6(4) of the UNCITRAL Arbitration Rules uses similar wording and must therefore have been used as a model.[38]

It is questionable whether such a provision in the Model Law is at all fitting, because (a) the matters recommended are also regulated elsewhere in the Model Law (for example, the issue of independence and impartiality is set out in Article 12)[39] and (b) one can assume that an unbiased court is quite capable of knowing how to appoint an arbitrator itself (this being a task that the Model Law normally entrusts to the parties, which in most cases will try to promote their own interests).

7. Conclusion

3–035 Article 11 is one of those provisions of the Model Law where court assistance is vital to ensure the smoothness and efficiency of the arbitral proceedings. Due to its detailed wording, there are few cases that are left open and there is little room for intentional delay by one of the parties. The provision even takes the Model Law's goal of harmonising and unifying international trade law a step further by stipulating that a person of any nationality may act as an arbitrator, which is a praiseworthy, brave approach against discrimination worldwide.

Article 12 — Grounds for Challenge

3–036 "(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."[40]

1. Introduction

3–037 Unlike a full-time judge, an arbitrator is commonly engaged in business activities before, during and after the arbitral proceedings, and therefore one can never completely rule out the possibility of a member of the

[38] A/CN.9/216, para. 4. Article 6(4) of the UNCITRAL Arbitration Rules states: "In making the appointment, the appointing authority shall have regard to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and shall take into account as well the advisability of appointing an arbitrator of a nationality other than the nationalities of the parties."

[39] A/CN.9/264, Art. 11, para. 8.

[40] Article 12 of the UNCITRAL Model law on International Commercial Arbitration, United Nations documents A/40/17, annex I.

arbitral panel having had prior contact with any of the parties. Although this does not immediately imply the arbitrator's partiality, it can cast a shadow over his independence and impartiality. Article 12 of the Model Law deals with the grounds on which an arbitrator can be challenged and ensures that a party which has voted for arbitration, and therefore chosen to exclude the courts' jurisdiction, does not have to dispense with sincerity.

3–038 Article 12(1) is directed at the arbitrator, reminding him of his duty to disclose any circumstances which could call into question his impartiality or independence on the occasion of his possible appointment on the one hand (Article 12(1), first sentence) or from the time of his appointment onwards during the proceedings, on the other hand (Article 12(1), second sentence). The grounds which allow the parties to challenge an arbitrator are set out in Article 12(2), featuring "only"[41] circumstances that give rise to justifiable doubts as to his *impartiality* or *independence* and his non-possession of qualifications agreed by the parties.

Once again, the UNCITRAL Arbitration Rules served as the model for these provisions of the Model Law. With only slight deviations, Article 12(1) corresponds with Article 9 of the UNCITRAL Arbitration Rules and Article 12(2) of the Model Law corresponds with Article 10 of the UNCITRAL Arbitration Rules.

2. "Impartiality" and "independence"

3–039 The terms "impartiality" and "independence" are used throughout Article 12 without ever being defined, therefore an independent definition will be attempted here. Although some authors use these terms interchangeably the following will show that a distinction must be drawn between the two.

Impartiality (occasionally incorrectly referred to as "neutrality") is the "test for the lack of impermissible bias in the mind of the arbitrator toward a party or toward the subject-matter in dispute", as was outlined by M. Scott Donahey in this context.[42] This test is a subjective one and it is not directed at the appearance of bias but to its actual presence, which is "inferred from the facts and circumstances surrounding the arbitrator's exercise of the arbitral functions".[43]

3–040 *Independence,* on the other hand, is a term that refers to the relationship between the arbitrator and the parties and indicates prior or current personal, social or business contact between them.[44] The closer the relationship between these "spheres", the less "independent" the arbitrator or tribunal is considered to be. Unlike the test for impartiality, the test for independence is an objective one, as prior business or financial relations are easy to determine. Professor Lalive came up with a well-chosen, albeit

[41] The contentiousness of the word "only" will be discussed below, para. 3–051.

[42] M.S. Donahey, "The Independence and Neutrality of Arbitrators", [1992] 4 *Journal of International Arbitration 32.*

[43] *Ibid.*

[44] W.M. Tupman, "Challenge and Disqualification of Arbitrators in International Commercial Arbitration", (1989) 38 *International and Comparative Law Quarterly* 29.

cynical definition of the term at the VIth Symposium on International Arbitration (Paris, October 1988):

> "Independence implies the courage to displease, the absence of any desire, especially for the arbitrator appointed by a party, to be appointed once again as an arbitrator."[45]

3–041 Although all adopting States employ the terms "impartiality" and "independence", none of the laws explicitly defines them. Only the arbitration statutes of California, Oregon and Texas, in the United States, list the instances that an arbitrator must disclose when accepting an appointment. These instances can be regarded as a loose definition of the above-mentioned terms:

> *"1297.121 Disclosure of information questioning impartiality; circumstances"*
>
> Except as otherwise provided in this title, all persons whose names have been submitted for consideration for appointment or designation as arbitrators or conciliators, or who have been appointed or designated as such, shall, within 15 days, make a disclosure to the parties of any information which might cause their impartiality to be questioned including, but not limited to, any of the following instances:
>
> (a) The person has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.
> (b) The person served as a lawyer in the matter in controversy, or the person is or has been associated with another who has participated in the matter during such association, or he or she has been a material witness concerning it.
> (c) The person served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceeding.
> (d) The person, individually or a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject-matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

3–042

> (e) The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:
>
> (i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.

[45] P. Lalive, *Conclusions in the Arbitral Process and the Independence of Arbitrators,* (ICC Publishing, Paris, 1991), p. 121.

> (ii) The person is acting or has acted as a lawyer in the proceeding.
> (iii) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.
> (iv) The person is likely to be a material witness in the Proceeding.
>
> (f) The person has a close personal or professional relationship with a person who meets any of the following conditions:
>
> (i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.
> (ii) The person is acting or has acted as a lawyer or representative in the proceeding.
> (iii) The person is or expects to be nominated as an arbitrator or conciliator in the proceedings.
> (iv) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.
> (v) The person is likely to be a material witness in the proceeding."[46]

3–043 To give arbitrators some kind of idea where the borders of impartiality or independence lie, the American Arbitration Association/American Bar Association ("AAA/ABA") and the International Bar Association ("IBA") both drafted a set of ethical guidelines for commercial arbitrators, which are generally recognised worldwide. These codes of ethics are mere guidelines, which are not directly binding upon the arbitrators or the parties, and are not intended to create grounds for setting aside of awards in the national municipal courts, unless they are referred to in the parties' arbitral clause.[47] Excerpts from the IBA and AAA/ABA ethical guidelines for arbitrators probably depict their purpose best, the IBA guidelines stating as follows:

> *"1. Fundamental rule* **3–044**
>
> Arbitrators shall proceed diligently and effectively to provide the parties with a just and effective resolution of their disputes and shall be and remain free from bias.
>
> *2. Acceptance of Appointment*
>
> A prospective arbitrator shall accept an appointment only if he is able to discharge his duties without bias . . . if he is fully satisfied that he is competent to determine the issues in dispute . . . if he is able to give to the arbitration the time and attention which the parties are reasonably entitled to expect . . .

[46] Section 1297.121 of the Californian Code of Civil Procedure.
[47] Introductory note to "IBA Ethics for International Arbitrators".

3. Elements of Bias

. . . facts, which might lead a reasonable person, not knowing the arbitrators true state of mind, to consider that he is dependent on a party create the appearance of bias . . .

Past business relationships will not operate as an absolute bar to acceptance of appointment, unless they are of such magnitude or nature as to be likely to affect a prospective arbitrator's judgment.

4. Duty of disclosure

3–045 4.1 A prospective arbitrator should disclose all facts or circumstances that may give rise to justifiable doubts as to his impartiality or independence. Failure to make such disclosure creates an appearance of bias, and may of itself be a ground for disqualification even though the non-disclosed facts or circumstances would not of themselves justify disqualification.

4.2 A prospective arbitrator should disclose:

(a) any past or present business relationship . . .
(b) the nature and duration of any substantial social relationships with any party or any person known to be an important witness in the arbitration, . . .
(c) the nature of any previous relationship with any fellow arbitrator
(d) the extent of any prior knowledge he may have of the dispute

. . .

4.3 The duty of disclosure continues throughout the arbitral proceedings as regards new facts or circumstances.

4.4 Disclosure should be made in writing and communicated to all parties and arbitrators. When an arbitrator has been appointed any previous disclosure made to the parties should be communicated to the other arbitrators."

5. Communications with parties

3–046 When approached with a view to appointment, a prospective arbitrator should make sufficient inquiries in order to inform himself whether there may be any justifiable doubts regarding his impartiality or independence . . .

Throughout the arbitral proceedings, an arbitrator should avoid any unilateral communications regarding the case with any party, or its representative. If such a communication should occur, the arbitrator should inform the other party or parties and arbitrators of its substance. . . . No arbitrator should accept any gift or substantial hospitality . . ."[48]

[48] IBA Rules of Ethics for International Arbitrators.

The AAA/ABA guidelines state: **3–047**

"D. After accepting appointment and while serving as an arbitrator, a person should avoid entering into any financial, business, professional, family or social relationship, or acquiring any financial or personal interest, which is likely to affect impartiality or which might reasonably create the appearance of partiality or bias. For a reasonable period of time after the decision of a case, persons who have served as arbitrators should avoid entering into any such relationship, or acquiring any such interest in circumstances which might reasonably create the appearance that they had been influenced in the arbitration by the anticipation or expectation of relationship or interest.

E. Arbitrators should conduct themselves in a way that is fair to all parties and should not be swayed by outside pressure, by public clamour, by fear of criticism or by self-interest.

F. When an arbitrator's authority is derived from an agreement of the parties, the arbitrator should neither exceed that authority nor do less than is required to exercise that authority completely. Where the agreement of the parities set forth procedures to be followed in conducting the arbitration or refers to rules to be followed, it is the obligation of the arbitrator to comply with such procedures or rules.

G. An arbitrator should make all reasonable efforts to prevent delaying tactics, harassment of parties or other participants, or other abuse or disruption of the arbitration process."[49]

3. Individual grounds for challenge

During the drafting of the Model Law a decision had to be made on **3–048** whether Article 12 would list the separate instances of violations against the arbitrator's independence or impartiality, or whether a general formula could be found, which would cover all relevant cases.[50] Using a general formula — similar to Article 10(1) of the UNCITRAL Arbitration Rules — was given preference over the listing approach. The formula consists of three grounds: impartiality, independence and missing qualifications.

The statement "circumstances . . . that give rise to justifiable doubts as to his impartiality or independence . . ."[51] is not only to be found in the Model Law, but was later also used verbatim in Article 8 of the AAA Arbitration Rules (1997), Article 24(a) of the WIPO Rules (1994) and Rule 7.4 of the CPR Arbitration Rules (1992).

Article 15(2) of the Lithuanian Law on Commercial Arbitration illus- **3–049** trates the circumstances which "give rise to justifiable doubts" as to the impartiality and independence, similar to the U.S. provisions mentioned above:

[49] AAA/ABA Code of Ethics for Arbitrators in Commercial Disputes.
[50] A/CN.9/207, para. 65.
[51] Article 12(2) of the Model Law.

"An arbitrator may be challenged only if there are the following circumstances that give rise to justifiable doubts as to his impartiality or independence:

(1) an arbitrator . . . is dependent on one of the parties;
(2) is a relative of one of the parties;
(3) is directly or indirectly concerned with the outcome of the case in favour of one of the parties;
(4) participated in pre-arbitral mediation procedure;
(5) there are other circumstances that give rise to justifiable doubts as to his impartiality."[52]

3–050 The Republic of Egypt and the Sri Lankan adoptions of Article 12 contain fewer grounds for challenge. Article 18 of the Egyptian Law No. 27 Promulgating the Law Concerning Arbitration in Civil and Commercial Matters states as follows:

"1. An arbitrator may be challenged only if circumstances exist that give rise to serious doubts on his impartiality or independence.

2. A party to the arbitration may challenge the arbitrator appointed by it or in whose appointment it has participated, only for reasons of which he becomes aware after the appointment has been made."

3–051 The fact that Article 12(2) allows a challenge "only" if the above-mentioned circumstances exist, gave rise to considerable discussion in the Commission: some of the views expressed, supported *inter alia* by the delegates from Yugoslavia, India, Tanzania and the Philippines,[53] were of the opinion that the word "only" made the provision too restrictive by excluding grounds for challenge that would not be covered by the terms "impartiality" and "independence".[54] On the other hand, the majority of delegations — including Hungary, Cuba, the United States and the International Trade Law Branch — were in support of the retention of the word "only", mainly because it was decided to exclude grounds of challenge not dealt with in the Model Law[55] and that the word "only" was intended to clarify the meaning of this Article.[56]

4. The ICC Court of Arbitration's experience with challenge

3–052 Michel Calvo, Israel's representative at the ICC International Court of Arbitration, recently summarised the ICC's experience regarding the challenge of arbitrators[57]:

[52] Article 15(2) of the Lithuania Law on Commercial Arbitration 1996.
[53] A/CN.9/SR.313, paras 9–38.
[54] A/40/17, para. 116.
[55] *Ibid.*, para. 117.
[56] A/CN.9/SR.313, para. 27.
[57] Michel A. Calvo, "The Challenge of the ICC Arbitrators: Theory and Practice" [1998] 15(4) *Journal of International Arbitration* 63–72.

"The fact that an arbitrator has been working years ago as an associate in a law firm who represented one party to the arbitration, has not been considered relevant to the extent as to prevent him from being an arbitrator. The same conclusion has been drawn in a case where a candidate arbitrator who was a partner several years ago in a big law firm was appointed by one party, and one of his former partners was at that time the lawyer of one of the subsidiaries of said party. In another instance, the court [ICC Court of Arbitration] accepted the candidature in an arbitration of a former civil servant, appointed by the state he formerly served.

The court refused to confirm a candidate whose law firm was concurrently acting for the party which proposed his name upon the objection of the other party. Further, the court refused to confirm a candidate who had previously provided legal advice to one party. A lawyer appointed by one party and whose law firm was concurrently providing services to the opposite party failed to be confirmed by the court . . .

In another case, a candidate arbitrator revealed to the court that he was holding shares in a company which was one of the parties to the arbitration. The court deemed this holding as minor or insignificant and accepted his candidature; the result of the arbitration could not have any significant consequence on the price of the shares on the stock market."

5. Appointing party's prior knowledge of grounds for challenge

3–053 The second sentence of Article 12(2) states that a party that appointed an arbitrator or was involved in the appointment of an arbitrator of whose challengeability the party was aware prior to the appointment, is later excluded from challenging this arbitrator on these grounds. Although such a statement is appropriately situated amongst the "grounds for challenge", it is submitted that the issue is already covered by Article 4 of the Model Law with the title "Waiver of the Right to Object", and is possibly superfluous in Article 12(2).

3–054 The degree of the party's involvement in the appointment procedure is depicted by the Analytical Commentary[58] as going beyond the case where the parties jointly appoint the arbitrator, extending it to a less direct involvement such as, for example, the taking part in the procedure listed in Article 6(3) of the UNCITRAL Arbitration Rules.

The Nigerian Arbitration and Conciliation Decree 1988 is the only adopting law not to include such a "prior knowledge" provision.

6. Conclusion

3–055 Unlike a full-time judge, an arbitrator is generally engaged in occupations in the commercial world before, during and after the arbitral

[58] A/CN.9/264, Art. 12, para. 6.

proceedings, and therefore the possibility of a member of the arbitral tribunal behaving in a partial, dependent or fraudulent manner or indulging in other forms of misconduct can never be completely excluded. The fact that the parties to the arbitration agreement chose to exclude the jurisdiction of the national courts by no means implies a waiver of sincerity, an asset that characterises municipal court judges. Alternatively, if such doubts arise during the arbitral proceedings, the arbitrator must immediately disclose them, for by not doing so he could risk the arbitral award being set aside and could even face possible criminal charges.

Seen from the parties' point of view, the justified challenge of an arbitrator can be used as an important psychological tool in the proceedings, because an arbitrator who is accused of being dependent will be inclined to demonstrate strongly his independence and not favour one of the parties if he intends to maintain a good reputation.

ARTICLE 13 — CHALLENGE PROCEDURE

3–056 "(1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of paragraph (3) of this article.

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

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this article is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court or other authority specified in article 6 to decide on the challenge, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and make an award."[59]

1. Introduction

3–057 The preceding article outlined the various standards an arbitrator has to fulfil and also, in consequence, the grounds which are available to the parties for challenging an arbiter who fails to maintain his integrity. A prerequisite for the successful challenge of a partial, dependent or otherwise unqualified arbitrator is, of course, an effective challenge procedure, which is supplied by Article 13 of the Model Law.

[59] Article 13 of the UNCITRAL Model Law on International Commercial Arbitration, United Nations document A/40/17, annex I.

Article 13 follows the familiar approach of the "two-level system"[60] granting the parties general freedom of choice as regards the challenge procedure, followed by the default rule "failing such agreement". Article 2(d) in conjunction with Article 13(1) enables the parties to use the challenge procedure supplied by arbitration rules, either independent ones (such as the UNCITRAL Arbitration Rules) or in conjunction with institutional arbitration. Article 13(2) was modelled on Articles 11 and 12 of the UNCITRAL Arbitration Rules,[61] with only minor deviations.

2. Parties' freedom to choose challenge procedure — Article 13(1)

3–058 The general freedom the parties are granted when choosing a challenge procedure is subject to two exceptions. The first exception can be found in the second part of Article 13(1), stating that the freedom is "subject to the provisions of paragraph (3) of this article". Paragraph (3), which will be discussed in greater detail below, states that if a challenge under the parties' procedure is rejected by the tribunal, the challenging party can ask the court for a final decision on the challenge issue. This last resort to the court is mandatory and may under no circumstances be excluded by the parties' chosen procedure.[62]

The second exception from the parties' freedom is in Article 18, the equal treatment of the parties. Accordingly, Article 18 lays down "basic notions of fairness in requiring that the parties be treated with equality and each party be given a full opportunity of presenting his case".[63] Hence, this equality of the parties must also extend to the challenge procedure, forbidding a challenge procedure which is strongly advantageous to only one party.

3–059 The Republic of Egypt and the Sultanate of Oman fail to grant the parties the above freedom; their procedure for challenging a member of the tribunal is mandatory:

"1. The challenge request shall be submitted in writing to the arbitral panel, indicating the reasons for the challenge, within fifteen days after the challenging party became aware of the constitution of the arbitral panel or of the circumstances which justify the challenge. Unless the challenged arbitrator withdraws from his office, the arbitral panel shall decide on the challenge.

2. A challenge request shall not be accepted from a party who had previously submitted a request challenging the same arbitrator in the same arbitration.

3. The challenging party may lodge a recourse against the decision refusing his request, within thirty days of receiving notice thereof, before the court specified in Article 9 of this Law, and the court's decision shall be subject to no appeal.

[60] The two-level system is also used in Articles 10 and 11.
[61] A/CN.9/WG.II/WP.37, Art. 19.
[62] A/CN.9/264, Art. 13, para. 2.
[63] *Ibid.*, Art. 19(3), para. 7 (note: Article 19(3) became Article 18 in the final text).

4. Neither the submission of the challenge nor the recourse against the decision of the arbitral panel rejecting such request shall entail the suspension of the arbitral proceedings. However, if the challenge of the arbitrator is successful, whether by a decision of the arbitral panel or by the court reviewing the challenge, the arbitral proceedings already conducted, including the arbitral award, shall be null and void."[64]

3. Default challenge procedure — Article 13(2)

3–060 Article 13(2) represents the second level of the "two-level system": the suppletive rules which apply "failing such agreement [by the parties]".[65]

This provision states that — unless the parties have agreed on a challenge procedure — the party seeking the removal of an arbitrator shall within a period of 15 days from the moment that challenging party becomes aware of the constitution of the arbitral tribunal or after becoming aware of a ground for challenge, send a written statement of the reasons to the tribunal. The tribunal shall then decide on the challenge unless prior to that the challenged arbitrator withdraws from his office voluntarily or unless the other party agrees to the correctness of the challenge.

3–061 The Working Group reports divergent views on the question of whether the Model Law should contain supplementary rules at all for cases where the parties had failed to choose a procedure for challenge.[66] One view was that it would not be in accordance with the purpose of the Model Law to incorporate detailed rules on such a procedural issue.[67] This idea deserves consideration because the challenge procedure is an issue which is usually regulated by arbitration rules (especially in institutional arbitration) and not by a national arbitration statute. In spite of that, Article 13 was drafted carefully and makes provision for the incorporation of institutional arbitration rules by granting the parties freedom in the choice of their challenge procedure. To obtain a law that would be useful overall, it was important for the Model Law to contain just such a default procedure, as otherwise the adopting countries would be forced to include their own provisions on this issue, which would perhaps vary greatly from country to country.

3–062 In its Report of March 6, 1984 the Working Group agreed that "the decision entrusted to the arbitral tribunal by paragraph (2) of that article [*i.e.* Article 13] was not to be considered as a decision on a question of procedure in the terms of Article 29 [second sentence] and that the decision was entrusted to all members of the tribunal, *including the challenged arbitrator*".[68] Therefore, the decision shall be made by the whole tribunal. The reason for this lies *inter alia* in the importance of the decision, as one of the parties' fundamental rights could be violated through the participation of the biased arbitrator in the arbitral proceedings. It is

[64] Article 18 of the Egyptian Law No. 27 for 1994, Promulgating the Law Concerning Arbitration in Civil and Commercial Matters.
[65] Art. 13(2), 1st sentence.
[66] A/CN.9/216, para. 45.
[67] *Ibid.*
[68] A/CN.9/246, para. 38 (emphasis added).

questionable whether this clarification would have been necessary at all, as the decision on the challenge of an arbitrator is taken after examining the existence of material grounds of challenge against him, and hence is not a question of procedure. (A question of procedure would be whether the parties had correctly agreed upon the chosen challenge procedure or not.)

3–063 In any case, the fact that the challenged arbitrator himself could take part in deciding whether he would be allowed to take further part in the arbitration was heavily criticised by the German Federal Republic's delegation, which stated that its country would have problems implementing that provision.[69] Some 13 years later, Germany finally adopted the Model Law in its *Zivilprozeßordnung* (10th book, sections 1025–1066) and the provisions corresponding to Article 13 and Article 29 show no relevant deviation from the Model Law. It seems, therefore, that the German delegate in 1985 was a little overcautious.

3–064 What happens when a sole arbitrator is challenged deserves further examination. It is questionable whether a sole arbitrator who was challenged and who refuses to resign because of the challenge actually needs to be challenged according to Article 13(2) at all. After all, through his non-resignation the sole arbitrator has already made a decision on the challenge. Mr Herrmann from the International Trade Law Branch commented that the Secretariat's view was that the non-resignation of the sole arbitrator *implicitly* indicated the decision contemplated in Article 13(2).[70] This view was also reproduced in the Commission Report, stating that "[t]he refusal of the sole arbitrator to resign would constitute a rejection of the challenge, making available resort to the court under paragraph (3) [of Article 13]".[71]

3–065 The Summary Record of the Commission meeting in 1985[72] also reveals a number of other concerns. For example, the delegate from India, Mr Sekhon, feared the 15-day period for challenging an arbitrator could be too short in cases of international commercial arbitration,[73] a view also shared by the Norwegian delegation outlining the time-lag in common international commercial arbitration proceedings:

> "The reason [for 15 days being too short] is that, in international commercial arbitration, a communication is often delivered to the addressee's solicitor at the place of arbitration, and this solicitor communicates with the addressee's solicitor at the addressee's place of business, who communicates with the addressee. A reply from the addressee will usually be transmitted in the same way, and at each link some time is needed for processing the communication."[74]

[69] A/CN.9/263, Art. 13, para. 2; A/CN.9/SR.313, para. 55.
[70] A/CN.9/SR.313, para. 53.
[71] A/40/17, para. 129.
[72] A/CN.9/SR.313 and 314.
[73] A/CN.9/SR.314, para. 3.
[74] A/CN.9/263, Art. 13, para. 6.

3–066 In the interest of speeding up the arbitral process and in the light of the increased use of modern means of electronic communications, this time period does seem long enough. Nevertheless, section 10(3) of the 1995 Sri Lankan Arbitration Act's adoption of the Model Law extends the time-limit to 30 days — the only implementing legislation to do so:

> "A party who seeks to challenge an arbitrator shall, unless the parties have decided that the decision shall be taken by some other person, first do so before the arbitral tribunal, within thirty days of his becoming aware of the circumstances which give rise doubts about the arbitrators' impartiality or independence."

4. Resort to court for final decision — Article 13(3)

3–067 Article 13(3) deals with the situation where a party's challenge was rejected by the arbitral tribunal or other body agreed on by the parties and allows the challenging party to address the court for a final decision on the challenge. This provision is mandatory and applies even if the parties agree otherwise. It constitutes a party's last resort if all else fails, and therefore has to be secured accordingly.

Arriving at the final version was not an easy task, as the crucial — and also heavily disputed — question had to be answered concerning at which stage the court could be addressed. The two main possibilities were: (a) court assistance could only be sought at the end of the proceedings in connection with the setting aside of the award; (b) the court could be addressed during the proceedings as soon as the ground for a challenge arose.[75]

3–068 The main fears expressed in connection with the chosen approach, (b), were the fear of considerable delay and dilatory tactics,[76] of disruption and of additional costs.[77] Other views expressed were that it would be unacceptable to continue with the arbitral proceedings with a challenged tribunal and have to wait until the final award was rendered before being able to challenge the tribunal[78]; furthermore, if the tribunal is challenged successfully the whole arbitration has to be repeated with a new panel or an exchanged arbitrator — that is where the real costs lie!

A number of adopting States were clearly concerned by the above points and in their arbitration laws disallow the tribunal to continue with the proceedings as long as the court is considering the challenge. A good example is Article 16(2) of the Bulgarian Law on International Commercial Arbitration (1988):

> "While such a request is pending, the arbitral tribunal shall suspend its proceedings."

[75] A/CN.9/264, Art. 13, para. 5; A/40/17, para. 122; A/CN.9/245, para. 210.
[76] A/CN.9/245, para. 209.
[77] A/CN.9/264, Art. 13, para. 8.
[78] A/CN.9/245, para. 210.

3–069 Article 13(3) of the Model Law allows the arbitration to be continued even while the tribunal is being challenged by a court. This eliminates the fear of disruption and of possible dilatory tactics being employed by one of the parties.

The Norwegian delegation considered the finality of the court's decision inappropriate, at least in those cases where the court did not agree with the challenge.[79] Mr Herrmann explained that the reason behind giving the court's decision a final and unrepeatable character was that this would minimise delay.[80]

3–070 An interesting adoption of Article 13(3) of the Model Law can be found in the British Columbia, Canada adoption of the provision. Section 13(5) of the British Columbia International Commercial Arbitration Act 1986 allows the Supreme Court to refuse to decide on the challenge if the parties' agreement already provided for a challenge procedure to a body other than the tribunal:

> "Where a request is made under subsection (4), the Supreme Court may refuse to decide on the challenge, if it is satisfied that, under the procedure agreed upon by the parties, the party making the request had an opportunity to have the challenge decided upon by other than the arbitral tribunal."

5. Conclusion

3–071 The arbitral tribunal is the vital organ of any arbitration, for a dispute can only be settled equitably if all parties have equal trust in the tribunal. Accordingly, the challenge of the tribunal is an issue of high priority, as otherwise not only could injustice be done but the trust in the institution of arbitration could be harmed.

Article 13 can be considered to be a well-rounded solution to regulating the challenge procedure, incorporating both the parties' freedom to decide on a procedure of challenge and a certain degree of judicial control in the background.

Article 14 — Failure or Impossibility to Act

3–072 "(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.

[79] A/CN.9/263, Art. 13, para. 9.
[80] A/CN.9/SR.314, para. 27.

(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)."[81]

1. Introduction

3–073 While the Model Law's Article 12 deals with the grounds for an arbitrator's challenge relating to circumstances that could give rise to justifiable doubts to his impartiality and independence, Article 14 sets out the reasons for challenging an arbitrator due to his inability to perform his functions. The grounds for challenge in Article 12 originate from an arbitrator's presumed biased attitude towards one of the parties, whereas the reasons in Article 14 refer to a real legal or physical inability, such as lack of sufficient knowledge or the arbitrator's death.

3–074 Article 14 was modelled on Article 13(2) of the UNCITRAL Arbitration Rules,[82] although the Model Law provision's scope is considerably wider, also including, besides the *de jure* and *de facto* inability to perform the functions, the failure for "other reasons . . . to act without undue delay". The following analysis will begin with a detailed examination of Article 14(1), including a look at the provision's non-mandatory character, what constitutes the arbitrator's inability to perform his functions, the arbitrator's withdrawal and the consequences resulting therefrom, a party's request to court to have the arbitrator removed and the implications arising from a party's continuation of the proceedings despite its knowledge of the arbitrator's shortcomings. Article 14(2) will then be examined, showing that the arbitrator's withdrawal does not imply an admission of guilt regarding the accusations against him.

2. Arbitrator unable to perform functions — Article 14(1)

3–075 Article 14(1) states that an arbitrator who is legally or physically unable to perform the functions entrusted to him or who for some other reason fails to act without undue delay, loses his mandate either if he voluntarily withdraws from office or if the parties agree on the termination of his mandate. The provision further stipulates that "if a controversy remains concerning any of these grounds" (which means that neither the arbitrator himself withdraws nor the parties reach agreement on his removal) any party may request that the court (or other authority) decide on the termination of the mandate.

(a) Arbitrator's inability to perform

3–076 Article 14 provides three grounds that constitute an arbitrator's inability: (a) his *de jure* or (b) his *de facto* inability to perform his functions, or (c) his failure to act without undue delay for other reasons. As was mentioned

[81] Article 14 of the UNCITRAL Model Law on International Commercial Arbitration, United Nations document A/40/17, annex I.
[82] A/40/17, para. 139; A/CN.9/264, Art. 14.

above, the wording "for the sake of harmony" was taken from the UNCITRAL Arbitration Rules. It encompasses the following situations: the first ground, (a), refers to an arbitrator's *legal* incapacity to perform his functions. Such grounds for legal incapacity are found in the *lex loci arbitri* and relate to circumstances under which the arbitrator is by law barred from continuing in office (for example, incapacity, bankruptcy, conviction of a criminal offence).[83] The second ground for inability, (b), concerns cases of factual inability, which include factual situations in which the arbitrator is *physically* prevented from fulfilling his functions (for example, death and disability).

3–077 The Sri Lankan Arbitration Act 1995 in section 8(1) ("Termination of arbitrator's mandate and removal of arbitrator"), provides slightly more detail than the Model Law as regards the arbitrator's factual inability to perform his functions:

> "The mandate of an arbitrator shall terminate if such arbitrator becomes unable to perform the functions of that office or for any other reason fails to act without undue delay, or dies, or withdraws from office or the parties agree on the termination."

3–078 The interpretation of the third ground — inability (c) — especially of the wording "without undue delay", caused some difficulty in drafting. At the outset Mr Bonell, the Italian delegate, proposed inserting the words "with appropriate speed and efficiency" instead of the above-mentioned phrase. He supported this proposal by stating that "nearly all national legislations and arbitration rules contained a provision of that kind".[84] The Italian proposal was supported *inter alia* by India,[85] Iraq,[86] Finland[87] and France[88]; nevertheless, the British and United States delegations expressed considerable concern about using the term "efficiency", which "seemed to invite any party dissatisfied with the way the proceedings were going to apply to a court on the grounds that there had been inefficiency".[89] The Commission Report supports this view in stating that the "criterion of efficiency was particularly inappropriate in the context of article 14 since it could open the door to court review and assessment of the substantive work of the tribunal". The wording "without undue delay" was suggested by Mr Holtzmann, the US delegate, and seemed to be the best solution partly because this is a term already familiar to the Model Law due to its use in Article 4.

3–079 The Analytical Commentary explains how the existence of an arbitrator's "failure to act" can be determined:

[83] A.I. Okekeifere, "Appointment and Challenge of Arbitrators under the UNCITRAL Model Law—Part II: Challenge" (2000) 1 Int.A.L.R. 17.
[84] A/CN.9/SR.314, para. 59.
[85] *Ibid.*, para. 51.
[86] *Ibid.*, para. 52.
[87] *Ibid.*, para. 54.
[88] *Ibid.*, para. 55.
[89] *Ibid.*, para. 59.

"It is submitted that in judging whether an arbitrator failed to act the following considerations may be relevant: Which action was expected or required of him in the light of the arbitration agreement and the specific procedural situation? If he has not done anything in this regard, has the delay been so inordinate as to be unacceptable in the light of the circumstances, including technical difficulties and the complexity of the case? If he has done something and acted in a certain way, did his conduct fall clearly below the standard of what may reasonably be expected from an arbitrator? Amongst the factors influencing the level of expectations are the ability to function efficiently and expeditiously and any special competence or other qualifications required of the arbitrator by agreement of the parties."[90]

3–080 By far the most extraordinary adoption of Article 14(1) can be found in the Tunisian Arbitration Code, Article 59:

"1. If an arbitrator becomes de jure or de facto unable to perform his functions or does not fulfil his duty *within thirty days*, his mission 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, one of the parties may ask the President of the Court of Appeal of Tunis to give a judgment in summary proceedings on the dismissal of the arbitrator, which judgment shall be subject to no appeal.

If the arbitrator is appointed in pursuance of rules of an arbitration institute, the examination of the removal shall be in accordance with those rules . . ."[91]

3–081 Restricting the arbitration to 30 days may have a positive influence on the speed of the proceedings, but such a time restriction can never fit all cases that are resolved by arbitration and such an approach is extremely dubious. Arbitrating under this provision is *not recommendable* and the use of arbitral rules is strongly advised in this situation.

(b) Arbitrator's withdrawal

3–082 According to Article 14(1), an arbitrator's mandate terminates if he, after becoming unable to perform his functions in the manner described above, withdraws from his office or if the parties agree on the termination of his mandate. In this context the question arises as to whether the arbitrator is absolutely free to resign or whether there are any legal consequences for him due to his negligence?

One view in the Working Group was convinced that a person who accepted the responsibility to act as an arbitrator should not be allowed to resign without a sound reason.[92] The prevailing view, however, held that

[90] A/CN.9/264, Art. 14, para. 4.
[91] Article 59(1) of the Tunisian Arbitration Code 1993 (emphasis added).
[92] A/CN.9/246, para. 44.

such an approach was impractical and that an unwilling arbitrator could not be forced to perform his functions.[93]

3–083 As to the question of the arbitrator's legal responsibility, the Working Group was of the opinion that the Model Law should not deal with this issue,[94] leaving it to be dealt with by the individual national laws. In most cases the arbitrator will only be liable if gross negligence can be proven, but it can be asserted that any arbitrator, who is interested in being selected to act as an arbitrator again in the future will go to great lengths either to try to find a way to continue performing his functions or to reduce the inconvenience to the parties as far as possible.

(c) Court request

3–084 The second sentence of Article 14(1) acts as the second step in the procedure concerning the challenge to the arbitrator's mandate termination. It states that "if a controversy remains concerning any of these grounds" each of the parties may request the court or other authority to issue a final and non-appealable award in the matter. As all other cases are regulated in the previous sentence of Article 14, this remaining controversy relates to the case where the arbitrator refuses to reach agreement on the termination of his mandate.

Although practically all adopting States follow the Model Law's approach of granting the court competence to review controversies concerning the grounds for mandate termination, not all arbitration statutes give the court's decision a final (non-appealable) character. Hungary, India and the Islamic Republic of Iran, for example, make no mention of this non-appealability, thereby leaving the arbitrator with recourse against such a decision.

(d) Non-mandatory character of Article 14

3–085 The International Chamber of Commerce pointed out a problem in connection with Article 14[95]: concern was expressed regarding whether the provision was mandatory or non-mandatory, as this had vital implications for institutional arbitration and for the application of institutional rules. If Article 14 had a mandatory character the parties could not choose a different challenge procedure for the removal of an arbitrator who is unable to act as is offered by arbitral institutions' rules, for example Article 12 ("Replacement of arbitrators") of the ICC Court of Arbitration Rules:

3–086 "1. An arbitrator shall be replaced upon his death, upon the acceptance by the Court [*i.e.* the ICC Court of Arbitration] of the arbitrator's resignation, upon acceptance by the Court of a challenge or upon the request of all the parties.

[93] A/CN.9/246.
[94] *Ibid.*, para. 43.
[95] A/CN.9/263, Art. 14, para. 2.

2. An arbitrator shall also be replaced on the Court's own initiative when it decides that he is prevented de jure or de facto from fulfilling his functions, or that he is not fulfilling his functions in accordance with the Rules or within the prescribed time limits.

3. When, on the basis of information that has come to its attention, the Court considers applying Article 12(2), it shall decide on the matter after the arbitrator concerned, the parties and any other members of the Arbitral Tribunal have had an opportunity to comment in writing within a suitable period of time. Such comments shall be communicated to the parties and to the arbitrators.

4. When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.

5. Subsequent to the closing of the proceedings, instead of replacing an arbitrator who has died or been removed by the Court pursuant to articles 12(1) and 12(2), the Court may decide, when it considers it appropriate, that the remaining arbitrators shall continue the arbitration. In making such determination, the Court shall take into account the views of the remaining arbitrators and of the parties and such other matters that it considers appropriate in the circumstances."

3–087 In consequence, the Commission held that although Article 14 did not expressly give the parties freedom to agree on a procedure (as Articles 12 and 13 did), "the provision was not intended to preclude parties from varying the grounds which would give rise to the termination of the mandate or from entrusting a third person or institution with deciding on such termination".[96] Even without the Commission's explanation, or for countries who have not adopted the *travaux préparatoires*, the non-mandatory character of Article 14 can be inferred from the parties' freedom to agree on the termination of an arbitrator's mandate, due to the assumption that, if the parties are free to agree on the arbitrator's mandate, they can also choose a procedure for this agreement (namely, choose institutional rules).

3–088 Interestingly, either this point seems not to have posed a problem for the adopting States or it was overlooked, as only a few adoptions of Article 14 include explicit wording on the mandatory or non-mandatory character of the provision. It is submitted, however, that the above arguments, together with the fact that there is no apparent reason for giving this provision mandatory character, suggest that the parties can agree on a different procedure for the termination of the mandate.

(e) Continuation of proceedings

3–089 If a party who knows of the arbitrator's *de jure* or *de facto* inability to perform his functions continues with the arbitration without demanding

[96] A/40/17, para. 136.

that the arbitrator be exchanged, that party has, according to Article 4 combined with Article 14 of the Model Law, waived its right to object and cannot raise this point later in the proceedings.

In this context it seems appropriate to mention an interesting provision of the Bermuda International Conciliation and Arbitration Act 1993, which, in cases where one member of the tribunal fails to participate, gives the remaining arbitrators the discretion to continue with the proceedings without the absentee:

"*30. Failure of an arbitrator to participate in proceedings*

3–090 (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."[97]

3. Withdrawal does not imply admission of guilt — Article 14(2)

3–091 Article 14(2) states that if an arbitrator withdraws from his office, either for the above-mentioned reasons contained in Article 14(1) or for the grounds indicated in Article 13(2), this shall not imply that he accepts the validity of those grounds.

The necessity of such a statement is questionable, as the broader legal principle of *in dubiis pro reo* covers the case. The Analytical Commentary explains that this provision "is designed to facilitate [the] withdrawal or consent in order to prevent lengthy controversies".[98] One should be reminded, however, that this provision is not capable of preventing subsequent legal proceedings regarding an arbitrator's possible violation of

[97] Section 30 of the Bermuda International Conciliation and Arbitration Act 1993.
[98] A/CN.9/264, Art. 14*bis*, para. 2.

duties under his contract with the parties or with the arbitral institution. The municipal court will still have to decide whether the arbitrator's withdrawal from office "implies" his guilt or not.

4. Conclusion

3–092 Two points of criticism are apparent in Article 14: first, it is incomprehensible why this provision was not given the non-mandatory drafting style or so-called "two-level system" followed in Articles 10, 11 and 13; the clarity of the provision would no doubt have profited from such wording. Secondly, it must be questioned whether it would in fact have been more efficient to draft a single provision containing all the grounds for challenge, as opposed to splitting them between Articles 12 and 14. These points do not seem to have influenced the adopting States, as only a few States diverge from Article 14 in their national arbitration statutes.

ARTICLE 15 — APPOINTMENT OF SUBSTITUTE ARBITRATOR

3–093 "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."[99]

1. Introduction

3–094 Article 15 is concerned with the appointment of a substitute arbitrator in the case of a member of the tribunal losing his mandate or his mandate terminating in any other way. At first sight the provision, if read in context with the other articles contained in this Chapter, seems to be straightforward. Upon closer examination, however, one soon discovers a number of inconsistencies, as the following will show.

The subsequent analysis will try to shed light on these inconsistencies. Beginning with the grounds for an arbitrator's mandate termination, it has to be asked why Article 15 allows such a termination in cases other than those specified in Articles 13 or 14? Consequently, it must be asked what are the grounds for the termination of an arbitrator's mandate in the Model Law, and whether there are others that are not regulated in Articles 13 and 14? The discussion then deals with the appointment procedure, asking whether this provision has a mandatory character (which could have far-reaching consequences for institutional arbitration, as will be shown).

[99] Article 15 of the UNCITRAL Model Law on International Commercial Arbitration, United Nations document A/40/17, annex I.

2. Grounds for the termination of the mandate

3–095 At the outset of the discussions on Article 15 it must be stressed that the termination of an arbitrator's mandate according to this provision only relates to the *pre-award* stage of the proceedings. Article 32 of the Model Law covers the issue of the automatic termination of the mandate *upon termination of the proceedings;* Article 15 does not apply in this case.

By using, for example, the following wording, which is used by Article 18 of the Republic of Bulgaria's Law on International Commercial Arbitration, the drafters of the Model Law could have shortened the first part of Article 15 dramatically and by doing so could have spared the provision a great deal of controversy:

> "When the mandate of an arbitrator is terminated, another arbitrator shall be appointed according to the rules that were applicable for the appointment of the arbitrator whose mandate is terminated."

3–096 However, it is submitted that UNCITRAL followed a different aim with the provision and it was their intention to extend the scope of grounds for the termination of the arbitrator's mandate beyond those stated in Articles 13 and 14. The Analytical Commentary explains: "Article 15 deals primarily with the question how a substitute arbitrator would be appointed. Yet, in order to embrace all possible cases where such a need may arise, it deals, in a less conspicuous manner, also with those manifold situations of termination of mandate which are *not* covered by articles 13 and 14."[1]

3–097 According to Article 15, the following grounds for termination of an arbitrator's mandate are possible:

(a) *Termination under Article 13,* which specifies that the arbitral tribunal shall decide on an arbitrator's challenge unless he withdraws from his office voluntarily or unless both parties agree on the challenge (see the discussions on Article 13 for further details).

(b) *Termination under Article 14,* which concerns the case of an arbitrator's failure or impossibility to act and states that his mandate terminates upon this inability or if the parties agree on a the termination (see the discussions on Article 14 for further details).

3–098

(c) *Termination due to the arbitrator's withdrawal from office for any other reason.* This ground for the mandate's termination is not covered by Articles 13 and 14, as the Analytical Commentary expressly states.[2] This leads to the vital conclusion that there must be more grounds for this termination in the Model Law that are not explicitly covered. Even the Commentary has difficulties admitting this consequence, calling it "less easily justified".[3] In accordance with the analysis of

[1] A/CN.9/264, Art. 15, para. 1 (emphasis added).
[2] *Ibid.*, para. 2.
[3] *Ibid.*, para. 3.

Article 14, the Analytical Commentary argues that it would be impractical to require the arbitrator to provide a just cause for his resignation,[4] since an unwilling arbitrator could not be forced to perform his functions.

(d) *Termination due to parties' agreement.* This situation goes beyond that found in Articles 13 and 14 — it permits the parties to agree on the arbitrator's mandate termination for other reasons and automatically ends his mandate. Justification for this ground can be found in the "consensual nature of arbitration which gives the parties unrestricted freedom to agree on the nature of the termination of the mandate of an arbitrator", as the Analytical Commentary explains.[5]

3–099 Nine of the 14 Canadian adoptions of the Model Law added the following provision to their version of Article 15:

> "With respect to article 15 of the International Law [*i.e.* the Model Law], the parties may remove an arbitrator at any time prior to the final award, regardless of how the arbitrator was appointed."[6]

This clarification contributes to the comprehensibility of Article 15, although it is submitted that a reference to the *travaux préparatoires* for interpretation (as provided by these laws) would have been sufficient.

3–100 In summary, it can be held that Article 15 overrides Articles 13 and 14 to a certain extent, by setting forth that an arbitrator can resign at any point in time without one of the reasons contained in Articles 13 and 14 having to be present. Equally, the parties can agree to terminate an arbitrator's mandate at leisure. It is therefore questionable why Articles 13 and 14 explicitly state these instances as they are already covered by Article 15, which serves, as it were, as a "general clause".

3. Substitute arbitrator

3–101 It must not be overlooked that Article 15 is initially geared towards the appointment of a substitute arbitrator, rather than the grounds for the termination of his mandate. In this point Article 15 states that a substitute arbitrator is to be appointed "according to the rules that were applicable to the appointment of the arbitrator being replaced". These "rules" can either be a party-chosen procedure according to Article 11(2) or the standard default procedure set out in Article 11(3).

The wording of the provision "a substitute arbitrator *shall* be appointed" and the fact that the standard non-mandatory phrase contained in the drafts "unless otherwise agreed by the parties" was eliminated, gives the impression that the provision indeed has mandatory character. However,

[4] A/CN.9/264.
[5] *Ibid.*, para. 2.
[6] Section 6(2) of the Manitoba International Commercial Arbitration Act 1986.

the Commission Report clarifies that the party autonomy set out in Article 11 also extends to Article 15.[7]

3–102 Even the final draft version of the Model Law, which was used as a basis for the Analytical Commentary, contained the wording "unless the parties agree otherwise".[8] Eventually, the Commission decided to delete these words as it was feared that difficulties would arise in the case where the parties had agreed that there should be no provision for a substitute arbitrator.[9] Mr Loewe, the Chairman of the Commission, held that the deletion of the phrase would put the parties when appointing a substitute arbitrator in the same position as is the case when appointing the original arbitrator (see Article 11).[10] Consequently, the parties' freedom to choose a procedure according to Article 11(2) would be retained, with the useful safeguards and court assistance of Article 11(4) and (5).

3–103 A further concern in this context was highlighted by the Working Group: it was feared that in the case of a party-appointed arbitrator the mechanism of resignation and replacement of that arbitrator by the party could be misused as a dilatory tactic.[11] The Working Group decided not to deal with this problem for which "no easy solution could be found".[12] The Analytical Commentary nevertheless recommended a stipulation to overcome such practice by agreeing that a party-appointed arbitrator would not be replaced by the party, but rather by the chairman of the tribunal.[13] The solution was inspired by Article 56(3) of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, Washington 1965 ("ICSID Convention") which reads:

> "If a conciliator or arbitrator appointed by party shall have resigned without the consent of the Commission or Tribunal of which he was a member, the Chairman shall appoint a person from the appropriate Panel to fill the resulting vacancy."[14]

The absence of such a provision in the Model Law is not necessarily a major shortcoming, due to the limited practical relevance of this situation. This also seems to be confirmed by the adopting laws, which hardly differ from the Model Law in this respect.

4. The effect of a substitution

3–104 Unlike the UNCITRAL Arbitration Rules, Article 15 contains no provision determining what effect the substitution of an arbitrator has, namely whether the proceedings need to be repeated or not. Article 14 of the UNCITRAL Arbitration Rules states:

[7] A/40/17, para. 147.
[8] A/CN.9/246, Art. 15 and annex.
[9] A/40/17, para. 147; A/CN.9/SR.315, paras 21 and 22.
[10] A/CN.9/SR.315, para. 22.
[11] A/CN.9/245, para. 219.
[12] *Ibid.*
[13] A/CN.9/264, Art. 15, para. 5 and n.51.
[14] Article 56(3) of the ICSID Convention.

"If under articles 11 to 13 the sole or presiding arbitrator is replaced, any hearings held previously shall be repeated; if any other arbitrator is replaced, such prior hearings may be repeated at the discretion of the arbitral tribunal."

3–105 The effect of such a substitution can be seen as a "procedure to be followed by the arbitral tribunal in conducting the proceedings", as is set out in Article 19(1) of the Model Law. Accordingly, it is primarily up to the parties to determine such a procedure; only if the parties fail to do so may the arbitral tribunal "conduct the arbitration in such a manner as it considers appropriate".[15] In the case where the parties agree on the procedure that is to be followed, they will most probably choose a set of institutional arbitration rules such as the ICC Arbitration Rules:

"*Article 12 — Replacement of Arbitrators*

. . .

(4) When an arbitrator is to be replaced, the Court has discretion to decide whether or not to follow the original nominating process. Once reconstituted, and after having invited the parties to comment, the Arbitral Tribunal shall determine if and to what extent prior proceedings shall be repeated before the reconstituted Arbitral Tribunal.

. . ."[16]

3–106 Nineteen of the 47 adopting jurisdictions state that the effect of the substitution of an arbitrator is the repetition of the proceedings. For example, Section 6(1) of the Alberta (Canada) International Commercial Arbitration Act reads as follows:

"Unless the parties otherwise agree, if an arbitrator is replaced or removed in accordance with the International Law [*i.e.* the Model Law], any hearing held prior to the replacement or removal shall be repeated."

3–107 Similarly, §1297.153 of the California (U.S.) Code of Civil Procedure states:

"Unless otherwise agreed by the parties:

(a) Where a sole or presiding arbitrator is replaced, any hearings previously held shall be repeated.

(b) Where an arbitrator other than the sole or presiding arbitrator is replaced, any hearings previously held may be repeated at the discretion of the arbitral tribunal."

5. Conclusion

3–108 The title assigned to Article 15, "Appointment of a substitute arbitrator", only portrays half of the provision's content. The other half of the provision

[15] Article 19(2) of the Model Law.
[16] Article 12(4) of the ICC Arbitration Rules.

deals with the grounds for the mandate termination, which can be found elsewhere in the Model Law, and extends these using general formulas of practical importance. It would perhaps have been better to give Article 15 the heading "Grounds for the mandate termination and appointment of a substitute arbitrator" and then to split the provision into two clearly defined sub-paragraphs in order for each part to attract the attention it deserves.

A further possible improvement would have been to state more explicitly the non-mandatory nature of the provision, as this was not done sufficiently — the remaining wording of the provision at first glance does not necessarily indicate party autonomy on this point.