

Bermuda International Arbitration and Conciliation Act 1992

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BERMUDA INTERNATIONAL CONCILIATION AND ARBITRATION ACT 1993

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[29 June 1993]

WHEREAS it is expedient to provide for the conduct of international commercial conciliations and arbitrations and the recognition and enforcement of foreign arbitral awards in Bermuda and for matters connected therewith;

[Words of enactment omitted]

Short Title

1 This Act may be cited as the Bermuda International Conciliation and Arbitration Act 1993.

PART I PRELIMINARY

Interpretation; Schedules 1, 2 and 3

2 In this Act, unless the context otherwise requires —

"arbitral award" has the same meaning as in the New York Convention;

"arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

"arbitration agreement" has the same meaning as in article 7(1) of the Model Law;

"conciliation" includes mediation;

"Conciliation Rules" means the UNCITRAL Conciliation Rules adopted by the United Nations Commission on International Trade Law on 23 July 1980, the English text of which is set out in Schedule 1;

"Convention award" means an award to which Part IV applies, namely, an award made in pursuance of an arbitration agreement in a State or territory other than Bermuda, which is a party to the New York Convention;

"Court" means the Supreme Court or the Court of Appeal of Bermuda;

"dispute" includes a difference;

"international arbitration agreement" means an arbitration agreement pursuant to which an arbitration is, or would if commenced be, international within the meaning of article 1(3) of the Model Law;

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

"the New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration on 10 June 1958 the English text of which is set out in Schedule 3.

PART II CONCILIATION

Conciliation

3 Parties to an international arbitration agreement are hereby encouraged to resolve any disputes between them through conciliation.

Application of this Part

4 The provisions of this Part shall apply to the extent that the parties have not otherwise agreed in writing.

Appointment of conciliator

5 (1) The parties to an international arbitration agreement may appoint or permit an arbitral tribunal or other third party to appoint one or more persons to serve as the conciliator or conciliators (hereafter referred to as "the conciliator") who shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) Where the parties have agreed in writing for the appointment of a conciliator by an institution or a person who is not one of the parties and that institution or person refuses to make the appointment or does not make the appointment within the time specified in the agreement, or if no time is specified, within a reasonable time not exceeding twenty-eight days of being notified of the existence of the dispute, any party to the agreement may by notice in writing require the institution or person in default to appoint a conciliator and shall forthwith give a copy of the notice to the other parties to the agreement; if the appointment is not made within seven clear days after giving the notice to the institution or person, the Court may on the application of any party to the agreement appoint a conciliator (in respect of which decision there is no right of appeal) who shall have the like powers to act in the conciliation proceedings as if he had been appointed in accordance with the terms of the agreement.

Guide for conciliator

6 The 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 business practices between the parties.

Conduct of conciliation proceedings

7 (1) The conciliator may conduct the conciliation proceedings in such manner as the conciliator considers appropriate, taking into account the circumstances of the case, the wishes of the parties and the desirability of a speedy settlement of the dispute.

(2) The conciliator may, unless otherwise agreed in writing by the parties to the agreement, meet at any place designated by the conciliator for discussions with one or more parties, for the hearing of witnesses, experts or parties, for inspection of documents, goods or other property or for consultation with the conciliator and need not be in Bermuda when signing any recommendation or other communication to the parties or any settlement agreement.

(3) Except as otherwise provided in this Act, other provisions of this Act, the Evidence Act 1905 [*title 8 item 10*] and the Supreme Court Act 1905 [*title 8 item 1*] and the rules made thereunder shall not apply to conciliation proceedings under this Act.

Draft conciliation settlement

8 At any time during the proceedings, the conciliator 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.

Acceptance of settlement not required

9 No party may be required to accept any settlement proposed by the conciliator.

Admissibility of evidence and nondisclosure in other proceedings

10 (1) Unless otherwise agreed in writing by the parties, it shall be an implied term of the written agreement to conciliate that the parties undertake not to rely on or introduce as evidence in any arbitral or judicial proceedings in any jurisdiction, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings—

(a) views expressed or suggestions made by any party in respect of possible settlement of the dispute;

(b) admissions made by any party in the course of the conciliation proceedings;

(c) proposals made by the conciliator;

(d) the fact that the other party had indicated willingness to accept all, or part, of a proposal for settlement made by the other party, or by the conciliator.

(2) Without limiting the obligations created by subsection (1), evidence of anything said or of any admission made in relation to any or all of the matters referred to in subsection (1)(a) to (d) (inclusive) is not admissible in evidence in any arbitration conducted pursuant to Part III or judicial proceeding in Bermuda, and disclosure of any such evidence shall not be compelled in

any civil action in Bermuda in which, pursuant to the law, testimony may be compelled to be given.

(3) Where 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.

Agreement to stay judicial or arbitral proceedings

11 Unless the parties otherwise agree in writing, the written agreement of the parties to submit a dispute to conciliation shall be 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.

Termination of conciliation proceedings

12 The conciliation proceedings may be terminated as to all parties in any of the following cases:

(a) in the case where the parties have agreed in writing that the conciliation shall be conducted in accordance with the Conciliation Rules, the conciliation proceedings shall be terminated in accordance with Article 15 of those Rules;

(b) in the case where the parties have not agreed in writing that the Conciliation Rules shall apply, unless a contrary intention appears in their written agreement or in any rules which they agree in writing shall apply, it shall be an implied term of an agreement to participate in conciliation that in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties within three months or such longer period as the parties may agree to, of the date of the appointment of the conciliator, or where he is appointed by name in the agreement, of the receipt by him of written notification of the existence of a dispute, the conciliation proceedings shall thereupon terminate;

(c) in the case where there is a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, conciliation proceedings shall terminate on the date of the declaration;

(d) in the case where there is a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, the conciliation proceedings shall terminate on the date of the declaration;

(e) in the case where there is the signing of a settlement agreement by all of the parties, conciliation proceedings shall terminate on the date of the agreement.

Termination of conciliation proceedings as to particular parties

13 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, 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.

Conciliator as arbitrator, ineligibility for appointment etc.

14 (1) 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 agree in writing to such participation or the rules agreed for conciliation or arbitration so provide.

(2) Where the parties have agreed in writing that a person appointed as a conciliator shall act as an arbitrator, in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties no objection shall be taken to the appointment of such person as an arbitrator, or to his conduct of the arbitration proceedings or to any award, solely on the ground that he had acted previously as a conciliator in connection with some or all of the matters referred to arbitration; but if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required first to act as a conciliator unless the parties have otherwise agreed in writing.

Non-waiver of rights or remedies by submission to conciliation

15 By submitting to conciliation, no party has 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.

Costs

16 (1) Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties.

(2) Costs shall be borne equally by the parties unless the

settlement agreement provides for a different apportionment and all other expenses incurred by a party shall be borne by that party.

- (3) In this section "costs" means—
- (a) a reasonable fee to be paid to the conciliator;
 - (b) the travel and other reasonable expenses of the conciliator;
 - (c) the travel and other reasonable expenses of witnesses requested by the conciliator with the consent of the parties;
 - (d) the cost of any expert advice requested by the conciliator with the consent of the parties;
 - (e) the cost of any court;
 - (f) the administration fees and expenses of an arbitral institution.

No consent to court jurisdiction upon failure of conciliation

17 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 constitute consent to the jurisdiction of any court in Bermuda in the event conciliation fails except that this section does not affect the jurisdiction of any court in Bermuda with respect to any settlement agreement resulting from a conciliation.

Immunity of participants in conciliation

18 Neither the conciliator, the parties, nor their representatives nor any assistant nor any witness or expert shall be subject to service of process on any civil matter relating to the dispute in respect of the conciliation under this Act while present in Bermuda for the purpose of arranging for or participating in conciliation pursuant to this Act.

Non-liability of conciliator

19 No person who serves as a conciliator shall be held liable in an action for damages resulting from any act or omission in his capacity as a conciliator in connection with any conciliation proceeding conducted under this Act except that such person may be liable for the consequences of conscious and deliberate wrongdoing.

Settlement agreements

20 If the parties to an arbitration agreement reach agreement by means of conciliation or otherwise in settlement of their dispute and enter into an agreement in writing containing the terms of settlement (the "settlement agreement") the settlement agreement shall, for the purposes of its enforcement in Bermuda, be treated as an award on an arbitration agreement and may, by

leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the agreement, pursuant to section 48.

Representation in conciliation proceedings

21 (1) Where, in accordance with this Act and with the written agreement of the parties or at the request in writing of a party, as the case may be, conciliation proceedings are conducted by way of oral hearings for the presentation of evidence or for oral argument, or conciliation proceedings are conducted on the basis of documents or other materials, the following provisions shall apply.

(2) A party may appear in person before conciliation proceedings and may be represented:

(a) by himself;

(b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or

(c) by any other person of that party's choice.

(3) A legal practitioner or a person, referred to in subsection (2)(b) or (c) respectively, while acting on behalf of a party to conciliation proceedings to which this Part applies shall not thereby be taken to have breached any law regulating admission to, or the practice of, the profession of the law within Bermuda in which the proceedings are conducted.

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

PART III INTERNATIONAL ARBITRATION

Interpretation

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

Model Law to have force of law

23 (1) Subject to this Part, the Model Law has the force of law in Bermuda.

(2) In the Model Law—

- (a) "State" means Bermuda and any foreign country;
- (b) "this State" means Bermuda;
- (c) "different States" shall be treated as including a reference to Bermuda and any other place;
- (d) "any agreement in force between this State and any other State or States" shall be treated as being a reference to any Convention or Treaty that binds Bermuda and any other place that has the force of law in Bermuda.

Interpretation of Model Law—use of extrinsic material

24 For the purposes of interpreting the Model Law, reference may be made to the documents of—

- (a) the United Nations Commission on International Trade Law, including but not limited to, documents of its Secretariat submitted to the Commission and the Summary Records of sessions of the Commission; and
- (b) the Commission's working group for the preparation of the Model Law relating to the Model Law.

Court specified for purposes of Article 6 of Model Law

25 (1) The courts that are competent to perform the functions referred to in Article 6 of the Model Law are as follows:

- (a) for the purposes of Articles 11(3), 11(4), 13(3), 14 and 16(3) of the Model Law, the Supreme Court and there is no right of appeal from a decision of that court;
- (b) for the purposes of Article 34(2) of the Model Law, the Court of Appeal and there is no right of appeal from a decision of that court.

(2) Notwithstanding section 12 of the Court of Appeal Act 1964 (jurisdiction of the Court of Appeal) the Court of Appeal shall have jurisdiction to hear and determine an application made to it pursuant to Article 34(2) of the Model Law.

[Section 25 amended by 1994:49 effective 28 December 1994]

Orders under Article 17 of the Model Law

26 Chapter VIII of the Model Law applies to an order by an arbitral tribunal under Article 17 of the Model Law requiring a party—

- (a) to take an interim measure of protection; or

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(b) to provide security in connection with a measure referred to in paragraph (a),

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

Articles 34 and 36 of Model Law—public policy

27 Without limiting the generality of Articles 34(2)(b)(ii) and 36(1)(b)(ii) of the Model Law, it is declared, for removing doubts, that, for the purposes of Articles 34(2)(b)(ii) and 36(1)(b)(ii), an award is in conflict with the public policy of Bermuda if the making of the award was induced or affected by fraud or corruption.

Chapter VIII of Model Law not to apply in certain cases

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

Settlement of dispute otherwise than in accordance with Model Law

29 Where the parties to an arbitration agreement have, whether in the agreement or in any other document in writing, agreed that any dispute that has arisen or may arise between them is not to be settled in accordance with the Model Law, the Model Law does not apply in relation to the settlement of that dispute and in such a case unless otherwise agreed in writing by the parties the Arbitration Act 1986 [*Title 8 Item 75*] shall apply.

Failure of an arbitrator to participate in proceedings

30 (1) Any resignation by an arbitrator shall be addressed to the arbitral tribunal and shall not be effective unless the arbitral tribunal determines that there are sufficient reasons to accept the resignation, and if the arbitral tribunal so determines the resignation becomes effective on the date designated by the arbitral tribunal.

(2) If an arbitrator on a three-person or five-person arbitral tribunal fails to participate in the arbitration, the other arbitrators have, unless the parties otherwise agree, the power in their sole discretion to continue the arbitration and to make any decision, ruling or award, notwithstanding the non-participation of that arbitrator.

(3) In determining whether to continue the arbitration or to render any decision, ruling, or award without the participation of an arbitrator, the other arbitrators shall take into account the stage of the arbitration, the reason, if any, expressed by the arbitrator for his non-participation and such other matters as they consider appropriate in the circumstances of the case.

(4) In the event of the other arbitrators determining not to continue the arbitration without the non-participating arbitrator, the arbitral tribunal shall declare the office vacant and a substitute arbitrator shall be appointed pursuant to Article 15 of the Model Law, unless the parties agree on a different method of appointment.

Interest

31 (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where an arbitral tribunal determines to make an award for the payment of money (whether on a claim for a liquidated or an unliquidated amount), the tribunal may, subject to subsections (2) and (4), include in the sum for which the award is made interest, at such reasonable rate as the tribunal determines on the whole or any part of the money, for the whole or any part of the period between the date on which the cause of action arose and the date on which the award is made.

(2) Subsection (1) does not apply in relation to any amount upon which interest is payable as of right whether by virtue of an agreement or otherwise.

(3) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, where an arbitral tribunal makes an award for the payment of money, the tribunal may, subject to subsection (4) direct that interest, at such reasonable rate as the tribunal determines, is payable, from the day of the making of the award or such later day as the tribunal specifies, on so much of the money as is from time to time unpaid and any interest that so accrues shall form part of the award.

(4) Where interest is included in the sum referred to in subsection (1) or payable pursuant to subsection (3) the following applies:

(a) if the award is made in a currency other than the currency of Bermuda, the Interest Credit Charges (Regulations) Act 1975 [*title 17 item 22*] does not apply;

(b) if the award is made in the currency of Bermuda, the Interest Credit Charges (Regulations) Act 1975 [*title 17 item 22*] applies.

Costs

32 (1) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, the costs of an arbitration, including—

(a) fees and expenses of the arbitrator and the costs of expert advice and of other assistance required by the arbitral tribunal;

(b) legal fees and expenses of the parties, their representatives, witnesses and expert witnesses;

(c) administration fees and expenses of an arbitral institution; and

(d) any other expenses incurred in connection with the arbitral proceedings,
shall be in the discretion of the arbitral tribunal.

(2) Unless the parties to an arbitration agreement have (whether in the agreement or in any other document in writing) otherwise agreed, an arbitral tribunal may in making an award—

(a) direct to whom, by whom, and in what manner, the whole or any part of the costs that it awards shall be paid; and

(b) fix the amount of costs to be so paid or any part of those costs.

Immunity of participants in arbitration

33 No arbitrator, party, party representative or assistant, witness or expert shall be subject to service of process on any civil matter relating to the dispute in respect of the arbitration under this Act while present in Bermuda for the purpose of arranging for or participating in arbitration pursuant to this Act.

Non-liability of arbitrator

34 An arbitrator is not liable for any act or omission in the capacity of arbitrator in connection with any arbitration conducted under this Act except that he may be liable for the consequences of conscious and deliberate wrongdoing.

Conduct of proceedings, witnesses, etc.

35 (1) Unless a contrary intention is expressed therein, every arbitration agreement shall, where such a provision is applicable to the arbitration, be treated as containing a provision that the arbitral tribunal has power to examine witnesses on oath or affirmation and also power to administer oaths to, or take the affirmations of, witnesses in the arbitration.

(2) Subject to section 10, an arbitral tribunal may receive any evidence that the tribunal considers relevant and, unless the parties have otherwise agreed, shall not be bound by rules of evidence applicable in Bermuda.

(3) Any party to an arbitration under an arbitration agreement may sue out a writ of *subpoena ad testificandum* or a writ of *subpoena duces tecum* but no person shall be compelled under any such writ to produce any document which he could not be compelled to produce on the trial of an action, and the Court may order that a writ of *subpoena ad testificandum* or of *subpoena duces tecum* shall be sue to compel the attendance before an arbitral tribunal of a witness wherever he may be within Bermuda.

(4) The Court may also order that a writ of *habeas corpus* shall issue to bring up a prisoner for examination before an arbitral tribunal.

(5) The Court shall have, for the purpose of and in relation to an arbitration, the same power of making orders in respect of—

- (a) examination on oath of any witness before an officer of the Court or any other person, and the issue of a commission or request for the examination of a witness out of the jurisdiction;
- (b) the preservation, interim custody or sale of any goods which are the subject matter of the arbitration;
- (c) securing the amount in dispute in the arbitration;
- (d) the detention, preservation or inspection of any property or thing which is the subject of the arbitration or as to which any question may arise therein, and authorizing for any of the purposes aforesaid any person to enter upon or into any land or building in the possession of any party to the arbitration, or authorizing any samples to be taken or any observation to be made or experiment to be tried which may be necessary or expedient for the purpose of obtaining full information or evidence; and
- (e) interim injunctions or the appointment of a receiver,

as it has for the purpose of and in relation to an action or matter in the Court except that nothing in this subsection shall be taken to prejudice any power which may be vested in an arbitrator of making orders with respect to any of the matters aforesaid.

Interim, interlocutory or partial awards

36 Unless a contrary intention is expressed therein, it shall be an implied term in every arbitration agreement that the arbitral tribunal may, if the tribunal thinks fit, make an interim, interlocutory or partial award, and any reference in this Part to an award includes a reference to an interim, interlocutory or partial award.

Representation in proceedings

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

- (2) A party may appear in person before an arbitral tribunal and may be represented—
 - (a) by himself;
 - (b) by a duly qualified legal practitioner from any legal jurisdiction of that party's choice; or
 - (c) by any other person of that party's choice.

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

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

Transitional

38 This Part does not affect any arbitration commenced, within the meaning of Article 21 of the Model Law, before the operative date of this Act, but applies to an arbitration so commenced on or after the operative date of this Act under an agreement made before the operative date of this Act.

PART IV ENFORCEMENT OF CONVENTION AWARDS

Effect this Part

39 This Part shall have effect with respect to the enforcement of Convention awards.

Effect of Convention awards

40 (1) A Convention award shall, subject to this Part, be enforceable in Bermuda either by action or may by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

(2) Any Convention award which would be enforceable under this Part shall be treated as binding for all purposes on the persons as between whom it was made, and may accordingly be relied on by any of those persons by way of defence, set off or otherwise in any legal proceedings in Bermuda and any reference in this Part to enforcing a Convention award shall be construed as including references to relying on such an award.

Evidence

41 The party seeking to enforce a Convention award must produce—

- (a) the duly authenticated original award or a duly certified copy of it;
- (b) the original arbitration agreement or a duly certified copy of it; and

(c) where the award or agreement is in a foreign language, a translation of it certified by an official or sworn translator or by a diplomatic or consular agent.

Refusal of enforcement

42 (1) Enforcement of a Convention award shall not be refused except in the cases mentioned in this section.

(2) Enforcement of a Convention award may be refused if the person against whom it is invoked proves —

(a) that a party to the arbitration agreement was (under the law applicable to him) under some incapacity; or

(b) that the arbitration agreement was not valid under the law to which the parties subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(c) that he 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

(d) subject to subsection (4), that the award deals with a difference 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; or

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

(f) that 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, it was made.

(3) Enforcement of a Convention award may also be refused if the award is in respect of a matter which is not capable of settlement by arbitration, or if it would be contrary to public policy to enforce the award.

(4) A Convention award which contains decisions on matters not submitted to arbitration may be enforced to the extent that it contains decisions on matters submitted to arbitration which can be separated from those on matters not so submitted.

(5) Where an application for the setting aside or suspension of a Convention award has been made to such a competent authority as is mentioned in subsection (2)(f), the Court before which enforcement of the award is sought may, if it thinks fit, adjourn the proceedings and may, on the application of the party seeking to enforce the award, order the other party to give security.

Saving

43 Nothing in this Part shall prejudice any right to enforce or rely on an award under this Part or otherwise.

Order to be conclusive evidence

44 A certificate purporting to be issued under the hand of the Deputy Governor to the effect that Her Majesty has by Order in Council declared that any State specified in the certificate is a party to the New York Convention shall be conclusive evidence in the proceedings that that State is a party to that Convention on the date of the certificate.

PART V GENERAL

Hearing of proceedings

45 Subject to the Constitution, proceedings in any court under this Act shall on the application of any party to the proceedings be heard otherwise than in open court.

Restrictions on reporting of proceedings

46 (1) This section applies to proceedings in any court under this Act heard otherwise than in open court.

(2) A court in which proceedings to which this section applies are being heard shall, on the application of any party to the proceedings, give directions as to what information, if any, relating to the proceedings may be published.

(3) A court shall not give a direction under subsection (2) permitting information to be published unless—

- (a) all parties to the proceedings agree that such information may be published; or
- (b) the court is satisfied that the information, if published in accordance with such directions as it may give, would not reveal any matter, including the identity of any party to the proceedings, that any party to the proceedings reasonably wishes to remain confidential.

(4) Notwithstanding subsection (3), where a court gives a judgment in respect of proceedings to which this section applies and considers that judgment to be of major legal interest, it may direct that reports of the judgment may be published in law reports and professional publications but, if any party to the proceedings reasonably wishes to conceal any matter, including the fact that he was such a party, the court shall

- (a) give directions as to the action that shall be taken to conceal that matter in the law reports and the professional publications; and

- (b) if it considers that a report published in accordance with directions given under paragraph (a) would be likely to reveal that matter, direct that no law report or

professional publication shall be published until after the end of such period, not exceeding ten years, as it considers appropriate.

Costs in respect of unqualified person

47 Section 31 of the Bermuda Bar Act 1974 [*title 30 item 3*], (which provides that no costs in respect of anything done by an unqualified person acting as a barrister and attorney shall be recoverable in any action, suit or matter) shall not apply to the recovery of costs directed by an award under this Act.

Enforcement of award

48 An award on an arbitration agreement may, by leave of the Court, be enforced in the same manner as a judgment or order to the same effect and, where leave is so given, judgment may be entered in terms of the award.

Crown to be bound

49 This Act except Part IV binds the Crown.

Amends Arbitration Act 1986

50 The Arbitration Act 1986 [*title 8 item 75*] is amended as follows:

- (a) in section 2, repeal the definition of the expressions "Convention award" and "the New York Convention";
- (b) repeal Part IV;
- (c) repeal the First Schedule;
- (d) delete the heading "SECOND SCHEDULE" and substitute therefor the heading "SCHEDULE".

Amends Limitation Act 1984

51 The Limitation Act 1984 [*title 8 item 42*] is amended as follows:

- (a) in the preamble, insert immediately after the word "arbitrations" the words ", to provide for any law relating to the limitation of actions to be treated, for the purposes of cases in which effect is given to foreign law or to determination by foreign courts, as a matter of substance rather than as a matter of procedure";

- (b) insert immediately above the heading "PART III" the following Part:

PART IIA

FOREIGN LIMITATION PERIODS

Application of foreign limitation law

34A (1) Subject to the following provisions of this Part, where in any action or proceedings in a court in Bermuda the law of any other country falls (in accordance with rules of private international law applicable by any such court) to be taken into account in the determination of any matter—

(a) the law of that other country relating to limitation shall apply in respect of that matter for the purposes of the action or proceedings; and

(b) except where that matter falls within subsection (2), the law of Bermuda relating to limitation shall not so apply.

(2) A matter falls within this subsection if it is a matter in the determination of which both the law of Bermuda and the law of some other country fall to be taken into account.

(3) The law of Bermuda shall determine for the purposes of any law applicable by virtue of subsection (1)(a) whether, and the time at which, proceedings have been commenced in respect of any matter; and, accordingly, section 36 applies in relation to time limits applicable by virtue of subsection (1)(a) as it applies in relation to time limits under this Act.

(4) A court in Bermuda, in exercising under subsection (1)(a) any discretion conferred by the law of any other country, shall so far as practicable exercise that discretion in the manner in which it is exercised in comparable cases by the courts of that other country.

(5) In this section "law", in relation to any country, shall not include rules of private international law applicable by the courts of that country or, in the case of Bermuda, this Part.

Exceptions to 34A

34B (1) In any case in which the application of section 34A would to any extent conflict (whether under subsection (2) or otherwise) with public policy, that section shall not apply to the extent that its application would so conflict.

(2) The application of section 34A in relation to any action or proceedings shall conflict with public policy to the extent that its application would cause undue hardship to a person who is, or might be made, a party to the action or proceedings.

(3) Where, under a law applicable by virtue of section 34A(1)(a) for the purposes of any action or proceedings, a limitation period is or may be extended or interrupted in respect of the absence of a party to the action or proceedings from any specified jurisdiction or country, so much of that law as provides for the extension or interruption shall be disregarded for those purposes.

Foreign judgments on limitation points

34C Where a court in any country outside Bermuda has determined any matter wholly or partly by reference to the law of that or any other country (including Bermuda) relating to limitation, then, for the purposes of the law relating to the effect to be given in Bermuda to that determination, that court shall, to the extent that it has so determined the matter, be deemed to have determined it on its merits.

Meaning of law relating to limitation

34D (1) Subject to subsection (3), references in this Part to the law of any country (including Bermuda) relating to limitation shall, in relation to any matter, be construed as references to so much of the relevant law of that country as (in any manner) makes provision with respect to a limitation period applicable to the bringing of proceedings in respect of that matter in the courts of that country and shall include—

(a) references to so much of that law as relates to, and to the effect of, the application, extension, reduction or interruption of that period; and

(b) a reference, where under that law there is no limitation period which is so applicable, to the rule that such proceedings may be brought within an indefinite period.

(2) In subsection (1) "relevant law", in relation to any country, means the procedural and substantive law applicable, apart from any rules of private international law, by the courts of that country.

(3) References in this Part to the law of Bermuda relating to limitation shall not include the rules by virtue of which a court may, in the exercise of any discretion, refuse equitable relief on the grounds of acquiescence or otherwise; but, in applying those rules to a case in relation to which the law of any country outside Bermuda is applicable by virtue of section 34A(1)(a) (not being a law that

provides for a limitation period that has expired), a court in Bermuda shall have regard, in particular, to the provisions of the law that is so applicable.

Application of this Part to arbitrations

34E The references to any other limitation enactment in section 35 include references to sections 34A, 34B and 34D; and accordingly, in section 35(5), the reference to the time prescribed by a limitation enactment has effect for the purposes of any case to which section 34A applies as a reference to the limitation period, if any, applicable by virtue of section 34A.

Part applies to Crown

34F (1) This Part applies in relation to any action or proceedings by or against the Crown as it applies in relation to actions and proceedings to which the Crown is not a party.

(2) For the purposes of this section references to an action or proceedings by or against the Crown include references to any action or proceedings by or against any Government department or any officer of the Crown as such or any person acting on behalf of the Crown.

Transitional provision

34G Nothing in this Part—

- (a) affects any action, proceedings or arbitration commenced in Bermuda before the date of the coming into operation of this Part; or
- (b) applies in relation to any matter if the limitation period which, apart from this Part, would have been applied in respect of that matter in Bermuda expired before the date of the coming into operation of this Part."

SCHEDULE 1

Section 2

UNCITRAL CONCILIATION RULES

(as adopted by the United Nations Commission on International Trade Law on 23 July 1980)

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^[1], 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]In this and all following articles, the term 'conciliator' applies to a sole conciliator, two or three conciliators, as the case may be.

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 therefor.

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 agreement²¹²¹. 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 to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

²¹²¹The 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.

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 proceeding 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 expert advice requested by the conciliator with the consent of the parties;
- (e) 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.

SCHEDULE 2 Section 2

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION
(AS ADOPTED BY THE UNITED NATIONS COMMISSION ON INTERNATIONAL
TRADE LAW ON 21 JUNE 1985)

CHAPTER 1. GENERAL PROVISIONS

Article 1. Scope of application*

- (1) This Law applies to international commercial** arbitration, subject to any agreement in force between this State and any other State or States.
- (2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of this State.
- (3) An arbitration is international if:
 - (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States; or
 - (b) one of the following places is situated outside the State in which the parties have their places of business:
 - (i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;
 - (ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject-matter of the dispute is most closely connected; or
 - (c) the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

* 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.

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

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

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

Article 2. Definitions and rules of interpretation

For the purposes of this Law:

(a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;

(b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(c) "court" means a body or organ of the judicial system of a State;

(d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination;

(e) where a provision of this Law refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;

(f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3. Receipt of written communications

(1) Unless otherwise agreed by the parties:

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

- (b) the communication is deemed to have been received on the day it is so delivered.
- (2) The provisions of this article do not apply to communications in court proceedings.

Article 4. Waiver of right to object

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

Article 5. Extent of court intervention

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

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

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

CHAPTER II. ARBITRATION AGREEMENT

Article 7. Definition and form of arbitration agreement

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

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

Article 8. Arbitration agreement and substantive claim before court

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

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

Article 9. Arbitration agreement and interim measures by court

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

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 10. Number of arbitrators

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

Article 11. Appointment of arbitrators

- (1) No person shall be precluded by reason of his nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this article.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in article 6;
 - (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or other authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (a) a party fails to act as required under such procedure, or
 - (b) the parties, or two arbitrators, are unable to reach an agreement expected of them under such procedure, or

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

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

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

Article 12. Grounds for challenge

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

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

Article 13. Challenge procedure

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

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

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

Article 14. Failure or impossibility to act

- (1) If an arbitrator becomes *de jure* or *de facto* unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from his office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court or other authority specified in article 6 to decide on the termination of the mandate, which decision shall be subject to no appeal.
- (2) If, under this article or article 13(2), an arbitrator withdraws from his office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15. Appointment of substitute arbitrator

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

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

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

- (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.
- (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence. A party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator. A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings. The arbitral tribunal may, in either case, admit a later plea if it considers the delay justified.
- (3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this article either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in article 6 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Article 17. Power of arbitral tribunal to order interim measures

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

CHAPTER V. CONDUCT OF ARBITRAL PROCEEDINGS

Article 18. Equal treatment of parties

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

Article 19. Determination of rules of procedure

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

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

Article 20. Place of arbitration

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

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

Article 21. Commencement of arbitral proceedings

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

Article 22. Language

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

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

Article 23. Statements of claim and defence

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

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

Article 24. Hearings and written proceedings

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

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

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

Article 25. Default of a party

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

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

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

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

Article 26. Expert appointed by arbitral tribunal

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

Article 27. Court assistance in taking evidence

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

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28. Rules applicable to substance of dispute

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

Article 29. Decision-making by panel of arbitrators

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

Article 30. Settlement

(1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the statement 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.***

*** 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.

Article 36. Grounds for refusing recognition or enforcement

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

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

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

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

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

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

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

(b) if the court finds that:

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

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

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

UNITED NATIONS CONFERENCE ON INTERNATIONAL COMMERCIAL
ARBITRATION

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL
AWARDS, DONE AT NEW YORK, ON 10 JUNE 1958

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 the 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, 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 contains decisions on matters submitted to arbitration may be recognized and enforced; or
- (d) the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

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

(a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

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

Article VII

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

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

Article VIII

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

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

Article IX

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

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

Article X

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

2 At any time thereafter any such 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 of 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.

*[Amended by
1994 : 49]*

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