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California's Adoption of a Code For International Commercial Arbitration and Conciliation

ALBERT S. GOLBERT¹ AND DANIEL M. KOLKEY²

INTRODUCTION

California's new International Commercial Arbitration and Conciliation Act,³ which became effective as of March 4, 1988, derives from a "Model Law" adopted by the United Nations Commission on International Trade Law ("UNCITRAL"). The UNCITRAL Model Law on International Commercial Arbitration,⁴ reflects the work of representatives from some 61 nations (including the United States) and sundry international organizations and attempts to codify internationally acceptable practices and procedures for conducting international arbitrations while providing for essential party autonomy and basic fairness.

On December 11, 1985, the U.N. General Assembly urged the member states to give serious consideration to the adoption of the Model Law.⁵ Thereafter, several jurisdictions, desiring to promote arbitration or prove themselves a neutral forum for the resolution of international business disputes, began to consider and enact the Model Act. In 1986, British Columbia adopted it; Hong Kong considered it; and now Australia may enact it.

On April 21, 1987, Assembly Bill Number 2667 was introduced in the California Legislature by Assemblywoman Lucy Killea of San Diego. This bill was substantially based on the first six chapters of the Model Law on International Commercial Arbitration and contained a new 7th Chapter on conciliation.

It was approved by the California Assembly on September 9,

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3. A copy of the Act is included in the Appendix to this presentation.

4. 24 I.L.M. 1302 (1985).

5. Although certain compromises inevitably were made in the drafting process, the United States was generally satisfied with the final results.

1987, and by the Senate on February 25, 1988, both by consent, and signed into law by Governor George Deukmejian on March 4, 1988.

California's new Act applies only to "international commercial" arbitration. "International" is defined and a non-exclusive list of commercial relationships are set forth in the Act. Courts will be permitted to intervene only where intervention is explicitly authorized in the Act. The Act also provides for "interim measures of relief" and for internationally accepted procedures to follow where the arbitration agreement is silent.

Additionally, the act contains a set of procedures for conciliation—a preferred method of dispute resolution by many Pacific Rim countries—which attempts to protect the confidentiality of any admissions or statements made during the course of the conciliation and provides for a stay of all judicial proceedings and a tolling of limitations periods during the course of the conciliation.

The law was initially drafted by members of the Los Angeles Center for International Commercial Arbitration and quickly received the support of the Los Angeles County Bar Association, the Bar Associations of San Francisco and San Diego, the Los Angeles Area Chamber of Commerce, the State Chamber of Commerce, and those in San Diego and San Francisco, the Board of Delegates of the State Bar of California and the California Trial Lawyers Association, to name but a few.

OUTLINE OF PROVISIONS

1. Application of the Code

California's arbitration and conciliation code will apply to any international commercial arbitration or conciliation where the place of arbitration or conciliation is in the State of California (subject to any contrary federal law or agreement which is enforced between the United States and any other country).

Under the code, an arbitration or conciliation is international if (1) the parties to the arbitration or conciliation agreement have their places of business in different countries, (2) the subject matter of the dispute is most closely connected to or a substantial part of the Parties' obligations is to be performed in a country other than that in which the parties have their places of business, or (3) the place of arbitration/conciliation is in a country other than that in which the parties have their places of business. Alternatively, the arbitration or conciliation is international where the parties have agreed in their ar-

bitration/conciliation agreement that the subject matter of their agreement relates to commercial interests in more than one country.

When applicable, the code expressly supersedes the existing arbitration code, California Civil Procedure Code sections 1280 to 1284.2.

2. Parties' Right to Determine Their Own Procedures

Under the code, parties are largely free to determine their own procedures for selecting their arbitrator(s) and conducting the arbitration. Where the parties fail to reach an agreement on a particular matter, however, the code governs.

3. Waiver of Right to Object

Effective immediately, any party conducting an international commercial arbitration or conciliation in California must make objections in a timely manner or they are deemed waived. Specifically, the code provides that a party who, knowing of a failure to comply with any provision of the code or any requirement under the parties' arbitration agreement, nevertheless proceeds with the arbitration without stating timely objection thereto, will be deemed to have waived any right to object.

4. Stay of Proceedings

The code provides that any party to an international commercial arbitration agreement may apply to the superior court for an order to stay any judicial proceedings which seek relief with respect to matters covered by the agreement to arbitrate and may move to compel arbitration.

5. Judicial Intervention and Interim Measures

The code provides, as does the UNCITRAL Model Law, that it is compatible with an arbitration agreement for a party to request from a court "an interim measure of protection."

The California code also adopts the UNCITRAL Model Law's provision that an arbitral tribunal itself may order interim measures of protection. In contrast to the Model Law, however, California's code sets forth a procedure for enforcing such tribunal-ordered measures whereby a party may request the superior court to enforce an arbitral tribunal's award of interim relief, including attachments or preliminary injunctions. In such cases, the court must give preclusive effect to any findings of fact of the arbitral tribunal (including a find-

ing as to the probable validity of the claim), but must otherwise review the interim relief pursuant to the standards applicable to the particular relief awarded.

6. *Composition of Arbitral Tribunal*

Unless the parties agree otherwise, the number of arbitrators for any arbitration will be one. Where the parties have not agreed to an appointment procedure for the arbitrator(s), the code provides one. Only if the parties have failed to agree and have not designated any institution to appoint the arbitrator will the superior court appoint one.

In an effort to provide full disclosure of any information which might cause an arbitrator's impartiality to be questioned, the new statute enumerates the type of information which must be disclosed by each arbitrator within 15 days of his or her appointment (or within 15 days of his or her consideration for appointment), including whether the prospective arbitrator has served as an arbitrator in another proceeding involving one or more of the parties. An arbitrator may only be challenged, however, if circumstances exist which give rise to "justifiable doubts as to his or her independence or impartiality" or as to his or her possession of the qualifications upon which the parties have agreed. The code provides for a procedure for challenge where the parties have not otherwise agreed to one, and the parties may appeal a decision denying a challenge to the superior court. The superior court's decision is final and not subject to further appeal.

7. *Competence of Arbitral Tribunal to Rule on Its Jurisdiction*

An arbitral tribunal may rule on its own jurisdiction, including any objections with respect to, the existence or validity of the arbitration agreement.

A plea that the arbitral tribunal does not have jurisdiction must be raised no later than the submission of the statement of defense; a plea that the arbitrators are exceeding the scope of their authority must be raised as soon as the matter alleged to be beyond the scope of their authority is raised during the arbitral proceedings.

If the arbitral tribunal rules as a preliminary matter that it has jurisdiction, any party who challenges that ruling must request the superior court to decide the matter or shall be deemed to have waived its objection to such a finding. While the request is pending, the arbitral tribunal may continue with the arbitral proceedings.

8. *Manner and Conduct of Arbitrations*

a. Principle of Equality for the Parties

Adopting one of the major principles in the UNCITRAL Model Arbitration Law, the California code provides that the parties shall be treated with equality and that each party shall be given a full opportunity to present his or her case.

b. General Procedures

Where the parties cannot agree, the code provides for the selection of the place of arbitration, the determination of the language(s) to be used, the right to an oral hearing upon request, and the appointment by the arbitral tribunal of one or more experts to report to it on specific issues.

The code also provides for the parties to file a statement of claim and statement of defense and for all hearings to be held *in camera*.

Additionally, the code provides procedures for consolidating arbitrations, but only where the parties have agreed to consolidate them.

c. Choice of Law

The code expressly provides that the arbitral tribunal shall decide the dispute in accordance with any rules of law designated by the parties.

Where no designation of law is made, the arbitral tribunal is free to apply the rules of law which it considers to be appropriate, given the circumstances surrounding the dispute. In all cases, however, it must decide the dispute in accordance with the terms of the contract and take into account usages of trade applicable to the transaction. This rule parallels the UNCITRAL Model Law's provisions.

9. *Making of the Arbitration Award*

All arbitral awards subject to the code must be in writing and signed by the members of the arbitral tribunal. The arbitral award must state the reasons upon which it is based unless the parties agree that no reasons are to be given or that the award is based on a settlement.

The code provides that the arbitral tribunal may encourage settlement, and if the matter is settled and the parties so request, the

settlement will be recorded in the form of an arbitral award which will have the same effect as any other arbitral award.

In a significant departure from customary U.S. practice, but in accordance with accepted international arbitration principles, the code provides that legal fees may be included as a cost of the arbitration unless otherwise agreed by the parties. Accordingly, *parties which do not wish to have attorneys' fees made a part of their award and which designate California as the place of arbitration of an international commercial dispute are best advised to so provide in their arbitration agreement.*

The code also provides procedures for requesting a correction to or an interpretation of an arbitral award, or an additional award as to claims presented but omitted from the award.

An award is not deemed final until the period for requesting (and responding to any request for) correction or interpretation of, or an addition to, an award has expired.

10. Conciliation

In recognition of and in deference to those Pacific Rim countries which favor less formal dispute resolution processes, the code provides that it is the policy of the State of California to encourage parties to resolve disputes through conciliation.

The conciliator is to be guided by principles of objectivity, fairness, and justice, giving consideration to, *inter alia*, the rights and obligations of the parties, the usages of trade, and the circumstances surrounding the dispute.

To further encourage conciliations in California, the code provides that neither a request for conciliation nor participation in a conciliation shall be deemed to be consent to the jurisdiction of any court in California in the event conciliation fails.

The most significant provisions in the conciliation code are (1) that evidence of anything said in the course of a conciliation is not admissible in evidence and disclosure thereof cannot be compelled in any civil action unless the parties all consent thereto, (2) that introduction of such evidence in contravention of that section provides a basis for an order appropriate to deal with such a violation, (3) that an agreement to submit a dispute to conciliation shall be deemed an agreement to stay all judicial or arbitral proceedings from the commencement of the conciliation until its termination, and (4) that all applicable limitation periods shall be tolled upon the commencement

of a conciliation proceeding until the tenth day following the termination of the conciliation proceeding.

A conciliation may be terminated as to any party by, *inter alia*, a written declaration by that party to the other party and conciliator(s) to terminate the conciliation.

If the conciliation results in settlement and the result is then reduced to writing and signed by the conciliator and the parties, that written statement shall be treated as an arbitral award pursuant to California law.

CONCLUSION

California's use of the UNCITRAL Model Law as the basis for its new international arbitration and conciliation code should make California a more attractive venue for resolving international commercial disputes and should provide some comfort to parties choosing California as the venue for an international arbitration.

Likewise, its new code for conciliation attempts to protect the confidentiality of any statements made during the course of the conciliation, stays judicial proceedings during the conciliation process and tolls limitations periods during the conciliation process, all in an effort to create an environment conducive to conciliation. The success of the new code is now in the hands of the international business community, to which we now commend it.

Appendix

Title 9.3. Arbitration and Conciliation of International Commercial Disputes

CHAPTER 1. APPLICATION AND INTERPRETATION

Article 1. Scope of Application

1297.11. This title applies to international commercial arbitration and conciliation, subject to any agreement which is in force between the United States and any other state or states.

1297.12. This title, except Article 2 (commencing with Section 1297.81) or Chapter 2 and Article 3 (commencing with Section 1297.91) of Chapter 2, applies only if the place of arbitration or conciliation is in the State of California.

1297.13. An arbitration or conciliation agreement is international if any of the following applies:

(a) The parties to an arbitration or conciliation agreement have, at the time of the conclusion of that agreement, their places of business in different states.

(b) One of the following places is situated outside the state in which the parties have their places of business:

(i) The place of arbitration or conciliation if determined in, or pursuant to, the arbitration or conciliation agreement.

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed.

(iii) The place with which the subject matter of the dispute is most closely connected.

(c) The parties have expressly agreed that the subject matter of the arbitration or conciliation agreement relates to commercial interests in more than one state.

(d) The subject matter of the arbitration or conciliation agreement is otherwise related to commercial interests in more than one state.

1297.14. For the purposes of Section 1297.13, if a party has more than one place of business, the place of business is that which has the closest relationship to the arbitration agreement, and if a party

does not have a place of business, reference is to be made to his habitual residence.

1297.15. For the purposes of Section 1297.13, the states of the United States, including the district of Columbia, shall be considered one state.

1297.16. An arbitration or conciliation agreement is commercial, if it arises out of a relationship of a commercial nature including, but not limited to, any of the following:

- (a) A transaction for the supply or exchange of goods or services.
- (b) A distribution agreement.
- (c) A commercial representation or agency.
- (d) An exploitation agreement or concession.
- (e) A joint venture or other, related form of industrial or business cooperation.
- (f) The carriage of goods or passengers by air, sea, rail, or road.
- (g) Construction.
- (h) Insurance.
- (i) Licensing.
- (j) Factoring.
- (k) Leasing.
- (l) Consulting.
- (m) Engineering.
- (n) Financing.
- (o) Banking.
- (p) The transfer of data or technology.
- (q) Intellectual or industrial property, including trademarks, patents, copyrights and software programs.
- (r) Professional services.

1297.17. This title shall not affect any other law in force in California by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only in accordance with provisions other than those of this title. Notwithstanding the foregoing, this title supersedes Sections 1280 to 1284.2, inclusive, with respect to international commercial arbitration and conciliation.

Article 2. Interpretation

1297.21. For the purposes of this title:

(a) "Arbitral award" means any decision of the Arbitral tribunal on the substance of the dispute submitted to it and includes an interim, interlocutory, or partial arbitral award.

(b) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators.

(c) "Arbitration" means any arbitration whether or not administered by a permanent arbitral institution.

(d) "Conciliation" means any conciliation whether or not administered by a permanent conciliation institution.

(e) "Chief Justice" means the Chief Justice of California or his or her designee.

(f) "Court" means a body or an organ of the judicial system of a state.

(g) "Party" means a party to an arbitration or conciliation agreement.

(h) "Superior court" means the superior court in the county in this state selected pursuant to Section 1297.61.

(i) "Supreme Court" means the Supreme Court of California.

1297.22. Where a provision of this title, except Article 1 (commencing with Section 1297.281) of Chapter 6, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorize a third party, including an institution, to make that determination.

1297.23. Where a provision of this title refers to the fact that the parties have agreed or that they may agree, or in any other way refers to an agreement of the parties, such agreement shall be deemed to include any arbitration or conciliation rules referred to in that agreement.

1297.24. Where this title, other than Article 8 (commencing with Section 1297.251) of Chapter 5, Article 5 (commencing with Section 1297.321) of Chapter 6, or subdivision (a) of Section 1297.322, refers to a claim, it also applies to a counterclaim, and where it refers to a defense, it also applies to a defense to that counterclaim.

Article 3. Receipt of Written Communications

1297.31. Unless otherwise agreed by the parties, any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at his place of business,

habitual residence, or mailing address, and the communication is deemed to have been received on the day it is so delivered.

1297.32. If none of the places referred to in Section 1297.31 can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee's last known place of business, habitual residence, or mailing address by registered mail or by any other means which provides a record of the attempt to deliver it.

1297.33. This article does not apply to written communications in respect of court proceedings.

Article 4. Waiver of Right to Object

1297.41. A party who knows that any provision of this title, or any requirement under the arbitration agreement, has not been complied with and yet proceeds with the arbitration without stating his or her objection to noncompliance without undue delay or, if a time limit is provided for stating that objection, within that period of time, shall be deemed to have waived his right to object.

1297.42. For purposes of Section 1297.41, "any provision of this title" means any provision of this title in respect of which the parties may otherwise agree.

Article 5. Extent of Judicial Intervention

1297.51. In matters governed by this title, no court shall intervene except where so provided in this title, or applicable federal law.

Article 6. Functions

1297.61. The functions referred to in Sections 1297.114, 1297.115, 1297.116, 1297.134, 1297.135, 1297.136, 1297.165, 1297.166, and 1297.167 shall be performed by the superior court of the county in which the place of arbitration is located. The functions referred to in Section 1297.81 shall be performed by the superior court selected pursuant to Article 2 (commencing with Section 1292) of Chapter 5 of Title 9.

CHAPTER 2. ARBITRATION AGREEMENTS AND JUDICIAL MEASURES IN AID OF ARBITRATION

Article 1. Definition and Form of Arbitration Agreements

1297.71. An "arbitration agreement" is an agreement by the

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

1297.72. An arbitration agreement shall be in writing. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams, or other means of telecommunication which provide a record of this agreement, or in an exchange of statements of claim and defense in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make that clause part of the contract.

Article 2. Stay of Proceedings

1297.81. When a party to an international commercial arbitration agreement as defined in this title commences judicial proceedings seeking relief with respect to a matter covered by the agreement to arbitrate, any other party to the agreement may apply to the superior court for an order to stay the proceedings and to compel arbitration.

1297.82. A timely request for a stay of judicial proceedings made under Section 1297.81 shall be granted.

Article 3. Interim Measures

1297.91. It is not incompatible with an arbitration agreement for a party to request from a superior court, before or during arbitral proceedings, an interim measure of protection, or for the court to grant such a measure.

1297.92. Any party to an arbitration governed by this title may request from the superior court enforcement of an award of an arbitral tribunal pursuant to Article 2 (commencing with Section 1297.171) of Chapter 4. Enforcement shall be granted pursuant to the law applicable to the granting of the type of interim relief requested.

1297.93. Measures which the court may grant in connection with a pending arbitration include, but are not limited to:

(a) An order of attachment issued to assure that the award to which applicant may be entitled is not rendered ineffectual by the dissipation of party assets.

(b) A preliminary injunction granted in order to protect trade secrets or to conserve goods which are the subject matter of the arbitral dispute.

1297.94. In considering a request for interim relief, the court shall give preclusive effect to any and all findings of fact of the arbitral tribunal including the probable validity of the claim which is the subject of the award for interim relief and which the arbitral tribunal has previously granted in the proceedings in question, provided that such interim award is consistent with public policy.

1297.95. Where the arbitral tribunal has not ruled on an objection to its jurisdiction, the court shall not grant preclusive effect to the tribunal's findings until the court has made an independent finding as to the jurisdiction of the arbitral tribunal. If the court rules that the arbitral tribunal did not have jurisdiction, the application for interim measures of relief shall be denied. Such a ruling by the court that the arbitral tribunal lacks jurisdiction is not binding on the arbitral tribunal or subsequent judicial proceeding.

CHAPTER 3. COMPOSITION OF ARBITRAL TRIBUNALS

Article 1. Number of Arbitrators

1297.101. The parties may agree on the number of arbitrators. Otherwise, there shall be one arbitrator.

Article 2. Appointment of Arbitrators

1297.111. A person of any nationality may be an arbitrator.

1297.112. Subject to Sections 1297.115 and 1297.116, the parties may agree on a procedure for appointing the arbitral tribunal.

1297.113. Failing such agreement referred to in Section 1297.112, in an arbitration with three arbitrators and two parties, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator.

1297.114. If the appointment procedure in Section 1297.113 applies and either a party fails to appoint an arbitrator within 30 days after receipt of a request to do so from the other party, or the two appointed arbitrators fail to agree on the third arbitrator within 30 days after their appointment, the appointment shall be made, upon request of a party, by the superior court.

1297.115. Failing any agreement referred to in Section 1297.112, in an arbitration with a sole arbitrator, if the parties fail to

agree on the arbitrator, the appointment shall be made, upon request of a party, by the superior court.

1297.116. The superior court, upon the request of a party, may take the necessary measures, unless the agreement on the appointment procedure provides other means for securing the appointment, where, under an appointment procedure agreed upon by the parties, any of the following occurs:

(a) A party fails to act as required under that procedure.

(b) The parties, or two appointed arbitrators, fail to reach an agreement expected of them under that procedure.

(c) A third party, including an institution, fails to perform any function entrusted to it under that procedure.

1297.117. A decision on a matter entrusted to the superior court pursuant to Sections 1297.114, 1297.115, and 1297.116 is final and is not subject to appeal.

1297.118. The superior court, in appointing an arbitrator [sic], shall have due regard to all of the following:

(a) Any qualifications required of the arbitrator by the agreement of the parties.

(b) Other considerations as are likely to secure the appointment of an independent and impartial arbitrator.

(c) In the case of a sole or third arbitrator, the advisability of appointing an arbitrator of a nationality other than those of the parties.

Article 3. Grounds for Challenge

1297.121. 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 has 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 partici-

pated 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 as a fiduciary, or such person's spouse or minor child residing in such person's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding.

(e) The person, his or her spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person meets any of the following conditions:

(i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.

(ii) The person is acting or has acted as a lawyer in the proceeding.

(iii) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.

(iv) The person is likely to be a material witness in the proceeding.

(f) The person has a close personal or professional relationship with a person who meets any of the following conditions:

(i) The person is or has been a party to the proceeding, or an officer, director, or trustee of a party.

(ii) The person is acting or has acted as a lawyer or representative in the proceeding.

(iii) The person is or expects to be nominated as an arbitrator or conciliator in the proceedings.

(iv) The person is known to have an interest that could be substantially affected by the outcome of the proceeding.

(v) The person is likely to be a material witness in the proceeding.

1297.122. The obligation to disclose information set forth in Section 1297.121 is mandatory and cannot be waived as to the parties with respect to persons serving either as the sole arbitrator or sole conciliator or as the chief or prevailing arbitrator or conciliator. The parties may otherwise agree to waive such disclosure.

1297.123. From the time of appointment and throughout the arbitral proceedings, an arbitrator, shall, without delay, disclose to

the parties any circumstances referred to in Section 1297.121 which were not previously disclosed.

1297.124. Unless otherwise agreed by the parties or the rules governing the arbitration, an arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his or her independence or impartiality, or as to his or her possession of the qualifications upon which the parties have agreed.

1297.125. A party may challenge an arbitrator appointed by it, or in whose appointment it has participated, only for reasons of which it becomes aware after the appointment has been made.

Article 4. Challenged Procedure

1297.131. The parties may agree on a procedure for challenging an arbitrator and the decision reached pursuant to that procedure shall be final.

1297.132. Failing any agreement referred to in Section 1297.131, a party which intends to challenge an arbitrator shall, within 15 days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstances referred to in Sections 1297.124 and 1297.125, whichever shall be later, send a written statement of the reasons for the challenge to the arbitral tribunal.

1297.133. Unless the arbitrator challenged under Section 1297.132 withdraws from his or her office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

1297.134. If a challenge following the procedure under Section 1297.133 is not successful, the challenging party may request the superior court, within 30 days after having received notice of the decision rejecting the challenge, to decide on the challenge. If a challenge is based upon the grounds set forth in Section 1297.121, and the superior court determines that the facts support a finding that such ground or grounds fairly exist, then the challenge should be sustained.

1297.135. The decision of the superior court under Section 1297.134 is final and is not subject to appeal.

1297.136. While a request under Section 1297.134 is pending, the arbitral tribunal, including the challenged arbitrator, may continue with the arbitral proceedings and make an arbitral award.

Article 5. Failure or Impossibility to Act

1297.141. The mandate of an arbitrator terminates if he be-

comes de jure or de facto unable to perform his or her functions or for other reasons fails to act without undue delay, and he withdraws from his or her office or the parties agree to the termination of his or her mandate.

1297.142. If a controversy remains concerning any of the grounds referred to in Section 1297.141, a party may request the superior court to decide on the termination of the mandate.

1297.143. A decision of the superior court under Section 1297.142 is not subject to appeal.

1297.144. If, under this section or Section 1297.132, an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in Section 1297.132.

*Article 6. Termination of Mandate and Substitution
of Arbitrators [sic]*

1297.151. In addition to the circumstances referred to under Article 4 (commencing with Section 1297.131) and Article 5 (commencing with Section 1297.141) of this chapter, the mandate of an arbitrator terminates upon his or her withdrawal from office for any reason, or by or pursuant to agreement of the parties.

1297.152. Where the mandate of an arbitrator terminates, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

1297.153. Unless otherwise agreed by the parties:

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

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

1297.154. Unless otherwise agreed by the parties, an order or ruling of the arbitral tribunal made prior to the replacement of an arbitrator under this section is not invalid because there has been a change in the composition of the tribunal.

CHAPTER 4. JURISDICTION OF ARBITRAL TRIBUNALS

*Article 1. Competence of an Arbitral Tribunal to Rule
on its Jurisdiction*

1297.161. The arbitral tribunal may rule on its own jurisdic-

tion, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

1297.162. A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defense. However, a party is not precluded from raising such a plea by the fact that he or she has appointed, or participated in the appointment of an arbitrator.

1297.163. 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.

1297.164. The arbitral tribunal may, in either of the cases referred to in Sections 1297.162 and 1297.163, admit a later plea if it considers the delay justified.

1297.165. The arbitral tribunal may rule on a plea referred to in Sections 1297.162 and 1297.163 either as a preliminary question or in an award on the merits.

1297.166. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party shall request the superior court, within 30 days after having received notification of that ruling, to decide the matter or shall be deemed to have waived objection to such finding.

1297.167. While a request under Section 1297.166 is pending, the arbitral tribunal may continue with the arbitral proceedings and make an arbitral award.

Article 2. Interim Measures Ordered by Arbitral Tribunals

1297.171. Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order a party to take any interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject matter of the dispute.

1297.172. The arbitral tribunal may require a party to provide appropriate security in connection with a measure ordered under Section 1297.171.

CHAPTER 5. MANNER AND CONDUCT OF ARBITRATION

Article 1. Equal Treatment of Parties

1297.181. The parties shall be treated with equality and each party shall be given a full opportunity to present his or her case.

Article 2. Determination of Rules of Procedure

1297.191. Subject to this title, the parties may agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

1297.192. Failing any agreement referred to in Section 1297.191, the arbitral tribunal may, subject to this title, conduct the arbitration in the manner it considers appropriate.

1297.193. The power of the arbitral tribunal under Section 1297.192 includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

Article 3. Place of Arbitration

1297.201. The parties may agree on the place of arbitration.

1297.202. Failing any agreement referred to in Section 1297.201, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

1297.203. Notwithstanding Section 1297.201, the arbitral tribunal may, unless otherwise agreed by the parties, meet at any place it considers appropriate for consultation among its members, for hearing witnesses, experts, or the parties, or for inspection of documents, goods, or other property.

Article 4. Commencement of Arbitral Proceedings

1297.211. 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 5. Language

1297.221. The parties may agree upon the language or languages to be used in the arbitral proceedings.

1297.222. Failing any agreement referred to in Section

1297.221, the arbitral tribunal shall determine the language or languages to be used in the arbitral proceedings.

1297.223. The agreement or determination, unless otherwise specified, shall apply to any written statement by a party, any hearing, and any arbitral award, decision, or other communication by the arbitral tribunal.

Article 6. Statement of Claims and Defense

1297.231. Within the period of time agreed upon by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting his or her claim, the points at issue, and the relief or remedy sought, and the respondent shall state his or her defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of those statements.

1297.232. 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.

1297.233. Unless otherwise agreed by the parties, either party may amend or supplement his or her claim or defense during the course of the arbitral proceedings, unless the arbitral tribunal considers it inappropriate to allow the amendment or supplement having regard to the delay in making it.

Article 7. Hearings and Written Proceedings

1297.241. Unless otherwise agreed by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials.

1297.242. Unless the parties have agreed that no oral hearings shall be held, the arbitral tribunal shall hold oral hearings at an appropriate state of the proceedings, if so requested by a party.

1297.243. The parties shall be given sufficient advance notice of any hearing and of any meeting of the arbitral tribunal for the purpose of inspection of documents, goods, or other property.

1297.244. All statements, documents, or other information supplied to, or applications made to, the arbitral tribunal by one party shall be communicated to the other party, and any expert report or evidentiary document on which the arbitral tribunal may rely in making its decision shall be communicated to the parties.

1297.245. Unless otherwise agreed by the parties, all oral hearings and meetings in arbitral proceedings shall be held in camera.

Article 8. Default of a Party

1297.251. Unless otherwise agreed by the parties, where, without showing sufficient cause, the claimant fails to communicate his or her statement of claim in accordance with Sections 1297.231 and 1297.232, the arbitral tribunal shall terminate the proceedings.

1297.252. Unless otherwise agreed by the parties, where, without showing sufficient cause, the respondent fails to communicate his or her statement of defense in accordance with Sections 1297.231 and 1297.232, the arbitral tribunal shall continue the proceedings without treating that failure in itself as an admission of the claimant's allegations.

1297.253. Unless otherwise agreed by the parties, where, without showing sufficient cause, a party fails to appear at an oral hearing or to produce documentary evidence, the arbitral tribunal may continue with the proceedings and make the arbitral award on the evidence before it.

Article 9. Expert Appointed by Arbitral Tribunal

1297.261. Unless otherwise agreed by the parties, the arbitral tribunal may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal, and require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for his or her inspection.

1297.262. Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of his or her written or oral report, participate in an oral hearing where the parties have the opportunity to question the expert and to present expert witnesses on the points at issue.

Article 10. Court Assistance in Taking Evidence and Consolidating Arbitrations

1297.271. The arbitral tribunal, or a party with the approval of the arbitral tribunal, may request from the superior court assistance in taking evidence and the court may execute the request within its competence and according to its rules on taking evidence. In addition, a subpoena may issue as provided in Section 1282.6, in which

case the witness compensation provisions of Section 1283.2 shall apply.

1297.272. Where the parties to two or more arbitration agreements have agreed, in their respective arbitration agreements or otherwise, to consolidate the arbitrations arising out of those arbitration agreements, the superior court may, on application by one party with the consent of all the other parties to those arbitration agreements, do one or more of the following:

(a) Order the arbitrations to be consolidated on terms the court considers just and necessary.

(b) Where all the parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with Section 1297.118.

(c) Where all the parties cannot agree on any other matter necessary to conduct the consolidated arbitration, make any other order it considers necessary.

1297.273. Nothing in this article shall be construed to prevent the parties to two or more arbitrations from agreeing to consolidate those arbitrations and taking any steps that are necessary to effect that consolidation.

CHAPTER 6. MAKING OF ARBITRAL AWARD AND TERMINATION OF PROCEEDINGS

Article 1. Rules Applicable to Substance of Dispute

1297.281. The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute.

1297.282. Any designation by the parties of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

1297.283. Failing any designation of the law under Section 1297.282 by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute.

1297.284. The arbitral tribunal shall decide *ex aequo et bono* or as *amiabile compositeur*, if the parties have expressly authorized it to do so.

1297.285. In all cases, the arbitral tribunal shall decide in ac-

cordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

Article 2. Decisionmaking by Panel of Arbitrators

1297.291. Unless otherwise agreed by the parties, in arbitral proceedings with more than one arbitrator, any decision of the arbitral tribunal shall be made by a majority of all its members.

Notwithstanding this section, if authorized by the parties or all the members of the arbitral tribunal, questions of procedure may be decided by a presiding arbitrator.

Article 3. Settlement

1297.301. It is not incompatible with an arbitration agreement for an arbitral tribunal to encourage settlement of the dispute and, with the agreement of the parties, the arbitral tribunal may use mediation, conciliation, or other procedures at any time during the arbitral proceedings to encourage settlement.

1297.302. If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

1297.303. An arbitral award on agreed terms shall be made in accordance with Article 4 (commencing with Section 1297.311) of this chapter and shall state that it is an arbitral award.

1297.304. An arbitral award on agreed terms has the same status and effect as any other arbitral award on the substance of the dispute.

Article 4. Form and Content of Arbitral Award

1297.311. An arbitral award shall be made in writing and shall be signed by the members of the arbitral tribunal.

1297.312. For the purpose of Section 1297.311, in arbitral proceedings with more than one arbitrator, the signatures of the majority of all the members of the arbitral tribunal shall be sufficient so long as the reason for any omitted signature is stated.

1297.313. The arbitral award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to

be given, or the award is an arbitral award on agreed terms under Article 3 (commencing with Section 1297.301) of this chapter.

1297.314. The arbitral award shall state its date and the place of arbitration as determined in accordance with Article 3 (commencing with Section 1297.201 of Chapter 5 and the award shall be deemed to have been made at that place.

1297.315. After the arbitral award is made, a signed copy shall be delivered to each party.

1297.316. The arbitral tribunal may, at any time during the arbitral proceedings, make an interim arbitral award on any matter with respect to which it may make a final arbitral award. The interim award may be enforced in the same manner as a final arbitral award.

1297.317. Unless otherwise agreed by the parties, the arbitral tribunal may award interest.

1297.318. (a) Unless otherwise agreed by the parties, the costs of an arbitration shall be at the discretion of the arbitral tribunal.

(b) In making an order for costs, the arbitral tribunal may include as costs any of the following:

(1) The fees and expenses of the arbitrators and expert witnesses.

(2) Legal fees and expenses.

(3) Any administration fees of the institution supervising the arbitration, if any.

(4) Any other expenses incurred in connection with the arbitral proceedings.

(c) In making an order for costs, the arbitral tribunal may specify any of the following:

(1) The party entitled to costs.

(2) The party who shall pay the costs.

(3) The amount of costs or method of determining that amount.

(4) The manner in which the costs shall be paid.

Article 5. Termination of Proceedings

1297.321. The arbitral proceedings are terminated by the final arbitral award or by an order of the arbitral tribunal under Section 1297.322. The award shall be final upon the expiration of the applicable periods in Article 6 (commencing with Section 1297.331) of this chapter.

1297.322. The arbitral tribunal shall issue an order for the termination of the arbitral proceedings where any of the following occurs:

(a) The claimant withdraws his or her claim, unless the respondent objects to the order and the arbitral tribunal recognizes a legitimate interest on the respondent's part in obtaining a final settlement of the dispute.

(b) The parties agree on the termination of the proceedings.

(c) The arbitral tribunal finds that the continuation of the proceedings has for any other reason become unnecessary or impossible.

1297.323. Subject to Article 6 (commencing with Section 1297.331) of this chapter, the mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings.

*Article 6. Correction and Interpretation of Awards
and Additional Awards*

1297.331. Within 30 days after receipt of the arbitral award, unless another period of time has been agreed upon by the parties:

(a) A party may request the arbitral tribunal to correct in the arbitral award any computation errors, any clerical or typographical errors, or any other errors of a similar nature.

(b) A party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

1297.332. If the arbitral tribunal considers any request made under Section 1297.331 to be justified, it shall make the correction or give the interpretation within 30 days after receipt of the request and the interpretation shall form part of the arbitral award.

1297.333. The arbitral tribunal may correct any error of the type referred to in subdivision (a) of Section 1297.331, on its own initiative, within 30 days after the date of the arbitral award.

1297.334. Unless otherwise agreed by the parties, a party may request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional award as to the claims presented in the arbitral proceedings but omitted from the arbitral award.

1297.335. If the arbitral tribunal considers any request made under Section 1297.334 to be justified, it shall make the additional arbitral award within 60 days after receipt of the request.

1297.336. The arbitral tribunal may extend, if necessary, the

period of time within which it shall make a correction, give an interpretation, or make an additional arbitral award under Section 1297.331 or 1297.334.

1297.337. Article 4 (commencing with Section 1297.311) of this chapter applies to a correction or interpretation of the arbitral award or to an additional arbitral award made under this section.

CHAPTER 7. CONCILIATION

Article 1. Appointment of Conciliators

1297.341. It is the policy of the State of California to encourage parties to an international commercial agreement or transaction which qualifies for arbitration or conciliation pursuant to Section 1297.13, to resolve disputes arising from such agreements or transactions through conciliation. The parties may select or permit an arbitral tribunal or other third party to select one or more persons to serve as the conciliator or conciliators who shall assist the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

1297.342. The conciliator or conciliators shall be guided by principles of objectivity, fairness, and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous practices between the parties.

1297.343. The conciliator or conciliators may conduct the conciliation proceedings in such a manner as they consider appropriate, taking into account the circumstances of the case, the wishes of the parties, and the desirability of a speedy settlement of the dispute. Except as otherwise provided in this title, other provisions of this code, the Evidence Code, or the California Rules of Court, shall not apply to conciliation proceedings brought under this title.

Article 2. Representation and Assistance

1297.351. The parties may appear in person or be represented or assisted by any person of their choice. A person assisting or representing a party need not be a member of the legal profession or licensed to practice law in California.

Article 3. Report of Conciliators

1297.361. At any time during the proceedings, the conciliator

or conciliators may prepare a draft conciliation settlement which may include the assessment and apportionment of costs between the parties, and send copies to the parties, specifying the time within which they must signify their approval.

1297.362. No party may be required to accept any settlement proposed by the conciliator and conciliators.

Article 4. Confidentiality

1297.371. When persons agree to participate in conciliation under this title:

(a) Evidence of anything said or of any admission made in the course of the conciliation is not admissible in evidence, and disclosure of any such evidence shall not be compelled in any civil action in which, pursuant to law, testimony may be compelled to be given. However, this subdivision does not limit the admissibility of evidence if all parties participating in conciliation consent to its disclosure.

(b) In the event that any such evidence is offered in contravention of this section, the arbitration tribunal or the court shall make any order which it considers to be appropriate to deal with the matter, including, without limitation, orders restricting the introduction of evidence, or dismissing the case without prejudice.

(c) Unless the document otherwise provides, no document prepared for the purpose of, or in the course of, or pursuant to, the conciliation, or any copy thereof, is admissible in evidence, and disclosure of any such document shall not be compelled, in any arbitration or civil action in which, pursuant to law, testimony may be compelled to be given.

Article 5. Stay of Arbitration and Resort to Other Proceedings

1297.381. The agreement of the parties to submit a dispute to conciliation shall be deemed an agreement between or among those parties to stay all judicial or arbitral proceedings from the commencement of conciliation proceedings.

1297.382. All applicable limitation periods including periods of prescription shall be tolled or extended upon the commencement of conciliation proceedings to conciliate a dispute under this title and all limitation periods shall remain tolled and periods of prescription extended as to all parties to the conciliation proceedings until the 10th day following the termination of conciliation proceedings. For purposes of this article, conciliation proceedings are deemed to have com-

menced as soon as (a) a party has requested conciliation of a particular dispute or disputes, and (b) the other party or parties agree to participate in the conciliation proceeding.

Article 6. Termination

1297.391. The conciliation proceedings may be terminated as to all parties by any of the following:

(a) A written declaration of the conciliator or conciliators, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration.

(b) A written declaration of the parties addressed to the conciliator or conciliators to the effect that the conciliation proceedings are terminated, on the date of the declaration.

(c) The signing of a settlement agreement by all of the parties on the date of the agreement.

1297.392. The conciliation proceedings may be terminated as to the particular parties by either of the following:

(a) A written declaration of a party to the other party and the conciliator or conciliators, if appointed, to the effect that the conciliation proceedings shall be terminated as to that particular party, on the date of the declaration.

(b) The signing of a settlement agreement by some of the parties, on the date of the agreement.

1297.393. No person who has served as a conciliator may be appointed as an arbitrator for, or take part in any arbitral or judicial proceedings in, the same dispute unless all parties manifest their consent to such participation or the rules adopted for conciliation or arbitration otherwise provide.

1297.394. By submitting to conciliation, no party shall be deemed to have waived any rights or remedies which that party would have had if conciliation had not been initiated, other than those set forth in any settlement agreement which results from the conciliation.

Article 7. Enforceability of Decree

1297.401. If the conciliation succeeds in settling the dispute, and the result of the conciliation is reduced to writing and signed by the conciliator or conciliators and the parties or their representatives, the written agreement shall be treated as an arbitral award rendered by an arbitral tribunal duly constituted in and pursuant to the laws of

this state, and shall have the same force and effect as a final award in arbitration.

Article 8. Costs

1297.411. Upon termination of the conciliation proceedings, the conciliator shall fix the costs of the conciliation and give written notice thereof to the parties. As used in this article, "costs" includes only the following:

(a) A reasonable fee to be paid to the conciliator or conciliators.

(b) The travel and other reasonable expenses of the conciliator or conciliators.

(c) The travel and other reasonable expenses of witnesses requested by the conciliator or conciliators with the consent of the parties.

(d) The cost of any expert advice requested by the conciliator or conciliators with the consent of the parties.

(e) The cost of any court.

1297.412. These costs shall be borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party shall be borne by that party.

Article 9. Effect on Jurisdiction

1297.421. Neither the request for conciliation, the consent to participate in the conciliation proceedings, the participation in such proceedings, nor the entering into a conciliation agreement or settlement shall be deemed as consent to the jurisdiction of any court in this state in the event conciliation fails.

Article 10. Immunity of Conciliators and Parties

1297.431. Neither the conciliator or conciliators, the parties, nor their representatives shall be subject to service of process on any civil matter while they are present in this state for the purpose of arranging for or participating in conciliation pursuant to this title.

1297.432. No person who serves as a conciliator shall be held liable in an action for damages resulting from any act or omission in the performance of his or her role as a conciliator in any proceeding subject to this title.

SEC. 2. No reimbursement is required by this act pursuant to

Section 6 of Article XIII B of the California Constitution because the local agency or school district has the authority to levy service charges, fees, or assessments sufficient to pay for the program or level of service mandated by this act.

SEC. 3. This act is an urgency statute necessary for the immediate preservation of the public peace, health, or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting the necessity are: In order to reduce the unnecessary burden on the courts, and the resulting delay in the resolution of international commercial disputes, it is necessary that this act take effect immediately.

