as an arbitrator for or take part in any arbitral or judicial proceedings in the same dispute unless all parties consent to the participation or the rules adopted for conciliation or arbitration provide otherwise.

Sec. 4. A party by submitting to conciliation is not considered to have waived any rights or remedies that party would have had if conciliation had not been initiated, other than those set forth in any settlement agreement resulting from the conciliation.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-40. Enforceability of decree**

If the conciliation settles the dispute and the result of the conciliation is in writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal and shall have the same force and effect as a final award in arbitration.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-41. Costs**

Sec. 1. On termination of the conciliation proceedings, the conciliator shall set the costs of the conciliation and give written notice of the costs to the parties. For the purposes of this article, "costs" includes only:

(1) a reasonable fee to be paid to the conciliator or conciliators;

(2) travel and other reasonable expenses of the conciliator or conciliators;



(3) travel and other reasonable expenses of witnesses requested by the conciliator or conciliators with the consent of the parties;

(4) the cost of any expert advice requested by the conciliator or conciliators with the consent of the parties; and

(5) the cost of any court.

Sec. 2. Costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-42. Effect on jurisdiction**

The request for conciliation, the consent to participate in the conciliation proceedings, the participation in the proceedings, or the entering into a conciliation agreement or settlement does not constitute consent to the jurisdiction of any court in this state if conciliation fails.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

#### **Art. 249-43. Immunity of conciliators and parties**

Sec. 1. A conciliator, party, or representative of a conciliator or party, while present in this state for the purpose of arranging for or participating in conciliation under this part, is not subject to service of process on any civil matter related to the conciliation.

Sec. 2. A person who serves as a conciliator may not be held liable in an action for damages resulting from any act or omission in the performance of the person's role as a conciliator in any proceeding subject to this part.

Added by Acts 1989, 71st Leg., ch. 109, § 1, eff. Sept. 1, 1989.

## APPENDIX J

### FEDERAL ARBITRATION ACT

9 U.S.C. §§1-14

#### CHAPTER 1—GENERAL PROVISIONS

- |      |   |
|------|---|
| Sec. |   |
| 1.   | "Maritime transactions" and "commerce" defined; exceptions to operation of title.   |
| 2.   | Validity, irrevocability, and enforcement of agreements to arbitrate.   |
| 3.   | Stay of proceedings where issue therein referable to arbitration.   |
| 4.   | Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination. |
| 5.   | Appointment of arbitrators or umpire.   |
| 6.   | Application heard as motion.  |
| 7.   | Witnesses before arbitrators; fees; compelling attendance.  |
| 8.   | Proceedings begun by libel in admiralty and seizure of vessel or property.  |
| 9.   | Award of arbitrators; confirmation; jurisdiction; procedure.  |
| 10.  | Same; vacation; grounds; rehearing.   |
| 11.  | Same; modification or correction; grounds; order.   |
| 12.  | Notice of motions to vacate or modify; service; stay of proceedings.  |
| 13.  | Papers filed with order on motions; judgment; docketing; force and effect; enforcement.   |
| 14.  | Contracts not affected.   |
| 15.  | Inapplicability of the Act of State doctrine. <sup>1</sup>  |
| 15.  | Appeals.  |

#### AMENDMENTS

1988—Pub. L. 100-702, title X, § 1019(b), Nov. 19, 1988, 102 Stat. 4671, added item 15 relating to appeals.

1970—Pub. L. 91-368, § 3, July 31, 1970, 84 Stat. 693, designated existing sections 1 through 14 as "Chapter 1" and added heading for Chapter 1.

#### CHAPTER REFERRED TO IN OTHER SECTIONS

This chapter is referred to in sections 205, 208 of this title; title 25 section 416a.

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction;

<sup>1</sup> Editorially supplied. Section 15 relating to inapplicability of the Act of State doctrine added by Pub. L. 100-669 without corresponding amendment of chapter analysis.

tion; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

§ 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

§ 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition

any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.

#### § 5. Appointment of arbitrators or umpire

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

#### § 6. Application heard as motion

Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided.

#### § 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

#### § 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

#### § 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the

same court. If the adverse party shall be a non-resident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

**§ 10. Same; vacation; grounds; rehearing**

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

**§ 11. Same; modification or correction; grounds; order**

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

**§ 12. Notice of motions to vacate or modify; service; stay of proceedings**

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

**§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement**

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

**§ 14. Contracts not affected**

This title shall not apply to contracts made prior to January 1, 1926.

## APPENDIX K

# UNITED NATIONS CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS, TOGETHER WITH U.S. IMPLEMENTING LEGISLATION

### Convention on the Recognition and Enforcement of Foreign Arbitral Awards

#### Article I

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

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

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

#### Article II

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

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

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

#### Article III

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

#### Article IV

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

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

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

#### Article V

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

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

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

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

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

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

#### Article VI

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

#### Article VII

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

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 [27 LNTS 157; 92 LNTS 301] shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

#### Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice [T.S. 993; 59 Stat. 1055], or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

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

#### Article IX

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

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

#### Article X

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

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

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

#### Article XI

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

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

#### Article XII

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

#### Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.
2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.
3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

#### Article XIV

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

#### Article XV

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

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

#### Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.
2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

Done at New York June 10, 1958: entered into force for the United States December 29, 1970, subject to declarations.

Implementing Legislation Pub.L. 91-368, 84 Stat. 692, 9 USC 201-208

**§ 201. Enforcement of Convention**

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.

**§ 202. Agreement or award falling under the Convention**

An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States.

**§ 203. Jurisdiction; amount in controversy**

An action or proceeding falling under the Convention shall be deemed to arise under the laws and treaties of the United States. The district courts of the United States (including the courts enumerated in section 460 of title 28) shall have original jurisdiction over such an action or proceeding, regardless of the amount in controversy.

**§ 204. Venue**

An action or proceeding over which the district courts have jurisdiction pursuant to section 203 of this title may be brought in any such court in which save for the arbitration agreement an action or proceeding with respect to the controversy between the parties could be brought, or in such court for the district and division which embraces the place designated in the agreement as the place of arbitration if such place is within the United States.

**§ 205. Removal of cases from State courts**

Where the subject matter of an action or proceeding pending in a State court relates to an arbitration agreement or award falling under the Convention, the defendant or the defendants may, at any time before the trial thereof, remove such action or proceeding to the district court of the United States for the district and division embracing the place where the action or proceeding is pending. The procedure for removal of causes otherwise provided by law shall apply, except that the ground for removal provided in this section need not appear on the face of the complaint but may be shown in the petition for removal. For the purposes of Chapter 1 of this title any action or proceeding removed under this section shall be deemed to have been brought in the district court to which it is removed.

**§ 206. Order to compel arbitration; appointment of arbitrators**

A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. Such court may also appoint arbitrators in accordance with the provisions of the agreement.

**§ 207. Award of arbitrators; confirmation; jurisdiction; proceeding**

Within three years after an arbitral award falling under the Convention is made, any party to the arbitration may apply to any court having jurisdiction under this chapter for an order confirming the award as against any other party to the arbitration. The court shall confirm the award unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said Convention.

**§ 208. Chapter 1; residual application**

Chapter 1 applies to actions and proceedings brought under this chapter to the extent that chapter is not in conflict with this chapter or the Convention as ratified by the United States.



## APPENDIX L

# INTER-AMERICAN CONVENTION ON INTERNATIONAL COMMERCIAL ARBITRATION, TOGETHER WITH U.S. IMPLEMENTING LEGISLATION

### Inter-American Convention on International Commercial Arbitration

The Governments of the Member States of the Organization of American States, desirous of concluding a convention on international commercial arbitration, have agreed as follows:

#### Article 1

An agreement in which the parties undertake to submit to arbitral decision any differences that may arise or have arisen between them with respect to a commercial transaction is valid. The agreement shall be set forth in an instrument signed by the parties, or in the form of an exchange of letters, telegrams, or telex communications.

#### Article 2

Arbitrators shall be appointed in the manner agreed upon by the parties. Their appointment may be delegated to a third party, whether a natural or juridical person.

Arbitrators may be nationals or foreigners.

#### Article 3

In the absence of an express agreement between the parties, the arbitration shall be conducted in accordance with the rules of procedure of the Inter-American Commercial Arbitration Commission.

#### Article 4

An arbitral decision or award that is not appealable under the applicable law or procedural rules shall have the force of a final judicial judgment. Its execution or recognition may be ordered in the same manner as that of decisions handed down by national or foreign ordinary courts, in accordance with the procedural laws of the country where it is to be executed and the provisions of international treaties.

#### Article 5

1. The recognition and execution of the decision may be refused, at the request of the party against which it is made, only if such party is able to prove to the competent authority of the State in which recognition and execution are requested:

a. That the parties to the agreement were subject to some incapacity under the applicable law or that the agreement is not valid under the law to which the parties have submitted it, or, if such law is not specified, under the law of the State in which the decision was made; or

b. That the party against which the arbitral decision has been made was not duly notified of the appointment of the arbitrator or of the arbitration procedure to be followed, or was unable, for any other reason, to present his defense; or

c. That the decision concerns a dispute not envisaged in the agreement between the parties to submit to arbitration; nevertheless, if the provisions of the decision that refer to issues submitted to arbitration can be separated from those not submitted to arbitration, the former may be recognized and executed; or

d. That the constitution of the arbitral tribunal or the arbitration procedure has not been carried out in accordance with the terms of the agreement signed by the parties or, in the absence of such agreement, that the constitution of the arbitral tribunal or the arbitration procedure had not been carried out in accordance with the law of the State where the arbitration took place; or

e. That the decision is not yet binding on the parties or has been annulled or suspended by a competent authority of the State in which, or according to the law of which, the decision has been made.

2. The recognition and execution of an arbitral decision may also be refused if the competent authority of the State in which the recognition and execution is requested finds:

a. That the subject of the dispute cannot be settled by arbitration under the law of that State; or

b. That the recognition or execution of the decision would be contrary to the public policy ("ordre public" of that State).

#### Article 6

If the competent authority mentioned in Article 5.1,e has been requested to annul or suspend the arbitral decision, the authority before which such decision is invoked may, if it deems it appropriate, postpone a decision on the execution of the arbitral decision and, at the request of the party requesting execution, may also instruct the other party to provide appropriate guaranties.

#### Article 7

This Convention shall be open for signature by the Member States of the Organization of American States.

#### Article 8

This Convention is subject to ratification. The instruments of ratification shall be deposited with the General Secretariat of the Organization of American States.

#### Article 9

This Convention shall remain open for accession by any other State. The instruments of accession shall be deposited with the General Secretariat of the Organization of American States.

#### Article 10

This Convention shall enter into force on the thirtieth day following the date of deposit of the second instrument of ratification.

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

#### Article 11

If a State Party has two or more territorial units in which different systems of law apply in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them.

Such declaration may be modified by subsequent declarations, which shall expressly indicate the territorial unit or units to which the Convention applies. Such subsequent declarations shall be transmitted to the General Secretariat of the Organization of American States, and shall become effective thirty days after the date of their receipt.

#### Article 12

This Convention shall remain in force indefinitely, but any of the States Parties may denounce it. The instrument of denunciation shall be deposited with the General Secretariat of the Organization of American States. After one year from the date of deposit of the instrument of denunciation, the Convention shall no longer be in effect for the denouncing State, but shall remain in effect for the other States Parties.

#### Article 13

The original instrument of this Convention, the English, French, Portuguese and Spanish texts of which are equally authentic, shall be deposited with the General Secretariat of the Organization of American States. The Secretariat shall notify the Member States of the Organization of American States and the States that have acceded to the Convention of the signatures, deposits of instruments of ratification, accession, and denunciation as well as of reservations, if any. It shall also transmit the declarations referred to in Article 11 of this Convention.

**§ 301. Enforcement of Convention**

The Inter-American Convention on International Commercial Arbitration of January 30, 1975, shall be enforced in United States courts in accordance with this chapter.

**§ 302. Incorporation by reference**

Sections 202, 203, 204, 205, and 207 of this title shall apply to this chapter as if specifically set forth herein, except that for the purposes of this chapter "the Convention" shall mean the Inter-American Convention.

**§ 303. Order to compel arbitration; appointment of arbitrators; locale**

(a) A court having jurisdiction under this chapter may direct that arbitration be held in accordance with the agreement at any place therein provided for, whether that place is within or without the United States. The court may also appoint arbitrators in accordance with the provisions of the agreement.

(b) In the event the agreement does not make provision for the place of arbitration or the appointment of arbitrators, the court shall direct that the arbitration shall be held and the arbitrators be appointed in accordance with Article 3 of the Inter-American Convention.

**§ 304. Recognition and enforcement of foreign arbitral decisions and awards; reciprocity**

Arbitral decisions or awards made in the territory of a foreign State shall, on the basis of reciprocity, be recognized and enforced under this chapter only if that State has ratified or acceded to the Inter-American Convention.

**§ 305. Relationship between the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958**

When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows:

(1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply.

(2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.

**§ 306. Applicable rules of Inter-American Commercial Arbitration Commission**

(a) For the purposes of this chapter the rules of procedure of the Inter-American Commercial Arbitration Commission referred to in Article 3 of the Inter-American Convention shall, subject to subsection (b) of this section, be those rules as promulgated by the Commission on July 1, 1988.

(b) In the event the rules of procedure of the Inter-American Commercial Arbitration Commission are modified or amended in accordance with the procedures for amendment of the rules of that Commission, the Secretary of State, by regulation in accordance with section 553 of title 5, consistent with the aims and purposes of this Convention, may prescribe that such modifications or amendments shall be effective for purposes of this chapter.

**§ 307. Chapter 1; residual application**

Chapter 1 applies to actions and proceedings brought under this chapter to the extent chapter 1 is not in conflict with this chapter or the Inter-American Convention as ratified by the United States.

UNCITRAL ARBITRATION AND CONCILIATION RULES

ARBITRATION RULES

Section I. Introductory rules

SCOPE OF APPLICATION

Article 1

1. Where the parties to a contract have agreed in writing\* that disputes in relation to that contract shall be referred to arbitration under the UNCITRAL Arbitration Rules, then such disputes shall be settled in accordance with these Rules subject to such modification as the parties may agree in writing.

2. These Rules shall govern the arbitration except that where any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

NOTICE, CALCULATION OF PERIODS OF TIME

Article 2

1. For the purposes of these Rules, any notice, including a notification, communication or proposal, is deemed to have been received if it is physically delivered to the addressee or if it is delivered at his habitual residence, place of business or mailing address, or, if none of these can be found after making reasonable inquiry, then at the addressee's last-known residence or place of business. Notice shall be deemed to have been received on the day it is so delivered.

2. For the purposes of calculating a period of time under these Rules, such period shall begin to run on the day following the day when a notice, notification, communication or proposal is received. If the last day of such period is an official holiday or a non-business day at the residence or place of business of the addressee, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period.

NOTICE OF ARBITRATION

Article 3

1. The party initiating recourse to arbitration (hereinafter called the "claimant") shall give to the other party (hereinafter called the "respondent") a notice of arbitration.

2. Arbitral proceedings shall be deemed to commence on the date on which the notice of arbitration is received by the respondent.

3. The notice of arbitration shall include the following:

- (a) A demand that the dispute be referred to arbitration;
- (b) The names and addresses of the parties;
- (c) A reference to the arbitration clause or the separate arbitration agreement that is invoked;
- (d) A reference to the contract out of or in relation to which the dispute arises;

- (e) The general nature of the claim and an indication of the amount involved, if any;
- (f) The relief or remedy sought;
- (g) A proposal as to the number of arbitrators (i.e. one or three), if the parties have not previously agreed thereon.

**4. The notice of arbitration may also include:**

- (a) The proposals for the appointments of a sole arbitrator and an appointing authority referred to in article 6, paragraph 1;
- (b) The notification of the appointment of an arbitrator referred to in article 7;
- (c) The statement of claim referred to in article 18.

## **REPRESENTATION AND ASSISTANCE**

### **Article 4**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons must be communicated in writing to the other party; such communication must specify whether the appointment is being made for purposes of representation or assistance.

## **Section II. Composition of the arbitral tribunal**

### **NUMBER OF ARBITRATORS**

#### **Article 5**

If the parties have not previously agreed on the number of arbitrators (i.e. one or three), and if within fifteen days after the receipt by the respondent of the notice of arbitration the parties have not agreed that there shall be only one arbitrator, three arbitrators shall be appointed.

### **APPOINTMENT OF ARBITRATORS (ARTICLES 6 TO 8)**

#### **Article 6**

**1.** If a sole arbitrator is to be appointed, either party may propose to the other:

- (a) The names of one or more persons, one of whom would serve as the sole arbitrator; and
- (b) If no appointing authority has been agreed upon by the parties, the name or names of one or more institutions or persons, one of whom would serve as appointing authority.

**2.** If within thirty days after receipt by a party of a proposal made in accordance with paragraph 1 the parties have not reached agreement on the choice of a sole arbitrator, the sole arbitrator shall be appointed by the appointing authority agreed upon by the parties. If no appointing authority has been agreed upon by the parties, or if the appointing authority agreed upon refuses to act or fails to appoint the arbitrator within sixty days of the receipt of a party's request therefor, either party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate an appointing authority.

**3.** The appointing authority shall, at the request of one of the parties, appoint the sole arbitrator as promptly as possible. In making the appointment the appointing authority shall use the following list-procedure, unless both parties agree that the list-procedure should not be used or unless the appointing authority determines in its discretion that the use of the list-procedure is not appropriate for the case:

- (a) At the request of one of the parties the appointing authority shall communicate to both parties an identical list containing at least three names;
- (b) Within fifteen days after the receipt of this list, each party may return the list to the appointing authority after have deleted the name or names to which he objects and numbered the remaining names on the list in the order of his preference;
- (c) After the expiration of the above period of time the appointing authority shall appoint the sole arbitrator from among the names approved on the lists returned to it and in accordance with the order of preference indicated by the parties;
- (d) If for any reason the appointment cannot be made according to this procedure, the appointing authority may exercise its discretion in appointing the sole arbitrator.

4. In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties.

#### Article 7

- 1. If three arbitrators are to be appointed, each party shall appoint one arbitrator. The two arbitrators thus appointed shall choose the third arbitrator who will act as the presiding arbitrator of the tribunal.
- 2. If within thirty days after the receipt of a party's notification of the appointment of an arbitrator the other party has not notified the first party of the arbitrator he has appointed:
  - (a) The first party may request the appointing authority previously designated by the parties to appoint the second arbitrator; or
  - (b) If no such authority has been previously designated by the parties, or if the appointing authority previously designated refuses to act or fails to appoint the arbitrator within thirty days after receipt of a party's request therefor, the first party may request the Secretary-General of the Permanent Court of Arbitration at The Hague to designate the appointing authority. The first party may then request the appointing authority so designated to appoint the second arbitrator. In either case, the appointing authority may exercise its discretion in appointing the arbitrator.
- 3. If within thirty days after the appointment of the second arbitrator the two arbitrators have not agreed on the choice of the presiding arbitrator, the presiding arbitrator shall be appointed by an appointing authority in the same way as a sole arbitrator would be appointed under article 6.

#### Article 8

- 1. When an appointing authority is requested to appoint an arbitrator pursuant to article 6 or article 7, the party which makes the request shall send to the appointing authority a copy of the notice of arbitration, a copy of the contract out of or in relation to which the dispute has arisen and a copy of the arbitration agreement if it is not contained in the contract. The appointing authority may require from either party such information as it deems necessary to fulfil its function.
- 2. Where the names of one or more persons are proposed for appointment as arbitrators, their full names, addresses and nationalities shall be indicated, together with a description of their qualifications.

## CHALLENGE OF ARBITRATORS (ARTICLES 9 TO 12)

### Article 9

A prospective arbitrator shall disclose to those who approach him in connection with his possible appointment any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, once appointed or chosen, shall disclose such circumstances to the parties unless they have already been informed by him of these circumstances.

### Article 10

1. Any arbitrator may be challenged if circumstances exist that give rise to justifiable doubts as to the arbitrator's impartiality or independence.

2. A party may challenge the arbitrator appointed by him only for reasons of which he becomes aware after the appointment has been made.

### Article 11

1. A party who intends to challenge an arbitrator shall send notice of his challenge within fifteen days after the appointment of the challenged arbitrator has been notified to the challenging party or within fifteen days after the circumstances mentioned in articles 9 and 10 became known to that party.

2. The challenge shall be notified to the other party, to the arbitrator who is challenged and to the other members of the arbitral tribunal. The notification shall be in writing and shall state the reasons for the challenge.

3. When an arbitrator has been challenged by one party, the other party may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his office. In neither case does this imply acceptance of the validity of the grounds for the challenge. In both cases the procedure provided in article 6 or 7 shall be used in full for the appointment of the substitute arbitrator, even if during the process of appointing the challenged arbitrator a party had failed to exercise his right to appoint or to participate in the appointment.

### Article 12

1. If the other party does not agree to the challenge and the challenged arbitrator does not withdraw, the decision on the challenge will be made:

- (a) When the initial appointment was made by an appointing authority, by that authority;
- (b) When the initial appointment was not made by an appointing authority, but an appointing authority has been previously designated, by that authority;
- (c) In all other cases, by the appointing authority to be designated in accordance with the procedure for designating an appointing authority as provided for in article 6.

2. If the appointing authority sustains the challenge, a substitute arbitrator shall be appointed or chosen pursuant to the procedure applicable to the appointment or choice of an arbitrator as provided in articles 6 to 9 except that, when this procedure would call for the designation of an appointing authority, the appointment of the arbitrator shall be made by the appointing authority which decided on the challenge.

## REPLACEMENT OF AN ARBITRATOR

### Article 13

1. In the event of the death or resignation of an arbitrator during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in articles 6 to 9 that was applicable to the appointment or choice of the arbitrator being replaced.

2. In the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of his performing his functions, the procedure in respect of the challenge and replacement of an arbitrator as provided in the preceding articles shall apply.

#### REPETITION OF HEARINGS IN THE EVENT OF THE REPLACEMENT OF AN ARBITRATOR

##### Article 14

If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal.

### Section III. Arbitral Proceedings

#### GENERAL PROVISIONS

##### Article 15

1. Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at any stage of the proceedings each party is given a full opportunity of presenting his case.

2. If either party so requests at any stage of the proceedings, the arbitral tribunal shall hold hearings for the presentation of evidence by witnesses, including expert 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.

3. All documents or information supplied to the arbitral tribunal by one party shall at the same time be communicated by that party to the other party.

#### PLACE OF ARBITRATION

##### Article 16

1. Unless the parties have agreed upon the place where the arbitration is to be held, such place shall be determined by the arbitral tribunal, having regard to the circumstances of the arbitration.

2. The arbitral tribunal may determine the locale of the arbitration within the country agreed upon by the parties. It may hear witnesses and hold meetings for consultation among its members at any place it deems appropriate, having regard to the circumstances of the arbitration.

3. The arbitral tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. The parties shall be given sufficient notice to enable them to be present at such inspection.

4. The award shall be made at the place of arbitration.

#### LANGUAGE

##### Article 17

1. Subject to an agreement by the parties, the arbitral tribunal shall, promptly after its appointment, determine the language or languages to be used in the proceedings. This determination shall apply to the statement of claim, the statement of defence, and any further written statements and, if oral hearings take place, to the language or languages to be used in such hearings.



2. The arbitral tribunal may order that any documents annexed to the statement of claim or statement of defence, and any supplementary documents or exhibits submitted in the course of the proceedings, delivered in their original language, shall be accompanied by a translation into the language or languages agreed upon by the parties or determined by the arbitral tribunal.

## STATEMENT OF CLAIM

### Article 18

1. Unless the statement of claim was contained in the notice of arbitration, within a period of time to be determined by the arbitral tribunal, the claimant shall communicate his statement of claim in writing to the respondent and to each of the arbitrators. A copy of the contract, and of the arbitration agreement if not contained in the contract, shall be annexed thereto.

2. The statement of claim shall include the following particulars:

- (a) The names and addresses of the parties;
- (b) A statement of the facts supporting the claim;
- (c) The points at issue;
- (d) The relief or remedy sought.

The claimant may annex to his statement of claim all documents he deems relevant or may add a reference to the documents or other evidence he will submit.

## STATEMENT OF DEFENCE

### Article 19

1. Within a period of time to be determined by the arbitral tribunal, the respondent shall communicate his statement of defence in writing to the claimant and to each of the arbitrators.

2. The statement of defence shall reply to the particulars (b), (c) and (d) of the statement of claim (article 18, para. 2). The respondent may annex to his statement the documents on which he relies for his defence or may add a reference to the documents or other evidence he will submit.

3. In his statement of defence, or at a later stage in the arbitral proceedings if the arbitral tribunal decides that the delay was justified under the circumstances, the respondent may make a counter-claim arising out of the same contract or rely on a claim arising out of the same contract for the purpose of a set-off.

4. The provisions of article 18, paragraph 2, shall apply to a counter-claim and a claim relied on for the purpose of a set-off.

## AMENDMENTS TO THE CLAIM OR DEFENCE

### Article 20

During the course of the arbitral proceedings either party may amend or supplement his claim or defence unless the arbitral tribunal considers it inappropriate to allow such amendment having regard to the delay in making it or prejudice to the other party or any other circumstances. However, a claim may not be amended in such a manner that the amended claim falls outside the scope of the arbitration clause or separate arbitration agreement.

## **PLEAS AS TO THE JURISDICTION OF THE ARBITRAL TRIBUNAL**

### **Article 21**

1. The arbitral tribunal shall have the power to rule on objections that it has no jurisdiction, including any objections with respect to the existence or validity of the arbitration clause or of the separate arbitration agreement.

2. The arbitral tribunal shall have the power to determine the existence or the validity of the contract of which an arbitration clause forms a part. For the purposes of article 21, an arbitration clause which forms part of a contract and which provides for arbitration under these Rules shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

3. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than in the statement of defence or, with respect to a counter-claim, in the reply to the counter-claim.

4. In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award.

## **FURTHER WRITTEN STATEMENTS**

### **Article 22**

The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements.

## **PERIODS OF TIME**

### **Article 23**

The periods of time fixed by the arbitral tribunal for the communication of written statements (including the statement of claim and statement of defence) should not exceed forty-five days. However, the arbitral tribunal may extend the time-limits if it concludes that an extension is justified.

## **EVIDENCE AND HEARINGS (ARTICLES 24 and 25)**

### **Article 24**

1. Each party shall have the burden of proving the facts relied on to support his claim or defence.

2. The arbitral tribunal may, if it considers it appropriate, require a party to deliver to the tribunal and to the other party, within such a period of time as the arbitral tribunal shall decide, a summary of the documents and other evidence which that party intends to present in support of the facts in issue set out in his statement of claim or statement of defence.

3. At any time during the arbitral proceedings the arbitral tribunal may require the parties to produce documents, exhibits or other evidence within such a period of time as the tribunal shall determine.

## **Article 25**

1. In the event of an oral hearing, the arbitral tribunal shall give the parties adequate advance notice of the date, time and place thereof.

2. If witnesses are to be heard, at least fifteen days before the hearing each party shall communicate to the arbitral tribunal and to the other party the names and addresses of the witnesses he intends to present, the subject upon and the languages in which such witnesses will give their testimony.

3. The arbitral tribunal shall make arrangements for the translation of oral statements made at a hearing and for a record of the hearing if either is deemed necessary by the tribunal under the circumstances of the case, or if the parties have agreed thereto and have communicated such agreement to the tribunal at least fifteen days before the hearing.

4. Hearings shall be held in camera unless the parties agree otherwise. The arbitral tribunal may require the retirement of any witness or witnesses during the testimony of other witnesses. The arbitral tribunal is free to determine the manner in which witnesses are examined.

5. Evidence of witnesses may also be presented in the form of written statements signed by them.

6. The arbitral tribunal shall determine the admissibility, relevance, materiality and weight of the evidence offered.

## **INTERIM MEASURES OF PROTECTION**

### **Article 26**

1. At the request of either party, the arbitral tribunal may take any interim measures it deems necessary in respect of the subject-matter of the dispute, including measures for the conservation of the goods forming the subject-matter in dispute, such as ordering their deposit with a third person or the sale of perishable goods.

2. Such interim measures may be established in the form of an interim award. The arbitral tribunal shall be entitled to require security for the costs of such measures.

3. A request for interim measures addressed by any party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate, or as a waiver of that agreement.

## **EXPERTS**

### **Article 27**

1. The arbitral tribunal may appoint one or more experts to report to it, in writing, on specific issues to be determined by the tribunal. A copy of the expert's terms of reference, established by the arbitral tribunal, shall be communicated to the parties.

2. The parties shall give the expert any relevant information or produce for his inspection any relevant documents or goods that he may require of them. Any dispute between a party and such expert as to the relevance of the required information or production shall be referred to the arbitral tribunal for decision.

3. Upon receipt of the expert's report, the arbitral tribunal shall communicate a copy of the report to the parties who shall be given the opportunity to express, in writing, their opinion on the report. A party shall be entitled to examine any document on which the expert has relied in his report.

4. At the request of either party the expert, after delivery of the report, may be heard at a hearing where the parties shall have the opportunity to be present and to interrogate the expert. At this hearing either party may present expert witnesses in order to testify on the points at issue. The provisions of article 25 shall be applicable to such proceedings.

## DEFAULT

### Article 28

1. If, within the period of time fixed by the arbitral tribunal, the claimant has failed to communicate his claim without showing sufficient cause for such failure, the arbitral tribunal shall issue an order for the termination of the arbitral proceedings. If, within the period of time fixed by the arbitral tribunal, the respondent has failed to communicate his statement of defence without showing sufficient cause for such failure, the arbitral tribunal shall order that the proceedings continue.

2. If one of the parties, duly notified under these Rules, fails to appear at a hearing, without showing sufficient cause for such failure, the arbitral tribunal may proceed with the arbitration.

3. If one of the parties, duly invited to produce documentary evidence, fails to do so within the established period of time, without showing sufficient cause for such failure, the arbitral tribunal may make the award on the evidence before it.

## CLOSURE OF HEARINGS

### Article 29

1. The arbitral tribunal may inquire of the parties if they have any further proof to offer or witnesses to be heard or submissions to make and, if there are none, it may declare the hearings closed.

2. The arbitral tribunal may, if it considers it necessary owing to exceptional circumstances, decide, on its own motion or upon application of a party, to reopen the hearings at any time before the award is made.

## WAIVER OF RULES

### Article 30

A party who knows that any provision of, or requirement under, these Rules has not been complied with and yet proceeds with the arbitration without promptly stating his objection to such non-compliance, shall be deemed to have waived his right to object.

## Section IV. The award

## DECISIONS

### Article 31

1. When there are three arbitrators, any award or other decision of the arbitral tribunal shall be made by a majority of the arbitrators.

2. In the case of questions of procedure, when there is no majority or when the arbitral tribunal so authorizes, the presiding arbitrator may decide on his own, subject to revision, if any, by the arbitral tribunal.

## FORM AND EFFECT OF THE AWARD

### Article 32

1. In addition to making a final award, the arbitral tribunal shall be entitled to make interim, interlocutory, or partial awards.

2. The award shall be made in writing and shall be final and binding on the parties. The parties undertake to carry out the award without delay.

3. The arbitral tribunal shall state the reasons upon which the award is based, unless the parties have agreed that no reasons are to be given.

4. An award shall be signed by the arbitrators and it shall contain the date on which and the place where the award was made. Where there are three arbitrators and one of them fails to sign, the award shall state the reason for the absence of the signature.

5. The award may be made public only with the consent of both parties.

6. Copies of the award signed by the arbitrators shall be communicated to the parties by the arbitral tribunal.

7. If the arbitration law of the country where the award is made requires that the award be filed or registered by the arbitral tribunal, the tribunal shall comply with this requirement within the period of time required by law.

## APPLICABLE LAW, AMIABLE COMPOSITEUR

### Article 33

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or ex aequo et bono only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. 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.

## SETTLEMENT OR OTHER GROUNDS FOR TERMINATION

### Article 34

1. If, before the award is made, the parties agree on a settlement of the dispute, the arbitral tribunal shall either issue an order for the termination of the arbitral proceedings or, if requested by both parties and accepted by the tribunal, record the settlement in the form of an arbitral award on agreed terms. The arbitral tribunal is not obliged to give reasons for such an award.

2. If, before the award is made, the continuation of the arbitral proceedings becomes unnecessary or impossible for any reason not mentioned in paragraph 1, the arbitral tribunal shall inform the parties of its intention to issue an order for the termination of the proceedings. The arbitral tribunal shall have the power to issue such an order unless a party raises justifiable grounds for objection.

3. Copies of the order for termination of the arbitral proceedings or of the arbitral award on agreed terms, signed by the arbitrators, shall be communicated by the arbitral tribunal to the parties. Where an arbitral award on agreed terms is made, the provisions of article 32, paragraphs 2 and 4 to 7, shall apply.

## INTERPRETATION OF THE AWARD

### Article 35

1. Within thirty days after the receipt of the award, either party, with notice to the other party, may request that the arbitral tribunal give an interpretation of the award.

2. The interpretation shall be given in writing within forty-five days after the receipt of the request. The interpretation shall form part of the award and the provisions of article 32, paragraphs 2 to 7, shall apply.

## CORRECTION OF THE AWARD

### Article 36

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

2. Such corrections shall be in writing, and the provisions of article 32, paragraphs 2 to 7, shall apply.

## ADDITIONAL AWARD

### Article 37

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

2. If the arbitral tribunal considers the request for an additional award to be justified and considers that the omission can be rectified without any further hearings or evidence, it shall complete its award within sixty days after the receipt of the request.

3. When an additional award is made, the provisions of article 32, paragraphs 2 to 7, shall apply.

## COSTS (ARTICLES 38 TO 40)

### Article 38

The arbitral tribunal shall fix the costs of arbitration in its award. The term "costs" includes only:

- (a) The fees of the arbitral tribunal to be stated separately as to each arbitrator and to be fixed by the tribunal itself in accordance with article 39;
- (b) The travel and other expenses incurred by the arbitrators;
- (c) The costs of expert advice and of other assistance required by the arbitral tribunal;
- (d) The travel and other expenses of witnesses to the extent such expenses are approved by the arbitral tribunal;
- (e) The costs for legal representation and assistance of the successful party if such costs were claimed during the arbitral proceedings, and only to the extent that the arbitral tribunal determines that the amount of such costs is reasonable;
- (f) Any fees and expenses of the appointing authority as well as the expenses of the Secretary-General of the Permanent Court of Arbitration at The Hague.

#### **Article 39**

1. The fees of the arbitral tribunal shall be reasonable in amount, taking into account the amount in dispute, the complexity of the subject-matter, the time spent by the arbitrators and any other relevant circumstances of the case.

2. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and if that authority has issued a schedule of fees for arbitrators in international cases which it administers, the arbitral tribunal in fixing its fees shall take that schedule of fees into account to the extent that it considers appropriate in the circumstances of the case.

3. If such appointing authority has not issued a schedule of fees for arbitrators in international cases, any party may at any time request the appointing authority to furnish a statement setting forth the basis for establishing fees which is customarily followed in international cases in which the authority appoints arbitrators. If the appointing authority consents to provide such a statement, the arbitral tribunal in fixing its fees shall take such information into account to the extent that it considers appropriate in the circumstances of the case.

4. In cases referred to in paragraphs 2 and 3, when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix its fees only after consultation with the appointing authority which may make any comment it deems appropriate to the arbitral tribunal concerning the fees.

#### **Article 40**

1. Except as provided in paragraph 2, the costs of arbitration shall in principle be borne by the unsuccessful party. However, the arbitral tribunal may apportion each of such costs between the parties if it determines that apportionment is reasonable, taking into account the circumstances of the case.

2. With respect to the costs of legal representation and assistance referred to in article 38, paragraph (e), the arbitral tribunal, taking into account the circumstances of the case, shall be free to determine which party shall bear such costs or may apportion such costs between the parties if it determines that apportionment is reasonable.

3. When the arbitral tribunal issues an order for the termination of the arbitral proceedings or makes an award on agreed terms, it shall fix the costs of arbitration referred to in article 38 and article 39, paragraph 1, in the text of that order or award.

4. No additional fees may be charged by an arbitral tribunal for interpretation or correction or completion of its award under articles 35 to 37.

#### **DEPOSIT OF COSTS**

#### **Article 41**

1. The arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs referred to in article 38, paragraphs (a), (b) and (c).

2. During the course of the arbitral proceedings the arbitral tribunal may request supplementary deposits from the parties.

3. If an appointing authority has been agreed upon by the parties or designated by the Secretary-General of the Permanent Court of Arbitration at The Hague, and when a party so requests and the appointing authority consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits or supplementary deposits only after consultation with the appointing authority which may make any comments to the arbitral tribunal which it deems appropriate concerning the amount of such deposits and supplementary deposits.

4. If the required deposits are not paid in full within thirty days after the receipt of the request, the arbitral tribunal shall so inform the parties in order that one or another of them may make the required payment. If such payment is not made, the arbitral tribunal may order the suspension or termination of the arbitral proceedings.

5. After the award has been made, the arbitral tribunal shall render an accounting to the parties of the deposits received and return any unexpended balance to the parties.

**\*MODEL ARBITRATION CLAUSE**

*Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the UNCITRAL Arbitration Rules as at present in force.*

*Note: Parties may wish to consider adding:*

- (a) The appointing authority shall be . . . (Name of institution or person);*
- (b) The number of arbitrators shall be . . . (one or three);*
- (c) The place of arbitration shall be . . . (town or country);*
- (d) The language(s) to be used in the arbitral proceedings shall be . . .*

## **CONCILIATION RULES**

### **APPLICATION OF THE RULES**

#### **Article 1**

1. These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that the UNCITRAL Conciliation Rules apply.

2. The parties may agree to exclude or vary any of these Rules at any time.

3. Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

### **COMMENCEMENT OF CONCILIATION PROCEEDINGS**

#### **Article 2**

1. The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.

2. Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.

3. If the other party rejects the invitation, there will be no conciliation proceedings.

4. If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.



## **NUMBER OF CONCILIATORS**

### **Article 3**

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

## **APPOINTMENT OF CONCILIATORS**

### **Article 4**

1. (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;  
(b) In conciliation proceedings with two conciliators, each party appoints one conciliator;  
(c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.
2. Parties may enlist the assistance of an appropriate institution or person in connexion with the appointment of conciliators. In particular,
  - (a) A party may request such an institution or person to recommend the names of suitable individuals to act as conciliator; or
  - (b) The parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

## **SUBMISSION OF STATEMENTS TO CONCILIATOR**

### **Article 5**

1. The conciliator,<sup>1</sup> upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.
2. The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.
3. At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

## **REPRESENTATION AND ASSISTANCE**

### **Article 6**

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

## **ROLE OF CONCILIATOR**

### **Article 7**

1. The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

2. The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

3. The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

4. The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefore.

## **ADMINISTRATIVE ASSISTANCE**

### **Article 8**

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

## **COMMUNICATION BETWEEN CONCILIATOR AND PARTIES**

### **Article 9**

1. The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

2. Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

## **DISCLOSURE OF INFORMATION**

### **Article 10**

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

## **CO-OPERATION OF PARTIES WITH CONCILIATOR**

### **Article 11**

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

## **SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE**

### **Article 12**

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

## **SETTLEMENT AGREEMENT**

### **Article 13**

1. When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

2. If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.<sup>2</sup> If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

3. The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

## **CONFIDENTIALITY**

### **Article 14**

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

## **TERMINATION OF CONCILIATION PROCEEDINGS**

### **Article 15**

The conciliation proceedings are terminated:

- (a) By the signing of the settlement agreement by the parties, on the date of the agreement; or
- (b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- (c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

## **RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS**

### **Article 16**

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

## **COSTS**

### **Article 17**

1. Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term "costs" includes only:

- (a) The fee of the conciliator which shall be reasonable in amount;
- (b) The travel and other expenses of the conciliator;
- (c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;

- (d) The cost of any assistance provided pursuant to articles 4, paragraph 2(b), and 8 of these Rules.

2. The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

## DEPOSITS

### Article 18

1. The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

2. During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

3. If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

4. Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

## ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

### Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings. The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

## ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

### Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

- (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) Admissions made by the other party in the course of the conciliation proceedings;
- (c) Proposals made by the conciliator;
- (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

## MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)

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<sup>1</sup> In this and all following articles, the term "conciliator" applies to a sole conciliator, two or three conciliators, as the case may be.

<sup>2</sup> The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

## **PART SIX INSTITUTIONAL PROVISIONS**

### **Chapter Eighteen**

#### **Institutional Provisions**

##### **Article 1801: Application**

1. Except for the matters covered in Chapter Seventeen (Financial Services) and Chapter Nineteen (Binational Dispute Settlement in Antidumping and Countervailing Duty Cases), the provisions of this Part shall apply with respect to the avoidance or settlement of all disputes regarding the interpretation or application of this Agreement or whenever a Party considers that an actual or proposed measure of the other Party is or would be inconsistent with the obligations of this Agreement or cause nullification or impairment in the sense of Article 2011, unless the Parties agree to use another procedure in any particular case.

2. Disputes arising under both this Agreement and the *General Agreement on Tariffs and Trade*, and agreements negotiated thereunder (GATT), may be settled in either forum, according to the rules of that forum, at the discretion of the complaining Party.

3. Once the dispute settlement provisions of this Agreement or the GATT have been initiated pursuant to Article 1805 or the GATT with respect to any matter, the procedure initiated shall be used to the exclusion of any other.

##### **Article 1802: The Commission**

1. The Parties hereby establish the Canada-United States Trade Commission (the Commission) to supervise the implementation of this Agreement, to resolve disputes that may arise over its interpretation and application, to oversee its further elaboration, and to consider any other matter that may affect its operation.

2. The Commission shall be composed of representatives of both Parties. The principal representative of each Party shall be the cabinet-level officer or Minister primarily responsible for international trade, or their designees.
3. The Commission shall convene at least once a year in regular session to review the functioning of this Agreement. Regular sessions of the Commission shall be held alternately in the two countries.
4. The Commission may establish, and delegate responsibilities to, ad hoc or standing committees or working groups and seek the advice of non-governmental individuals or groups.
5. The Commission shall establish its rules and procedures. All decisions of the Commission shall be taken by consensus.

#### **Article 1803: Notification**

1. Each Party shall provide written notice to the other Party of any proposed or actual measure that it considers might materially affect the operation of this Agreement. The notice shall include, whenever appropriate, a description of the reasons for the proposed or actual measure.
2. The written notice shall be given as far in advance as possible of the implementation of the measure. If prior notice is not possible, the Party implementing the measure shall provide written notice to the other Party as soon as possible after implementation.
3. Upon request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure, whether or not previously notified.
4. The provision of written notice shall be without prejudice as to whether the measure is consistent with this Agreement.

#### **Article 1804: Consultations**

1. Either Party may request consultations regarding any actual or proposed measure or any other matter that it considers affects the operation of this Agreement, whether or not the matter has been notified in accordance with Article 1803.
2. The Parties shall make every attempt to arrive at a mutually satisfactory resolution of any matter through consultations under this Article or other consultative provisions in this Agreement.

3. Each Party shall treat any confidential or proprietary information exchanged in the course of consultations on the same basis as the Party providing the information.

#### **Article 1805: Initiation of Procedures**

1. If the Parties fail to resolve a matter through consultations within 30 days of a request for consultations under Article 1804, either Party may request in writing a meeting of the Commission. The request shall state the matter complained of, and shall indicate what provisions of this Agreement are considered relevant. Unless otherwise agreed, the Commission shall convene within 10 days and shall endeavour to resolve the dispute promptly.

2. The Commission may call on such technical advisors as it deems necessary, or on the assistance of a mediator acceptable to both Parties, in an effort to reach a mutually satisfactory resolution of the dispute.

#### **Article 1806: Arbitration**

1. If a dispute has been referred to the Commission under Article 1805 and has not been resolved within a period of 30 days after such referral, the Commission:

a) shall refer a dispute regarding actions taken pursuant to Chapter Eleven (Emergency Action); and

b) may refer any other dispute,

to binding arbitration on such terms as the Commission may adopt.

2. Unless the Commission directs otherwise, an arbitration panel shall be established and perform its functions in a manner consistent with the provisions of paragraphs 1, 3 and 4 of Article 1807.

3. If a Party fails to implement in a timely fashion the findings of a binding arbitration panel and the Parties are unable to agree on appropriate compensation or remedial action, then the other Party shall have the right to suspend the application of equivalent benefits of this Agreement to the non-complying Party.

## **Article 1807: Panel Procedures**

1. The Commission shall develop and maintain a roster of individuals who are willing and able to serve as panelists. Wherever possible, panelists shall be chosen from this roster. In all cases, panelists shall be chosen strictly on the basis of objectivity, reliability and sound judgment and, where appropriate, have expertise in the particular matter under consideration. Panelists shall not be affiliated with or take instructions from either Party.

2. If a dispute has been referred to the Commission under Article 1805 and has not been resolved within a period of 30 days after such referral, or within such other period as the Commission has agreed upon, or has not been referred to arbitration pursuant to Article 1806, the Commission, upon request of either Party, shall establish a panel of experts to consider the matter. A panel shall be deemed to be established from the date of the request of a Party.

3. The panel shall be composed of five members, at least two of whom shall be citizens of Canada and at least two of whom shall be citizens of the United States. Within 15 days of establishment of the panel, each Party, in consultation with the other Party, shall choose two members of the panel and the Commission shall endeavour to agree on the fifth who shall chair the panel. If a Party fails to appoint its panelists within 15 days, such panelists shall be selected by lot from among its citizens on the roster described in paragraph 1. If the Commission is unable to agree on the fifth panelist within such period, then, at the request of either Party, the four appointed panelists shall decide on the fifth panelist within 30 days of establishment of the panel. If no agreement is possible, the fifth panelist shall be selected by lot from the roster described in paragraph 1.

4. The panel shall establish its rules of procedure, unless the Commission has agreed otherwise. The procedures shall assure a right to at least one hearing before the panel as well as the opportunity to provide written submissions and rebuttal arguments. The proceedings of the panel shall be confidential. Unless otherwise agreed by the Parties, the panel shall base its decision on the arguments and submissions of the Parties.

5. Unless the Parties otherwise agree, the panel shall, within three months after its chairman is appointed, present to the Parties an initial report containing findings of fact, its determination as to whether the



measure at issue is or would be inconsistent with the obligations of this Agreement or cause nullification and impairment in the sense of Article 2011, and its recommendations, if any, for resolution of the dispute. Where feasible, the panel shall afford the Parties opportunity to comment on its preliminary findings of fact prior to completion of its report. If requested by either Party at the time of establishment of the panel, the panel shall also present findings as to the degree of adverse trade effect on the other Party of any measure found not to conform with the obligations of the Agreement. Panelists may furnish separate opinions on matters not unanimously agreed.

6. Within 14 days of issuance of the initial report of the panel, a Party disagreeing in whole or in part shall present a written statement of its objections and the reasons for those objections to the Commission and the panel. In such an event, the panel on its own motion or at the request of the Commission or either Party may request the views of both Parties, reconsider its report, make any further examination that it deems appropriate and issue a final report, together with any separate opinions, within 30 days of issuance of the initial report.

7. Unless the Commission agrees otherwise, the final report of the panel shall be published along with any separate opinions, and any written views that either Party desires to be published.

8. Upon receipt of the final report of the panel, the Commission shall agree on the resolution of the dispute, which normally shall conform with the recommendation of the panel. Whenever possible, the resolution shall be non-implementation or removal of a measure not conforming with this Agreement or causing nullification or impairment in the sense of Article 2011 or, failing such a resolution, compensation.

9. If the Commission has not reached agreement on a mutually satisfactory resolution under paragraph 8 within 30 days of receiving the final report of the panel (or such other date as the Commission may decide), and a Party considers that its fundamental rights (under this Agreement) or benefits (anticipated under this Agreement) are or would be impaired by the implementation or maintenance of the measure at issue, the Party shall be free to suspend the application to the other Party of benefits of equivalent effect until such time as the Parties have reached agreement on a resolution of the dispute.

## **Article 1808: Referrals of Matters from Judicial or Administrative Proceedings**

1. In the event an issue of interpretation of this Agreement arises in any domestic judicial or administrative proceeding of a Party which either Party considers would merit its intervention, or if a court or administrative body solicits the views of a Party, the Parties shall endeavour to agree on the interpretation of the applicable provisions of this Agreement.

2. The Party in whose territory the court or administrative body is located shall submit any agreed interpretation to the court or administrative body in accordance with the rules of that forum. If the Parties are unable to reach agreement on the interpretation of the provision of this Agreement at issue, either Party may submit its own views to the court or administrative body in accordance with the rules of that forum.

## **Chapter Nineteen**

### **Binational Panel Dispute Settlement in Antidumping and Countervailing Duty Cases**

#### **Article 1901: General Provisions**

1. The provisions of Article 1904 shall apply only with respect to goods that the competent investigating authority of the importing Party, applying the importing Party's antidumping or countervailing duty law to the facts of a specific case, determines are goods of the other Party.

2. For the purposes of Articles 1903 and 1904, panels shall be established in accordance with the provisions of Annex 1901.2.

#### **Article 1902: Retention of Domestic Antidumping Law and Countervailing Duty Law**

1. Each Party reserves the right to apply its antidumping law and countervailing duty law to goods imported from the territory of the other Party. Antidumping law and countervailing duty law include, as appropriate for each Party, relevant statutes, legislative history, regulations, administrative practice, and judicial precedents.

2. Each Party reserves the right to change or modify its antidumping law or countervailing duty law, provided that in the case of an amendment to a Party's antidumping or countervailing duty statute:

- a) such amendment shall apply to goods from the other Party only if such application is specified in the amending statute;
- b) the amending Party notifies the other Party in writing of the amending statute as far in advance as possible of the date of enactment of such statute;
- c) following notification, the amending Party, upon request of the other Party, consults with the other Party prior to the enactment of the amending statute; and
- d) such amendment, as applicable to the other Party, is not inconsistent with
  - i) the *General Agreement on Tariffs and Trade* (GATT), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade* (the Antidumping Code), or the *Agreement on the Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade* (the Subsidies Code), or
  - ii) the object and purpose of this Agreement and this Chapter, which is to establish fair and predictable conditions for the progressive liberalization of trade between the two countries while maintaining effective disciplines on unfair trade practices, such object and purpose to be ascertained from the provisions of this Agreement, its preamble and objectives, and the practices of the Parties.

#### **Article 1903: Review of Statutory Amendments**

1. A Party may request in writing that an amendment to the other Party's antidumping statute or countervailing duty statute be referred to a panel for a declaratory opinion as to whether:

- a) the amendment does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of Article 1902; or
- b) such amendment has the function and effect of overturning a prior decision of a panel made pursuant to Article 1904 and does not conform to the provisions of subparagraph (d)(i) or (d)(ii) of paragraph 2 of Article 1902.

Such declaratory opinion shall have force or effect only as provided in this Article.

2. The panel shall conduct its review in accordance with the procedures of Annex 1903.2.

3. In the event that the panel recommends modifications to the amending statute to remedy a non-conformity that it has identified in its opinion:

a) the Parties shall immediately begin consultations and shall seek to achieve a mutually satisfactory solution to the matter within 90 days of the issuance of the panel's final declaratory opinion. Such solution may include seeking remedial legislation with respect to the statute of the amending Party;

b) if remedial legislation is not enacted within nine months from the end of the 90-day consultation period referred to in subparagraph (a) and no other agreement has been reached, the Party that requested the panel may

i) take comparable legislative or equivalent executive action, or

ii) terminate the Agreement upon 60-day written notice to the other Party.

#### **Article 1904: Review of Final Antidumping and Countervailing Duty Determinations**

1. As provided in this Article, the Parties shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review.

2. Either Party may request that a panel review, based upon the administrative record, a final antidumping or countervailing duty determination of a competent investigating authority of either Party to determine whether such determination was in accordance with the antidumping or countervailing duty law of the importing Party. For this purpose, the antidumping or countervailing duty law consists of the relevant statutes, legislative history, regulations, administrative practice, and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority. Solely for purposes of the panel review provided for in this Article, the antidumping and countervailing duty statutes of the Parties, as those statutes may be amended from time to time, are incorporated into this Agreement.

3. The panel shall apply the standard of review described in Article 1911 and the general legal principles that a court of the importing Party otherwise would apply to a review of a determination of the competent investigating authority.

4. A request for a panel shall be made in writing to the other Party within 30 days following the date of publication of the final determination in question in the *Federal Register* or the *Canada Gazette*. In the case of final determinations that are not published in the *Federal Register* or the *Canada Gazette*, the importing Party shall immediately notify the other Party of such final determination where it involves a good from the other Party, and the other Party may request a panel within 30 days of receipt of such notice. Where the competent investigating authority of the importing Party has imposed provisional measures in an investigation, the other Party may provide notice of its intention to request a panel under this Article, and the Parties shall begin to establish a panel at that time. Failure to request a panel within the time specified in this paragraph shall preclude review by a panel.

5. Either Party on its own initiative may request review of a final determination by a panel and shall, upon request of a person who would otherwise be entitled under the law of the importing Party to commence domestic procedures for judicial review of a final determination, request such review.

6. The panel shall conduct its review in accordance with the procedures established by the Parties pursuant to paragraph 14. Where both Parties request a panel to review a final determination, a single panel shall review that determination.

7. The competent investigating authority that issued the final determination in question shall have the right to appear and be represented by counsel before the panel. Each Party shall provide that other persons who, pursuant to the law of the importing Party, otherwise would have had standing to appear and be represented in a domestic judicial review proceeding concerning the determination of the competent investigating authority, shall have the right to appear and be represented by counsel before the panel.

8. The panel may uphold a final determination, or remand it for action not inconsistent with the panel's decision. Where the panel remands a final determination, the panel shall establish as brief a time as is reasonable for compliance with the remand, taking into account the complexity of the facts and legal issues involved and the nature of the panel's decision. In no event shall the time permitted for compliance with a remand exceed an amount of time equal to the maximum amount of time (counted from the date of the filing of a

petition, complaint or application) permitted by statute for the competent investigating authority in question to make a final determination in an investigation. If review of the action taken by the competent investigating authority on remand is needed, such review shall be before the same panel, which shall issue a final decision within 90 days of the date on which such remand action is submitted to it.

9. The decision of a panel under this Article shall be binding on the Parties with respect to the particular matter between the Parties that is before the panel.

10. This Agreement shall not affect:

- a) the judicial review procedures of either Party, or
- b) cases appealed under those procedures,

with respect to determinations other than final determinations.

11. A final determination shall not be reviewed under any judicial review procedures of the importing Party if either Party requests a panel with respect to that determination within the time limits set forth in this Article. Neither Party shall provide in its domestic legislation for an appeal from a panel decision to its domestic courts.

12. The provisions of this Article shall not apply where:

- a) neither Party seeks panel review of a final determination;
- b) a revised final determination is issued as a direct result of judicial review of the original final determination by a court of the importing Party in cases where neither Party sought panel review of that original final determination; or
- c) a final determination is issued as a direct result of judicial review that was commenced in a court of the importing Party before the entry into force of this Agreement.

13. Where, within a reasonable time after the panel decision is issued, a Party alleges that:

- a) i) a member of the panel was guilty of gross misconduct, bias, or a serious conflict of interest, or otherwise materially violated the rules of conduct,
- ii) the panel seriously departed from a fundamental rule of procedure, or
- iii) the panel manifestly exceeded its powers, authority or jurisdiction set forth in this Article, and

- b) any of the actions set out in subparagraph (a) has materially affected the panel's decision and threatens the integrity of the binational panel review process,

that Party may avail itself of the extraordinary challenge procedure set out in Annex 1904.13.

14. To implement the provisions of this Article, the Parties shall adopt rules of procedure by January 1, 1989. Such rules shall be based, where appropriate, upon judicial rules of appellate procedure, and shall include rules concerning the content and service of requests for panels, a requirement that the competent investigating authority transmit to the panel the administrative record of the proceeding, the protection of business proprietary and other privileged information (including sanctions against persons participating before panels for improper release of such information), participation by private persons, limits on panel review to errors alleged by the Parties or private persons, filing and service, computation and extensions of time, the form and content of briefs and other papers, pre- and post-hearing conferences, oral argument, requests for rehearing, and voluntary terminations of panel reviews. The rules shall be designed to result in final decisions within 315 days of the date on which a request for a panel is made, and shall allow:

- a) 30 days for the filing of the complaint;
- b) 30 days for designation or certification of the administrative record and its filing with the panel;
- c) 60 days for the complainant to file its brief;
- d) 60 days for the respondent to file its brief;
- e) 15 days for the filing of reply briefs;
- f) 15 to 30 days for the panel to convene and hear oral argument;  
and
- g) 90 days for the panel to issue its written decision.

15. The Parties shall, in order to achieve the objectives of this Article, amend their statutes and regulations, as necessary, with respect to antidumping or countervailing duty proceedings involving goods of the other Party. In particular, without limiting the generality of the foregoing:

- a) Canada shall amend sections 56 and 58 of the *Special Import Measures Act*, as amended, to allow the United States of America or a United States manufacturer, producer, or exporter, without regard to payment of duties, to make a written request for a re-determination; and section 59 to require the Deputy Minister to make a ruling on a request for a re-determination within one year of a request to a designated officer or other customs officer;
- b) Canada shall amend section 28(4) of the *Federal Court Act* to render that section inapplicable; and shall provide in its statutes or regulations that persons (including producers of goods subject to an investigation) have standing to ask Canada to request a panel review where such persons would be entitled to commence domestic procedures for judicial review if the final determination were reviewable by the Federal Court pursuant to section 28;
- c) the United States of America shall amend section 301 of the *Customs Courts Act of 1980*, as amended, and any other relevant provisions of law, to eliminate the authority to issue declaratory judgments;
- d) each Party shall amend its statutes or regulations to ensure that existing procedures concerning the refund, with interest, of antidumping or countervailing duties operate to give effect to a final panel decision that a refund is due;
- e) each Party shall amend its statutes or regulations to ensure that its courts shall give full force and effect, with respect to any person within its jurisdiction, to all sanctions imposed pursuant to the laws of the other Party to enforce provisions of any protective order or undertaking that such other Party has promulgated or accepted in order to permit access for purposes of panel review or of the extraordinary challenge procedure to confidential, personal, business proprietary or other privileged information;
- f) Canada shall amend the *Special Import Measures Act*, and any other relevant provisions of law, to provide that the following actions of the Deputy Minister shall be deemed for the purposes of this Article to be final determinations subject to judicial review:
  - i) a determination by the Deputy Minister pursuant to section 41,



- ii) a re-determination by the Deputy Minister pursuant to section 59, and
  - iii) a review by the Deputy Minister of an undertaking pursuant to section 53(1); and
- g) each Party shall amend its statutes or regulations to ensure that:
- i) domestic procedures for judicial review of a final determination may not be commenced until the time for requesting a panel under paragraph 4 has expired, and
  - ii) as a prerequisite to commencing domestic judicial review procedures to review a final determination, a Party or other person intending to commence such procedures shall provide notice of such intent to the Parties and to other persons entitled to commence such review procedures of the same final determination no later than ten days prior to the latest date on which a panel may be requested.

#### **Article 1905: Prospective Application**

The provisions of this Chapter shall apply only prospectively to:

- a) final determinations of a competent investigating authority made after the entry into force of this Agreement; and
- b) with respect to declaratory opinions under Article 1903, amendments to antidumping or countervailing duty statutes enacted after the entry into force of this Agreement.

#### **Article 1906: Duration**

The provisions of this Chapter shall be in effect for five years pending the development of a substitute system of rules in both countries for antidumping and countervailing duties as applied to their bilateral trade. If no such system of rules is agreed and implemented at the end of five years, the provisions of this Chapter shall be extended for a further two years. Failure to agree to implement a new regime at the end of the two-year extension shall allow either Party to terminate the Agreement on six-month notice.

#### **Article 1907: Working Group**

1. The Parties shall establish a Working Group that shall:
  - a) seek to develop more effective rules and disciplines concerning the use of government subsidies;

- b) seek to develop a substitute system of rules for dealing with unfair pricing and government subsidization; and
  - c) consider any problems that may arise with respect to the implementation of this Chapter and recommend solutions, where appropriate.
2. The Working Group shall report to the Parties as soon as possible. The Parties shall use their best efforts to develop and implement the substitute system of rules within the time limits established in Article 1906.

#### **Article 1908: Consultations**

The Parties shall each designate one or more officials to be responsible for ensuring that consultations take place, where required, so that the provisions of this Chapter are carried out expeditiously.

#### **Article 1909: Establishment of Secretariat**

1. The Parties shall establish permanent Secretariat offices to facilitate the operation of this Chapter and the work of panels or committees that may be convened pursuant to this Chapter.
2. The permanent offices of the Secretariat shall be in Washington, District of Columbia, and in the National Capital Region of Canada.
3. Each Party shall be responsible for the operating cost of its Secretariat office.
4. The United States of America shall appoint an individual to serve as secretary of the United States section of the Secretariat who shall be responsible for all administrative matters involving the Secretariat in the United States of America.
5. Canada shall appoint an individual to serve as secretary of the Canadian section of the Secretariat who shall be responsible for all administrative matters involving the Secretariat in Canada.
6. The secretaries of the United States and Canadian sections of the Secretariat shall manage their respective Secretariat offices.
7. The Secretariat may provide support for the Commission established pursuant to Article 1802 if so directed by the Commission.
8. The secretaries shall act jointly to service all meetings of panels or committees established pursuant to this Chapter. The secretary of the country in which a panel or committee proceeding is held shall prepare a record thereof and each secretary shall preserve an authentic copy of the same in the permanent offices.

9. Each secretary shall receive and file all requests, briefs and other papers properly presented to a panel or committee in any proceeding before it that is instituted pursuant to this Chapter and shall number in numerical order all requests for a panel or committee. The number given to a request shall be the primary file number for briefs and other papers relating to such request.

10. Each secretary shall forward to the other copies of all official letters, documents, records or other papers received or filed with the Secretariat office pertaining to any proceeding before a panel or committee, so that there shall be on file in each office of the Secretariat either the original or a copy of all official letters and other papers relating to the proceeding.

#### **Article 1910: Code of Conduct**

The Parties shall, by the date of the entry into force of this Agreement, exchange letters establishing a code of conduct for panelists and members of committees established pursuant to Articles 1903 and 1904.

#### **Article 1911: Definitions**

For purposes of this Chapter,

**administrative record** means, unless otherwise agreed by the Parties and the other persons appearing before a panel:

- a) all documentary or other information presented to or obtained by the competent investigating authority in the course of the administrative proceeding, including any governmental memoranda pertaining to the case, and including any record of ex parte meetings as may be required to be kept;
- b) a copy of the final determination of the competent investigating authority, including reasons for the determination;
- c) all transcripts or records of conferences or hearings before the competent investigating authority; and
- d) all notices published in the *Canada Gazette* or the *Federal Register* in connection with the administrative proceeding.

**antidumping statute** as referred to in Articles 1902 and 1903 means:

- a) in the case of Canada, the relevant provisions of the *Special Import Measures Act*, as amended, and any successor statutes;

- b) in the case of the United States of America, the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended, and any successor statutes; and
- c) the provisions of any other statute that provides for judicial review of final determinations under subparagraph (a) or (b) or indicates the standard of review to be applied.

**competent investigating authority means:**

- a) in the case of Canada,
  - i) the Canadian Import Tribunal, or its successor, or
  - ii) the Deputy Minister of National Revenue for Customs and Excise as defined in the *Special Import Measures Act*, or his successor; and
- b) in the case of the United States of America,
  - i) the International Trade Administration of the United States Department of Commerce, or its successor, or
  - ii) the United States International Trade Commission, or its successor.

**countervailing duty statute** as referred to in Articles 1902 and 1903 means:

- a) in the case of Canada, the relevant provisions of the *Special Import Measures Act*, as amended, and any successor statutes;
- b) in the case of the United States of America, section 303 and the relevant provisions of Title VII of the *Tariff Act of 1930*, as amended, and any successor statutes; and
- c) the provisions of any other statute that provides for judicial review of final determinations under subparagraph (a) or (b) or indicates the standard of review to be applied.

**final determination means:**

- a) in the case of Canada,
  - i) an order or finding of the Canadian Import Tribunal under subsection 43(1) of the *Special Import Measures Act*,
  - ii) an order by the Canadian Import Tribunal under subsection 76(4) of the *Special Import Measures Act*, continuing an order or finding made under subsection 43(1) of the Act with or without amendment,
  - iii) a determination by the Deputy Minister of National Revenue for Customs and Excise pursuant to section 41 of the *Special Import Measures Act*,
  - iv) a re-determination by the Deputy Minister pursuant to section 59 of the *Special Import Measures Act*,

- v) a decision by the Canadian Import Tribunal pursuant to subsection 76(3) of the *Special Import Measures Act* not to initiate a review,
  - vi) a reconsideration by the Canadian Import Tribunal pursuant to subsection 91(3) of the *Special Import Measures Act*, and
  - vii) a review by the Deputy Minister of an undertaking pursuant to section 53(1) of the *Special Import Measures Act*; and
- b) in the case of the United States of America,
- i) a final affirmative determination by the International Trade Administration of the United States Department of Commerce or by the United States International Trade Commission under section 705 or 735 of the *Tariff Act of 1930*, as amended, including any negative part of such a determination,
  - ii) a final negative determination by the International Trade Administration of the United States Department of Commerce or by the United States International Trade Commission under section 705 or 735 of the *Tariff Act of 1930*, as amended, including any affirmative part of such a determination,
  - iii) a final determination, other than a determination in (iv), under section 751 of the *Tariff Act of 1930*, as amended,
  - iv) a determination by the United States International Trade Commission under section 751(b) of the *Tariff Act of 1930*, as amended, not to review a determination based upon changed circumstances, and
  - v) a determination by the International Trade Administration of the United States Department of Commerce as to whether a particular type of merchandise is within the class or kind of merchandise described in an existing finding of dumping or antidumping or countervailing duty order.

**general legal principles** includes principles such as standing, due process, rules of statutory construction, mootness, and exhaustion of administrative remedies.

**remand** means a referral back for a determination not inconsistent with the panel or committee decision.

**standard of review** means the following standards, as may be amended from time to time by a Party:

- a) in the case of Canada, the grounds set forth in section 28(1) of the *Federal Court Act* with respect to all final determinations; and
- b) in the case of the United States of America,
  - i) the standard set forth in section 516A (b)(1)(B) of the *Tariff Act of 1930*, as amended, with the exception of a determination referred to in (ii), and
  - ii) the standard set forth in section 516A (b)(1)(A) of the *Tariff Act of 1930*, as amended, with respect to a determination by the United States International Trade Commission not to initiate a review pursuant to section 751(b) of the *Tariff Act of 1930*, as amended.

## **Annex 1901.2**

### **Establishment of Binational Panels**

1. Prior to the entry into force of the Agreement, the Parties shall develop a roster of individuals to serve as panelists in disputes under this Chapter. The Parties shall consult in developing the roster, which shall include 50 candidates. Each Party shall select 25 candidates, and all candidates shall be citizens of Canada or the United States of America. Candidates shall be of good character, high standing and repute, and shall be chosen strictly on the basis of objectivity, reliability, sound judgment, and general familiarity with international trade law. Candidates shall not be affiliated with either Party, and in no event shall a candidate take instructions from either Party. Judges shall not be considered to be affiliated with either Party. The Parties shall maintain the roster, and may amend it, when necessary, after consultations.

2. A majority of the panelists on each panel shall be lawyers in good standing. Within 30 days of a request for a panel, each Party shall appoint two panelists, in consultation with the other Party. The Parties normally shall appoint panelists from the roster. If a panelist is not selected from the roster, the panelist shall be chosen in accordance with and be subject to the criteria of paragraph 1. Each Party shall have the right to exercise four peremptory challenges, to be exercised simultaneously and in confidence, disqualifying from appointment to the panel up to four candidates proposed by the other Party. Peremptory challenges and the selection of alternative panelists shall occur within 45 days of the request for the panel. If a Party fails to appoint its members to a panel within 30 days or if a panelist is struck

and no alternative panelist is selected within 45 days, such panelist shall be selected by lot on the 31st or 46th day, as the case may be, from that Party's candidates on the roster.

3. Within 55 days of the request for a panel, the Parties shall agree on the selection of a fifth panelist. If the Parties are unable to agree, the four appointed panelists shall select, by agreement, from the roster the fifth panelist within 60 days of the request for a panel. If there is no agreement among the four appointed panelists, the fifth panelist shall be selected by lot on the 61st day from the roster, excluding candidates eliminated by peremptory challenges.

4. Upon appointment of the fifth panelist, the panelists shall promptly appoint a chairman from among the lawyers on the panel by majority vote of the panelists. If there is no majority vote, the chairman shall be appointed by lot from among the lawyers on the panel.

5. Decisions of the panel shall be by majority vote and be based upon the votes of all members of the panel. The panel shall issue a written decision with reasons, together with any dissenting or concurring opinions of panelists.

6. Panelists shall be subject to the code of conduct established pursuant to Article 1910. If a Party believes that a panelist is in violation of the code of conduct, the Parties shall consult and if the Parties agree, the panelist shall be removed and a new panelist shall be selected in accordance with the procedures of this Annex.

7. When a panel is convened pursuant to Article 1904, each panelist shall be required to sign:

- a) a protective order for information supplied by the United States of America or its persons covering business proprietary and other privileged information; and
- b) an undertaking for information supplied by Canada or its persons covering confidential, personal, business proprietary and other privileged information.

8. The United States of America shall establish appropriate sanctions for violations of protective orders issued by it and of undertakings given to Canada. Canada shall establish appropriate sanctions for violations of undertakings given to it and protective orders issued by the United States of America. Each Party shall enforce such sanctions with respect to any person within its jurisdiction. Failure by a panelist to sign a protective order or undertaking shall result in disqualification of the panelist.

9. If a panelist becomes unable to fulfill panel duties or is disqualified, proceedings of the panel shall be suspended pending the selection of a substitute panelist in accordance with the procedures of this Annex.

10. Subject to the code of conduct established by the Parties, and provided that it does not interfere with the performance of the duties of such panelist, a panelist may engage in other business during the term of the panel.

11. While acting as a panelist, a panelist may not appear as counsel before another panel.

12. With the exception of violations of protective orders or undertakings signed pursuant to paragraph 7, panelists shall be immune from suit and legal process relating to acts performed by them in their official capacity.

13. The remuneration of panelists, their travel and lodging expenses, and all general expenses of the panel shall be borne equally by the Parties. Each panelist shall keep a record and render a final account of his time and expenses, and the panel shall keep a record and render a final account of all general expenses. The Commission shall establish amounts of remuneration and expenses that will be paid to the panelists.

## **Annex 1903.2**

### **Panel Procedures Under Article 1903**

1. The panel shall establish its own rules of procedure unless the Parties otherwise agree prior to the establishment of that panel. The procedures shall ensure a right to at least one hearing before the panel, as well as the opportunity to provide written submissions and rebuttal arguments. The proceedings of the panel shall be confidential, unless the Parties otherwise agree. The panel shall base its decisions solely upon the arguments and submissions of the Parties.

2. Unless the Parties otherwise agree, the panel shall, within 90 days after its chairman is appointed, present to the Parties an initial written declaratory opinion containing findings of fact and its determination pursuant to Article 1903.



3. If the findings of the panel are affirmative, the panel may include in its report its recommendations as to the means by which the amending statute could be brought into conformity with the provisions of subparagraph 2(d) of Article 1902. In determining what, if any, recommendations are appropriate, the panel shall consider the extent to which the amending statute affects interests under this Agreement. Individual panelists may provide separate opinions on matters not unanimously agreed. The initial opinion of the panel shall become the final declaratory opinion, unless a Party requests a reconsideration of the initial opinion pursuant to paragraph 4.

4. Within 14 days of the issuance of the initial declaratory opinion, a Party disagreeing in whole or in part with the opinion may present a written statement of its objections and the reasons for those objections to the panel. In such event, the panel shall request the views of both Parties and shall reconsider its initial opinion. The panel shall conduct any further examination that it deems appropriate, and shall issue a final written opinion, together with dissenting or concurring views of individual panelists, within 30 days of the request for reconsideration.

5. Unless the Parties otherwise agree, the final declaratory opinion of the panel shall be published, along with any separate opinions of individual panelists and any written views that either Party may wish to be published.

6. Unless the Parties otherwise agree, meetings and hearings of the panel shall take place at the office of the amending Party's section of the Secretariat.

## Annex 1904.13

### Extraordinary Challenge Procedure

1. The Parties shall establish an extraordinary challenge committee, comprised of three members, within fifteen days of a request pursuant to paragraph 13 of Article 1904. The members shall be selected from a ten-person roster comprised of judges or former judges of a federal court of the United States of America or a court of superior jurisdiction of Canada. Each Party shall name five persons to this roster. Each Party shall select one member from this roster and the third shall be selected from the roster by the two members chosen by the Parties or, if necessary, by lot from the roster.
2. The Parties shall establish by January 1, 1989 rules of procedure for committees. The rules shall provide for a decision of a committee typically within 30 days of its establishment.
3. Committee decisions shall be binding on the Parties with respect to the particular matter between the Parties that was before the panel. Upon finding that one of the grounds set out in paragraph 13 of Article 1904 has been established, the committee shall vacate the original panel decision or remand it to the original panel for action not inconsistent with the committee's decision; if the grounds are not established, it shall affirm the original panel decision. If the original decision is vacated, a new panel shall be established pursuant to Annex 1901.2.

## BIOGRAPHIES OF COMMISSION MEMBERS AND STAFF

### **RICHARD D. McLELLAN**

Mr. McLellan is Chairman of the Michigan Law Revision Commission, a position he has filled since 1986, the year following his appointment as a public member of the Commission.

Mr. McLellan is a partner in the 300-lawyer firm of Dykema Gossett, which has offices in Michigan, Florida and Washington, D.C. He serves as the head of his firm's Government Policy and Practice Group.

He is a graduate of the Michigan State University Honors College and the University of Michigan Law School.

Prior to entering private practice, Mr. McLellan served as an Administrative Assistant to former Governor William G. Milliken. He is a former member of the National Advisory Food and Drug Committee in the United States Department of Health, Education and Welfare. Mr. McLellan served as the Transition Director for Governor John Engler following the 1990 election.

Mr. McLellan is also the Treasurer and a member of the Executive Committee of the Michigan State Chamber of Commerce and is the President of the Library of Michigan Foundation.

His legal practice includes primarily the representation of business interests in matters pertaining to state government.

McLellan is a member of the Board of Directors of Crown America Life Insurance Company.

### **ANTHONY DEREZINSKI**

Mr. Derezinski is Vice-Chairman of the Michigan Law Revision Commission, a position he has filled since May 1986 following his appointment as a public member of the Commission in January of that year.

Mr. Derezinski is a visiting professor at Thomas M. Cooley Law School.

He is a graduate of Muskegon Catholic Central High School, Marquette University, University of Michigan Law School (Juris Doctor degree), and Harvard Law School (Master of Laws degree). He is married and has one child.

Mr. Derezinski is a Democrat and served as State Senator from 1975 to 1978. He is a member of the Board of Regents of Eastern Michigan University.

He served as a Lieutenant in the Judge Advocate General's Corps in the United States Navy from 1968 to 1971 and as a military judge in the Republic of Vietnam. He is a member of the Veterans of Foreign Wars, Derezhinski Post No. 7729, the American Academy of Hospital Attorneys, the International Association of Defense Counsel, and the National Health Lawyers' Association.

### **DAVID LEBENBOM**

Mr. Lebenbom is a public member of the Michigan Law Revision Commission and has served since his appointment in 1967, the second year of the Commission's existence.

Mr. Lebenbom is engaged in the private practice of law as David Lebenbom, P.C.

He is a graduate of Detroit Central High School, Wayne State University (where he graduated with distinction), and Columbia Law School. He is married and has four children.

Mr. Lebenbom is a Democrat and served as Chairman of the Wayne County Democratic Committee from 1961 to 1968.

He is a veteran of World War II with a Battle Star. He is a member of Congregation B'nai Moshe and Congregation Shaarey Zedek, the former President of the Jewish Community Council, and the current Vice President of the National Jewish Community Political Advisory Board.

Mr. Lebenbom is the Chair of the Columbia Law School Michigan Alumni Association.

### **MAURA D. CORRIGAN**

Ms. Corrigan is a public member of the Michigan Law Revision Commission and has served since her appointment in November 1991.

Ms. Corrigan is a shareholder in the law firm of Plunkett & Cooney, P.C.

She is a graduate of St. Joseph Academy, Cleveland, Ohio, Marygrove College, and the University of Detroit School of Law. She is married and has two children.

Ms. Corrigan is a Republican. She served as First Assistant United States Attorney for the Eastern District of Michigan, Chief of Appeals in the United States Attorney's Office, Assistant Wayne County Prosecutor, and a law clerk on the Michigan Court of Appeals. She is a member of the Oakland County Republican Party, and was selected Outstanding Practitioner of Criminal Law by the Federal Bar Association as well as awarded the Director's Award for superior performance as an Assistant United States Attorney by the United States Department of Justice.

## **DAVID M. HONIGMAN**

Mr. Honigman is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1987.

Mr. Honigman is a Republican State Senator representing the 17th Senatorial District. He was first elected to the Michigan House in November 1984 and served in that body until his election to the Senate in November 1990. He is currently Chairman of the Senate Committees on Labor and on Local Government and Urban Development, Vice-Chairman of the Senate Education Committee, and a member of the Legislative Council.

He is a graduate of Yale University (with honors) and the University of Michigan Law School. He is married.

Mr. Honigman serves on the Board of Trustees of the Michigan Cancer Foundation and the Alumni Board of Detroit County Day School. He is a member of the Michigan Regional Advisory Board of the Anti-Defamation League of B'nai Brith. He was named one of the Outstanding Young Men in America in 1985 and 1988.

Mr. Honigman is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

## **VIRGIL CLARK SMITH**

Mr. Smith is a legislative member of the Michigan Law Revision Commission and has served on the Commission since May 1988.

Mr. Smith is a Democratic State Senator representing the 2nd Senatorial District. He was first elected to the Michigan House in November 1976 and served in that body until his election to the Senate in March 1988. He currently serves on the Senate Committees on Finance; Reapportionment; Judiciary; and Family Law, Criminal Law, and Corrections. He is a member of the Afro-American Legislative Caucus.

He is a graduate of Detroit Pershing High School, Michigan State University (Bachelor of Arts Degree in Political Science), and Wayne State University Law School. Mr. Smith has two children.

Mr. Smith was a supervisory attorney for the Inkster office of Wayne County Legal Services and was Senior Assistant Corporation Counsel for the City of Detroit Law Department before his election to the Legislature.

## **W. PERRY BULLARD**

Mr. Bullard is a legislative member of the Michigan Law Revision Commission and has served on the Commission since January 1981.

Mr. Bullard is a Democratic State Representative representing the 53rd House District. He was first elected to the Michigan House in November 1972. Among his committee assignments, he has served as Chair of the House Civil Rights Committee and Chair of the House Labor Committee. He is currently Chair of the House Judiciary Committee.

He is a graduate of Harvard University and the University of Michigan Law School. He is married and has one child.

Mr. Bullard was in the United States Navy from 1964 to 1968, receiving 13-air medals. He is a member of the Michigan Commission on Criminal Justice, Educational Fund for Individual Rights Advisory Committee, and the American Civil Liberties Committee and is the Vice Chairman of the National Conference of State Legislatures State-Federal Assembly Energy Committee.

He was named the Police Officers Association of Michigan's Legislator of the Year in 1979 and 1988, the Outstanding Legislator of the Year in 1980 by the American Association of University Professors, and Legislator of the Year for the Michigan Network of Runaway & Youth Services for 1989.

Mr. Bullard is also a Commissioner of the National Conference of Commissioners on Uniform State Laws and a member of the Michigan 21st Century Commission on the Courts.

### **MICHAEL E. NYE**

Mr. Nye is a legislative member of the Michigan Law Revision Commission and has served on the Commission since March 1991.

Mr. Nye is a Republican State Representative representing the 41st House District. He was first elected to the Michigan House in November 1982. He is currently Minority Vice Chairman of the House Judiciary Committee and serves on the House Committees on Labor and on Tourism and Wildlife.

He is a graduate of Purdue University and University of Detroit Law School. He is married and has two children.

Mr. Nye was named the 1991 Legislator of the Year by the Michigan Association of Chiefs of Police and the 1990 Michigan Environmental Legislator of the Year by the Michigan Environmental Defense Association.

Mr. Nye is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.

### **ELLIOTT JOHN SMITH**

Mr. Smith is an ex officio member of the Michigan Law Revision Commission due to his position as the Director of the Legislative Service Bureau, a position he has filled since January 1980.

Mr. Smith has worked with Michigan legislators since 1972 in various capacities, including his work as a Research Analyst for Senator Stanley Rozycki, Administrative Assistant to Senator Anthony Derezinski, and Executive Assistant to Senate Majority Leader William Faust before being named to his current position.

He is a graduate of Michigan State University. He is married and has two children.

### **JEROLD ISRAEL**

Mr. Israel is the Executive Secretary to the Michigan Law Revision Commission, a position he has filled since October 1973.

Mr. Israel joined the University of Michigan law faculty in 1961 and has taught courses in constitutional law, civil procedure, criminal law, and criminal procedure. He is currently the Alene and Allan F. Smith Professor of Law at the University of Michigan Law School.

He is a graduate of Case-Western Reserve University and Yale University. Following his graduation from Yale, he served as a law clerk to Justice Potter Stewart of the United States Supreme Court. He is married and has three children.

Mr. Israel was co-reporter for the Michigan State Bar Association's Proposed Michigan Criminal Code and for the National Conference of Commissioners on Uniform State Laws' Uniform Rules of Criminal Procedure. He has served as a member of Michigan Supreme Court committees and gubernatorial commissions and as a consultant to other states revising their court rules and statutes.

He has co-authored several publications concerning criminal procedure, including the most widely used casebook and a frequently cited three-volume treatise.

### **GARY GULLIVER**

Mr. Gulliver acts as the liaison between the Michigan Law Revision Commission and the Legislative Service Bureau, a responsibility he has had since May 1984.

Mr. Gulliver is currently the Director of Legal Research with the Legislative Service Bureau. He is a graduate of Albion College (with honors) and Wayne State University Law School. He is married and has three children.

Mr. Gulliver is also a Commissioner of the National Conference of Commissioners on Uniform State Laws.