a) UNCITRAL's Model Law on International Commercial Arbitration

The Sub-Committee examined the UNCITRAL's text of the Model Law article by article. The discussions were as follows:

Article 1

Scope of Application

(1) The Sub-Committee noted that the first paragraph of this article sets forth the definition of 'international' but did not define the term 'commercial' and instead the text had provided in a footnote an illustrative list of commercial relationships. The Sub-Committee decided to recommend that a definition of the term "commercial" should be included within and made an integral part of the Model Law. As regards the question whether this definition should be illustrative or exhaustive, one view favoured an illustrative definition, the other preferred an exhaustive one.

(2) The Sub-Committee also agreed to recommend a drafting change in Article 1(1), namely, "which has effect in this State" to be replaced by the expression "which is in force in this State".

(3) It was noted that the Model Law did not contain any provision on the territorial scope of application. The Sub-Committee considered the question whether the Model Law should contain such a provision. After deliberation, it decided that the Model Law should not incorporate territorial limit.

Article 2

Definitions and Rules of Interpretation

(1) This Article sets forth definitions of certain terms as also rules of interpretation. The Sub-Committee decided to recommend that the definitional provisions and provisions relating to rules of interpretation should be divided into the independent articles entitled "Definitions" and "Rules of Interpretation", respectively. It was also agreed that it would be appropriate to locate the 'Interpretation' article towards the end of the Model Law.

(2) It was suggested by one representative to include a definition of the term "party" to the effect that that term included natural

or juridical persons or entities who had concluded an arbitration agreement irrespecive of whether the persons or entities were named or identified in the Arbitration Agreement.

Article 4

Waiver of Right to Object

Article 4 estoppes a party from later invoking non-compliance with a procedural requirement laid down in a non-mandatory provision of the Model Law, or in the arbitration agreement, if that party does not object thereto without delay. The Sub-Committee felt that the term "without delay" was vague and it would be appropriate if some time-limit was indicated.

Article 5

Scope of Court Intervention

(1) The Sub-Committee agreed with the suggestion made by one representative that the title of this article was inappropriate and should be amended to "Limitation of Court Intervention."

(2) One representative was of the view that this Article should either be deleted or exact circumstances should be specified in which the Court could intervene.

Article 6

Court for certain functions of Arbitration, Assistance and Supervision

(1) This Article requires the State adopting the Model Law to designate a specific court to perform certain functions referred to in specified provisions of the Model Law. On the suggestion of one representative, the Sub-Committee took the view that designated courts by the national authority should have the jurisdiction to deal with matters concerning the Model Law.

(2) The Sub-Committee recommended reformulation of this article as under:

Courts with jurisdiction to perform the functions provided in the Model Law

"The Courts with jurisdiction to perform the functions provided in the Model Law shall be....."

Article 7

Definition and Form of Arbitration Agreement

(1) The Sub-Committee agreed recommending that this Article should be split into two articles, one dealing with the definition of arbitration agreement and the other with the form of arbitration agreement.

(2) It was also agreed to recommend substitution of the expression "defined legal relationship" in paragraph (1) of this Article by "defined legal issues" or "defined legal disputes".

(3) Paragraph (3) of this Article provides that "An agreement is in writing if it is contained in a document signed by the parties". The question was raised whether the signature on the document should be hand written or could be effected by mechanical means. The Sub-Committee agreed to recommend that the mode of signature should be left to the national laws.

Article 8

Arbitration Agreement and Substantive claim before Court

(1) The last part of paragraph (1) of this Article reads: "Unless it finds that the agreement is null and void, inoperative or incapable of being performed". It was agreed to suggest deletion of the words "incapable of being performed" as they were deemed to be superfluous.

(2) Paragraph (2) of this Article permits continuance of arbitral proceedings while the issue of jurisdiction is pending with the court. The Sub-Committee recommended reformulation of this provision as follows:

"Where in such cases, arbitral proceedings have already commenced, the arbitral tribunal shall continue its proceedings unless the Court grants an interim order to suspend the proceedings."

Article 10

Number of Arbitrators

The Sub-Committee considered a suggestion that failing agreement by the parties; an arbitration should be conducted by a sole arbitrator

for the sake of economy and expediency. Another view considered was that unless the parties agreed on number of arbitrators, there should be three arbitrators. The majority of Sub-Committee members recommended retention of the present text.

Article 14

Failure or impossibility to act

In view of the suggested reformulation of Article 6, it was noted that certain consequential amendments would need to be incorporated in this Article, viz. "the Court specified in Article 6" would need to be substituted by "the Courts specified according to Article 6".

Article 14 Bis

The Sub-Committee recommended the deletion of the opening words of this article, namely "The fact that" as they were considered to be superfluous.

Article 16

Competence to rule on own Jurisdiction

(1) It was noted under this Article although the tribunal had the power to rule on its jurisdiction, it was not final and conclusive but ultimately subject to court control and as such a positive ruling could be contested only in an action for setting aside the final award on merits. One representative expressed the view that the question of jurisdiction of the arbitral tribunal should be settled first before it could go into the merits of a claim and further stated that the para (3) of Article 16 be substituted as follows:

(3) "Whenever the question of jurisdiction of the arbitral tribunal arises before it within the period specified by the tribunal as referred to in paragaph (2) of this Article, the arbitral tribunal shall rule on the question of jurisdiction before entering into the merits of the case."

The Sub-Committee, however, decided to retain the present text.

(2) The Sub-Committee agreed to recommend that this Article be entitled "Competence".

Article 18

Power of Arbitral Tribunal to order Interim Measures

(1) The Sub-Committee agreed to recommend that the title of this Article be as follows: "Interim Measures".

(2) The Sub-Committee recommended the reformulation of this Article as below:

"Unless otherwise agreed by the parties, the arbitral tribunal may at the request of one of the parties, order such interim measures 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 security for the cost of such measures".

(3) One representative expressed the view that the provision concerning security for the cost of interim measures could not be accepted unless it was subject to the prior agreements of the parties.

Article 19

Rules of Procedure

(1) Under Article 19, the procedural rules, unless laid down by the Model Law itself, are determined either by the parties or failing agreement, by the arbitral tribunal. It was suggested that the right of the parties to lay down in detail the procedural rules unless they had chosen the rules of an arbitral institution should be limited and wider discretion should be given to the arbitrators who would normally be more experienced than the parties. After deliberation, the Sub-Committee did not retain this suggestion.

(2) Paragraph (2) of this Article confers on the arbitral tribunal the power to determine the admissibility, relevance, materiality and weight of any evidence. One representative was of the view that the words "materiality" and "weight" were redundant. The Sub-Committee, however, favoured retention of all the four qualifying terms considering that each one of them had different connotations although to some extent overlapping.

Article 20

Place of Arbitration

(1) This Article lays down the rule that the place of arbitration may be agreed upon by the parties, and failing agreement, the arbitral tribunal may determine the place. Some representatives felt that although, seemingly, the rule looked sound, fair and reasonable, in actual practice it had worked to a great disadvantage of the parties particularly from the developing countries. The parties from the developed countries invariably insisted on the venue of arbitration to be either in Europe or America and the other party to the contract being in a weaker position had no choice but to agree to such a stipulation. The venue of arbitration in all such cases, although seemingly a matter of choice, turned out to be nothing but an imposition on the parties from the developing countries.

(2) There was a good deal of discussion on this matter during which the following suggestions were made: (a) There was no way to tackle this problem within the text of the Model Law as the freedom of the parties as to the selection of the venue of arbitration could not be fettered; (b) The venue of arbitration as a rule should be in the respondent's country; (c) Failing agreement, the venue should be fixed by the arbitral tribunal taking into account the wishes of the parties and circumstances of the case; (d) When the arbitral tribunal is to choose the venue of arbitration in a dispute between a party from a developing country and a party from a developed country, the venue should be in a developing country; (e) An addition of the sentence in Article 20(1): "While choosing the venue of arbitration in such case, the Arbitral Tribunal may, however, give priority to the venue of the party from the relatively less developed country in economical sense". However, it was felt by some other representatives that this suggestion was not realistic or practical.

(3) The Sub-Committee, after deliberation, decided that the best practical solution should be: First, that a footnote be appended to paragraph (1) of Article 20 as follows: "The Asian-African countries are recommended to include in their agreements the use of Cairo and Kuala Lumpur Arbitration Centres and any other Centre established by the AALCC, as a venue of arbitration. Second, that the AALCC recommend its Member Governments to use its Regional Centres as the venue of arbitration.

Article 22

Language

The Sub-Committee agreed to recommend expansion of paragraph (1) of this Article to provide for the situation where failing agreement by the parties, the arbitral tribunal does not choose the language of one of the parties for use in the arbitral proceedings. In this situation, this party should have the right to have translations of the proceedings in his own language at his own expense.

Article 23

Statements of Claim and Defence

(1) The Sub-Committee agreed to recommend the reformulation of paragraph (2) of this article to be as follows:

"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 or supplement having regard to the delay in making it or prejudice to the other party or any other circumstances".

(2) The Sub-Committee also agreed to recommend addition of a third paragraph to this article stating:

"In any case the court may fix a date before which parties shall present their documents and their final statements".

Article 24

Hearings and Written Proceedings

Since paragraph (4) or this article was not clear as to whether documents supplied to the arbitral tribunal were required to be submitted to the other party in original or copies thereof and whether the other party had the right to examine them, the Sub-Committee recommended deletion of reference to documents or document from that paragraph and addition of the following provision as paragraph (5):

"Each party shall have the right to examine any document presented by the other party to the arbitral tribunal. Unless otherwise decided by the arbitral tribunal, copies of such documents shall be communicated by the supplying party to the other party".

Article 25

Default of a party

With regard to sub-paragraph (c) of this Article, a view was expressed that while the arbitral tribunal in the case of a default in appearance before the tribunal had the right to continue the proceedings, it must take into account the possible arguments the defaulting party would have advanced had it been present. It was pointed out that this was the practice in the Common Law countries and was also in accord with international commercial arbitration practice. The Sub-Committee, however, decided to retain the present text.

Article 27

Court assistance in Taking Evidence

The Sub-Committee recommended substitution of the second sentence in paragraph (1) of this Article, viz. "The request shall specify" with "The request shall be in conformity with the rules accepted before the Court and shall specify":

Article 28

Rules applicable to substance of dispute

This Article obliges the arbitral tribunal to decide the dispute in accordance with the "Rules of Law" agreed by the parties. If the parties have not so agreed, the arbitral tibunal is only permitted to apply the law as determined by the conflict of law rules which it considers applicable. The view was expressed by one representative that the arbitral tribunal should be permitted to apply only the substantive rules it considered appropriate. The majority, however, decided to retain the present text.

Article 29

Decision-making by Panel of Arbitrators

The Sub-Committee recommended the title of this Article to be as follows: "Decision-making".

Article 30

Settlement

(1) The Sub-Committee took the view that if the parties settled the

dispute during the arbitration proceedings, they must be obliged to notify the arbitral tribunal and only upon receipt of such notification, the arbitral tribunal should terminate the proceedings. Paragraph (1) of this Article, therefore, needed to be amended accordingly.

(2) The Sub-Committee considered a suggestion that paragraph (1) should provide that parties settle the dispute through negotiation, conciliation or any other means. It was pointed out that conciliation was ruled out in this case as the arbitral proceedings had already commenced and that negotiations and conciliation were conceptually different from arbitration. After deliberation, the Sub-Committee decided to recommend retaining the present text.

Article 31

Form and contents of Award

It was agreed to recommend that since paragraph (1) of this Article used the wording "Arbitrator or Arbitrators", the same wording would have to be used in paragraph (4) as well.

Article 33

Correction and Interpretation of Awards and Additional Awards

(1) Under paragraph (2) of this Article, the arbitral tribunal has been given competence to correct errors in the awards rendered by it at its own initiative within 30 days of the date of the award. The view was expressed by one representative that no time-limit should be stipulated for this purpose. The Sub-Committee, however, took the view that in international commercial arbitrations it would be proper to have a time-limit for such purposes.

(2) The Sub-Committee was further of the view that where an arbitral tribunal contempated correction of an award *suo moto*, it should be obliged to notify the parties concerned. The Sub-Committee therefore recommended modification of paragraph (2) accordingly.

(3) Paragraph (3) enables a party to request the arbitral tribunal for an additional award as to the claims presented, but somehow

omitted from the award. The Sub-Committee took the view that in such cases the arbitral tribunal should first decide on the admissibility or otherwise of the request within a time-limit and only after it had convinced itself of the admissibility of the request should it reopen the proceedings to deliver an additional award. The Sub-Committee therefore recommended incorporation of the following formulation in paragraph (3):

"The arbitral tribunal shall decide on the admission or rejection of the request within 30 days of the receipt of such request. If the arbitral tribunal considers the request to be justified, it may initiate the necessary proceedings to deliver an additional award within sixty days."

(4) The Sub-Committee agreed to recommend the deletion of opening words "The provisions of" from paragraph (5) of this Article.

Article 34

Application for setting aside as Exclusive Recourse against Arbitral Award

This Article sets forth, *inter alia*, the procedural modalities for setting aside an award. It requires an application to be made for this purpose within three months. The three-month pariod was regarded to be somewhat long. The Sub-Committee was, however, of the view that the three-month period could be retained subject to the qualification "unless the parties have agreed otherwise".

Article 35

Recognition and Enforcement of Awards

One representative suggested to add "for the parties concerned" after "recognized as binding" in paragraph (1) of this article.

Article 36

Grounds for Refusing Recognition or Enforcement

It was noted that this Article listed the same grounds for refusing recognition or enforcment as does Article V of the 1958 New York Convention on Recognition and Enforcement of Foreign Arbitral Awards. The Sub-Committee considered a suggestion that the reference to *public policy* in paragraph (2) of this Article might be replaced by a

reference to "international public order". In support of this suggestion it was stated: (i) the term 'public policy' had been understood and interpreted in differing fashions depending upon the legal systems of the countries concerned; and (ii) an upcoming trends had been that inernational transactions were now being subjected to less strict standards than purely domestic transactions and distinction was now increasingly being made between international public order and domestic public order of a State where recognition and enforcement of an international award was sought. After deliberation, the Sub-Committee decided to retain the present text.

Costs:-

The Sub-Committee considered a suggestion made by two of the representatives as follows:

"The Model Law does not contain any provisions dealing with the cost of the arbitration proceedings. As it stands, the arbitral tribunal has no power to determine the costs of the proceedings. Further there is a question whether costs, if awarded by the tribunal, would form part of the "award" which is enforceable.

In order to ensure the attractiveness of arbitration as an alternative to litigation in the courts, it would be necessary for the Model Law (which when accepted would be enacted as the national law on arbitral proceedings) to deal with this issue. It is not necessary for the Model Law to provide specifically for the cost of each aspect of the proceedings, but it should *at least:*

(a) give the tribunal power to determine the costs of the proceeding;

(b) ensure that costs form part of the award which is enforceable; and

(c) give more guidelines as to who should bear the costs."

Some other representatives were, however of the opinion that it would be advisable to leave the matter of costs to be regulated by national procedural laws rather than dealing with it in the Model Law. It was also pointed out that in arbitration practice although the widely acceptable principle was that arbitration costs were borne by the losing party, in some jurisdictions the costs would be equally shared by the parties and in some instances, the arbitral tribunal had the competence to reduce the costs usually borne by the losing party after taking into

account the nature of the dispute and the situation of the losing party. Since procedural laws differ from one State to another these representatives felt that the question of costs might better be left to the national procedural laws.

THE SUB-COMMITTEE, decided:

(i) To request the UNCITRAL secretariat to prepare an official Commentry on the Model Law on international commercial arbitration with a view to assist the developing countries in the uniform application and interpretation of the different provisions of the model law; and

(ii) To draw the attention of UNCITRAL to the utmost importance of costs in the matter of international commercial arbitration and to provide an explanation in the official commentary for a lack of provision in the model law on costs.

(b)UNCITRAL'S DRAFT CONVENTION ON INTERNATIONAL BILLS OF EXCHANGE AND INTERNATIONAL PROMISSORY NOTES

Since the UNCITRAL's Draft Convention on International Bills of Exchange and International Promissory Notes had been examined article by article during the Twenty-third Session of the AALCC held in Tokyo (May 1983), the Sub-Committee limited its discussion to general observations. One representative suggested that the construction of the draft text needed reformulation in some provisions, for example Article 1 on Sphere of Application and Form of the Instrument should be split into two independent articles entitled "Sphere of Application" and "Form of the Instrument".

Another representative noted that the Draft Convention includes legal concepts which are not familiar in the legal systems of some of the member countries of the AALCC, for example, the concept of protected holder does not exist in their legal system.

One representative expressed the view in regard to Article 11 that the amount and date must be indicated in the bill of exchange or promissory note for its validity and completion.

The sub-committee taking into account the study prepared by the secretariat in document no. AALCC/XXIV/14 and noting the fact that the present text of the draft convention on international bills of exchange and international promissory notes was to be revised in the light of the comments and observations made by