

PURPOSE OF COVER SHEET: Completion of the information in this cover sheet will help expedite the Legislative Committee’s review and approval process. Of particular importance is information related to draft development and stakeholder work.

Short Title of Proposal: International Commercial Arbitration Act
Submitted by (Section): Alternative Dispute Resolution
Designated Section Representative and Contact Information (phone and email): Paul McVicker, ADR Legislative Committee Chairman, 206-456-6641, paul@seattlelawandmediation.net
Brief Summary of Bill and Anticipated Fiscal Impact: Bill based upon the model international commercial arbitration act by the United Nations Commission on International Trade Law (UNCITRAL) No anticipated fiscal impact.
Brief Statement of Need: Sixty six nations and eight U.S. States, including California and Orgeon, have enacted legislation based on the model act. International companies have settled expectations regarding international arbitration, including limited court intervention and international commercial arbitration differs significantly from domestic arbitration. International arbitrations provide an economic benefit and Washington is well suited to host commercial international arbitration cases. See Attachment.

Description of Draft Development - describe/explain: <ul style="list-style-type: none">• The number and makeup of the drafting team, including practice areas.• The vote of the drafting team to approve the proposal.• The vote of the Section’s Executive Committee to approve the drafting team’s proposal. Drafting team included 7 members who are attorneys, litigators, arbitrators and mediators. 100% approval of drafting team. 75% Approval of Executive Committee, 100% of those present and voting.
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<input type="checkbox"/> <input type="checkbox"/> Submittal Status:
1. Has this proposal been submitted to the Legislative Committee before? Yes No X <i>(If no, skip the remainder of this section, and move to the Stakeholder Work on the next page.)</i>
2. When was the proposal initially presented to the Legislative Committee? _____
3. Briefly, please provide the following:

- (a) What concerns/questions were raised (or requests for additional information were made) by the Legislative Committee?
- (c) How this proposal addresses any concerns/questions/requests raised or made by the Legislative Committee; and
- (d) Any other information relevant to the status of the proposal.

**Summary of Completed/Ongoing Stakeholder Work
(Vetting - Internal and External)**

Referred to:	Feedback : (Support; Oppose; Concerns; Neutral; No response – Explain any opposition or concerns.)
Business Law Section	
Corporate Counsel Section	
International Practice Section	
Litigation Section	
International Center for Dispute Resolution	
College of Commercial Arbitration	supportive
JAMS	
AAA	

Summary of Other Potential Stakeholder Input

***Describe any other anticipated stakeholders, opposition, or concerns about the proposal.**

Little feedback from anticipated stakeholders has been received. The CCA - College of Commercial Arbitrators has expressed support for the proposal but has not endorsed the specific bill. We expect they will take it up at their next meeting. The IDCR has simply expressed an interest in the proposal and participating in the forum scheduled October 23. Other stakeholders may include business organizations such as the Chamber of Commerce.

Proposed RCW 7.04B International Commercial Arbitration Act

Purpose: To make the State of Washington a more hospitable venue for international commercial arbitration by enacting new RCW 7.04B – based on the UNCITRAL Model Law on International Commercial Arbitration – to govern international arbitration.

Rationale: (1) Washington’s Current Law (RCW 7.04A) Is Inadequate for International Arbitration

- **RCW 7.04A is designed for domestic arbitration**
 - Allows more court supervision of the arbitral process than the Model Law
 - Court supervision is more appropriate to protect individuals / residents than sophisticated business entities / foreign parties
- **International arbitration differs significantly from domestic arbitration**
 - Typically involves parties from different legal traditions
 - Almost always involves disputes between companies, not individuals
 - Typically involves relatively large amounts in dispute (millions of dollars)
 - Always involves only commercial – not labor, employment, or consumer – relationships
- **International arbitration’s differences warrant separate treatment under the law**
 - Companies have settled expectations regarding international arbitration
 - Foreign companies avoid jurisdictions that allow local courts to intervene

Rationale: (2) Washington Would Benefit From Adopting the UNCITRAL Model Law

- **The Model Law is time-tested and internationally trusted**
 - 66 nations and 8 U.S. states have enacted legislation based on the Model Law
 - The Model Law is the product of extensive collaboration among governments and interested stakeholders to establish a harmonized legal framework for resolving international commercial disputes
- **Washington’s Pacific coast neighbors have enacted legislation based on the Model Law**

• California (1988)	• Oregon (1991)
• British Columbia (1986)	• Mexico (1993)

- **International arbitrations are economically beneficial to the cities and states that host them**
 - Toronto study (2012): Estimated average economic impact of a case—C\$1.7 million
 - UK estimate (1979): Estimated impact of international arbitration—£500 million
- **Seattle and Washington is well-situated to host cases between Canadian, Mexican, Asian, and U.S. companies**
 - Convenient for air travel; cost-effective facilities; hub of sophisticated global businesses; multicultural hospitality with a rich variety of dining and entertainment options.

Rationale: (3) Enacting Separate Legislation to Govern International Commercial Arbitration Has No Discernible Cost

DRAFT PROPOSED LEGISLATION ADOPTING THE UNCITRAL MODEL LAW

*** **ANNOTATED** ***

Chapter 7.04B RCW
International Commercial Arbitration Act

**RCW Sections
Outline**

General Provisions

- 7.04B.010 Scope of Application.
- 7.04B.020 Definitions and Rules of Interpretation.
- 7.04B.030 International Origin and General Principles.
- 7.04B.040 Receipt of Written Communications.
- 7.04B.050 Waiver of Right to Object.
- 7.04B.060 Extent of Court Intervention.
- 7.04B.070 Court Authority for Certain Functions of Arbitration Assistance and Supervision.

Arbitration Agreement

- 7.04B.080 Definition and Form of Arbitration Agreement.
- 7.04B.090 Arbitration Agreement and Substantive Claim before Court.
- 7.04B.100 Arbitration Agreement and Interim Measures by Court.

Composition of Arbitral Tribunal

- 7.04B.110 Number of Arbitrators.
- 7.04B.120 Appointment of Arbitrators.
- 7.04B.130 Grounds for Challenge.
- 7.04B.140 Challenge Procedure.
- 7.04B.150 Failure or Impossibility to Act.
- 7.04B.160 Appointment of Substitute Arbitrator.

Comment [A1]: The Committee recommends creating a "dual-track" arbitral regime in Washington State that would subject international commercial arbitration to these provisions -- which in most material respects mirror the provisions of the UNCITRAL Model Law on International Commercial Arbitration ("Model Law") -- and subject domestic arbitration to the provisions of current RCW 7.04A. The proposal would align Washington with its west coast sister states (Oregon and California) and west coast foreign jurisdictions (Mexico and B.C., Canada), all of which have adopted the Model Law. For more information, see Brewer, Koh & Hager, *International Commercial Arbitration in Washington: The Need for the Model Law*, Wash. St. B. News, Vol. 66, No. 40, at page 30 (April 2012).

Comment [A2]: These annotations identify and explain the material differences between the proposed RCW 7.04B and the Model Law, California law, Oregon law, and in some cases, the provisions of Washington's current arbitration law, RCW 7.04A. Where there are no annotations, the provisions mirror those in the Model Law and in California and Oregon's international commercial arbitration laws.

Jurisdiction of Arbitral Tribunal

7.04B.170 Competence of Arbitral Tribunal to Rule on its Own Jurisdiction.

Interim Measures and Preliminary Orders

7.04B.180 Power of Arbitral Tribunal to Order Interim Measures.

7.04B.190 Conditions of Granting Interim Measures.

7.04B.200 Applications for Preliminary Orders and Conditions for Granting Preliminary Orders.

7.04B.210 Specific Regime for Preliminary Orders.

7.04B.220 Modification, Suspension, Termination.

7.04B.230 Provision of Security.

7.04B.240 Disclosure.

7.04B.250 Costs and Damages.

7.04B.260 Recognition and Enforcement.

7.04B.270 Grounds for Refusing Recognition or Enforcement.

7.04B.280 Court Ordered Interim Measures.

Conduct of Arbitral Proceedings

7.04B.290 Equal Treatment of Parties.

7.04B.300 Determination of Rules of Procedure.

7.04B.310 Place of Arbitration.

7.04B.320 Commencement of Arbitral Proceedings.

7.04B.330 Language.

7.04B.340 Statements of Claim and Defense.

7.04B.350 Hearings and Written Proceedings.

7.04B.360 Default of a Party.

7.04B.370 Expert Appointed by Arbitral Tribunal.

7.04B.380 Court Assistance in Taking Evidence.

Making of Award and Termination of Proceedings

- 7.04B.390 Rules Applicable to Substance of Dispute.
- 7.04B.400 Decision Making by Panel of Arbitrators.
- 7.04B.410 Settlement.
- 7.04B.420 Form and Contents of Award.
- 7.04B.430 Termination of Proceedings.
- 7.04B.440 Correction and Interpretation of Award; Additional Award.

Recourse Against Award

- 7.04B.450 Application for Setting Aside as Exclusive Recourse against Arbitral Award.

Recognition and Enforcement of Awards

- 7.04B.460 Recognition and Enforcement.
- 7.04B.470 Grounds for Refusing Recognition or Enforcement.

General Provisions

7.04B.010

Scope of Application.

(1) This chapter applies to international commercial arbitration, subject to any agreement between this state and any other state or states.

(2) The provisions of this chapter, except RCW 7.04B.090, RCW 7.04B.100, RCW 7.04B.260, RCW 7.04B.270, RCW 7.04B.280, RCW 7.04B.460 and RCW 7.04B.470, apply only if the place of arbitration is in the territory of this state.

(3) An arbitration is international if:

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

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

(i) the place of arbitration if determined in, or pursuant to, the arbitration agreement;

(ii) any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) the parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

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

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

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

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

7.04B.020

Definitions and Rules of Interpretation.

For the purpose of this chapter:

- (1) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (2) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (3) "commercial" means matters arising from all relationships of a commercial nature, whether contractual or not, including, but not limited to, any of the following transactions:
 - (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; and
 - (r) Professional services.

Comment [A3]: The Model Law defines "commercial" this way, but in a footnote. California and Oregon incorporate the Model Law's definition of "commercial" in the text of their international arbitration statutes.

The Committee recommends expressly defining the term to provide clearer guidance on the law's applicability and to align Washington with California and Oregon.

- (4) “court” means a body or organ of the judicial system of this state;
- (5) where a provision of this chapter, except RCW 7.04B.390, 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;
- (6) where a provision of this chapter refers to the fact that the parties have agreed or that they may agree or in any other way refers to an agreement of the parties, such agreement includes any arbitration rules referred to in that agreement;
- (7) where a provision of this chapter, other than in RCW 7.04B.360 (1) and RCW 7.04B.430 (2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defense, it also applies to a defense to such counter-claim.

(8) for the purpose of interpreting this chapter, recourse may be had, in addition to aids of interpretation ordinarily available under the law of this state, to,

(a) the Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (June 3-21, 1985); and

(b) the Analytical Commentary contained in the Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law; and

(c) the Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as Amended in 2006.

7.04B.030
International Origin and General Principles.

- (1) In the interpretation of this chapter, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.
- (2) Questions concerning matters governed by this chapter which are not expressly settled in it are to be settled in conformity with the general principles on which this chapter is based.

7.04B.040
Receipt of Written Communications.

- (1) Unless otherwise agreed by the parties:
 - (a) any written communication is deemed to have been received if it is delivered to the addressee personally or if it is delivered at the addressee’s place of business, habitual residence or mailing address; if none of these can be found after making a reasonable inquiry, a written communication is deemed to have been received if it is sent to the addressee’s last-

Comment [A4]: Neither the Model Law nor California and Oregon expressly identify interpretive aids, including the UNCITRAL Report, Analytical Commentary, or the Explanatory Note. However, many foreign statutes adopting the Model Law do reference those publications. *See, e.g.,*

The Committee recommends expressly referencing the three documents created by UNCITRAL regarding the Model Law for two reasons. First, the documents provide a legislative history for the Model Law, which may provide helpful guidance to courts, counsel, and parties that confront an issue of interpretation regarding provisions of the law. Expressly referencing the documents would provide helpful direction. Second, because the referenced documents would not be binding on a court or a tribunal, nor exclusive of other interpretive aids, the Committee sees no disadvantage to including the provision.

Comment [A5]: This provision is a recent addition to the Model Law. In 2010, UNCITRAL amended the Model Law (originally enacted in 1985) to include this and other provisions. California and Oregon do not include this provision presumably because the California and Oregon laws were enacted in 1988 and 1991 respectively, and have not been amended subsequent to UNCITRAL’s 2010 amendments.

The Committee recommends the provision be included to provide clear guidance as to the law’s purpose and its difference from RCW 7.04A, the domestic arbitration statute. Clear guidance is needed to effectively capture the perception-based advantages of adopting the Model Law. Because the provision guides but does not bind a court, the Committee sees no disadvantage to including the provision.

known place of business, habitual residence or mailing address by registered letter or any other means which provides a record of the attempt to deliver it;

(b) the communication is deemed to have been received on the day it is so delivered.

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

7.04B.050

Waiver of Right to Object.

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

7.04B.060

Extent of Court Intervention.

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

7.04B.070

Court Authority for Certain Functions of Arbitration Assistance and Supervision.

(1) The functions referred to in RCW 7.04B.120 (3), RCW 7.04B.120 (4), RCW 7.04B.140 (3), RCW 7.04B.150, RCW 7.04B.170 (3) and RCW 7.04B.450 (2) shall be performed by the Superior Court of the county in which the agreement to arbitrate is to be performed or was made.

(2) If the arbitration agreement does not specify a county where the agreement to arbitrate is to be performed and the agreement was not made in any county in the State of Washington, the county where any party to the court proceeding resides or has a place of business.

(3) In any case not covered by paragraph (1) or (2) of this section, in any county in the State of Washington.

Comment [A6]: The Model Law does not designate an appropriate court for these functions. California designates its superior courts and Oregon designates its circuit courts, which are functional equivalents of Washington's superior courts.

The Committee recommends mirroring California and Oregon by designating the Superior Court as the appropriate court for assisting and supervising international commercial arbitrations in Washington.

Comment [A7]: The Model Law and California do not include subsections (2) or (3), while Oregon does include them.

The Committee recommends mirroring Oregon's law in this respect and including subsections (2) and (3). First, subsections (2) and (3) provide clear guidance on proper venue for the limited court functions prescribed by the act in the event two foreign parties execute an arbitration agreement that designates a place of arbitration as, e.g., "in Washington State". Second, because the subsections address only proper venue for court action -- i.e., they do not increase the supervisory power of local courts -- the Committee sees no disadvantage to including them.

Arbitration Agreement

7.04B.080

Definition and Form of Arbitration Agreement.

- (1) "Arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.
- (2) The arbitration agreement shall be in writing.
- (3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.
- (4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference; "electronic communication" means any communication that the parties make by means of data messages; "data message" means information generated, sent, received or stored by electronic, magnetic, optical or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex or telecopy.
- (5) Furthermore, an arbitration agreement is in writing if it is contained 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 the other.
- (6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

7.04B.090

Arbitration Agreement and Substantive Claim before Court.

- (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
- (2) Where an action referred to in paragraph (1) of this section has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award made, while the issue is pending before the court.

Comment [A8]: The Model Law provides an either/or choice with respect to form of arbitration agreement, either in writing or not. California and Oregon both require a writing.

The Committee recommends requiring a writing to align Washington with California and Oregon and to align the international arbitration act with RCW 7.04A.060, which also requires an arbitration agreement be contained "in a record."

Comment [A9]: The Model Law, California, and Oregon agree on this issue. It is the linchpin of international commercial arbitration that local courts will refer would-be litigants to arbitration, except in the rarest of cases. RCW 7.04A.060 (2), on the other hand, requires the court to decide whether an arbitration agreement exists and whether the controversy is subject to the agreement. RCW 7.04A.060 also empowers a court to stay arbitration proceedings pending its determination. By contrast, the tribunal is given responsibility under RCW 7.04A.060 (3) to decide only "whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid arbitration agreement is enforceable."

The additional, mandatory court powers under RCW 7.04A (and the corresponding express limitation on arbitral authority) create a substantial deterrent to foreign parties who might otherwise consider seating their international commercial arbitrations within Washington.

7.04B.100

Arbitration Agreement and Interim Measures by Court.

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

Composition of Arbitral Tribunal

7.04B.110

Number of Arbitrators; Immunity.

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be three.
- (3) An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract. The immunity afforded by this section shall supplement, and not supplant, any otherwise applicable common law or statutory immunity.

7.04B.120

Appointment of Arbitrators.

- (1) No person shall be precluded by reason of the person’s nationality from acting as an arbitrator, unless otherwise agreed by the parties.
- (2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of paragraphs (4) and (5) of this section.
- (3) Failing such agreement,
 - (a) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court specified in RCW 7.04B.070.
 - (b) in an arbitrator with a sole arbitrator, if the parties are unable to agree on the arbitrator, the arbitrator shall be appointed, upon request of a party, by the court specified in RCW 7.04B.070.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (a) a party fails to act as required under such procedure, or

Comment [A10]: This is the Model Law’s formulation. California and Oregon also have this provision, but add subsections that identify factors to be considered in granting interim measures; list some permissible types of interim measures; define the preclusive effect of prior findings of fact by the arbitral tribunal; define the preclusive effect of arbitral decisions where jurisdiction has not been established; and allow judicial enforcement of arbitral awards for interim measures.

The Committee recommends adopting the Model Law’s formulation for three reasons. First, providing a non-exclusive list of permissive interim measures is unnecessary and potentially counterproductive. It may cause confusion with respect to unstated interim measures. Moreover, foreign parties will be most alert to permissible intervention by local courts; listing a slew of permissible ways a court may intervene in an international arbitration would work against the perception-based advantages of adopting the Model Law. Second, California and Oregon’s additions unnecessarily speak to issues best reserved for the court in view of prior common law rulings on interim measures, such as TROs. Third, the 2010 Amendments to the Model Law establish specific procedures for interim measures (see 7.04B.180 - .280 below) that have not been considered by California and Oregon, which both adopted the 1985 version of the Model Law.

Comment [A11]: The Model Law does not have any provision on arbitral immunity. California and Oregon do have this provision.

The Committee recommends that an express provision on arbitral immunity be included for two reasons. First, RCW 7.04A includes such a provision, and the availability of immunity for arbitrators should not turn on the nationality of the parties to an arbitration. Indeed, the lack of a similar provision in RCW 7.04B might be read to exclude immunity. Second, varying the Model Law in this respect would not be cause for concern for foreign counsel or foreign parties because the would not increase judicial supervision or intervention in the arbitral process. Rather, the provision enhances the policy goal of supporting arbitration and its independence from local courts.

Comment [A12]: California adds a provision regarding immunity for arbitrators, which has been included in RCW 7.04B110.

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

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

any party may request that the court specified in RCW 7.04B.070 to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.\

(5) A decision on a matter entrusted by paragraph (3) or (4) of this section to the court specified in RCW 7.04B.070 shall be subject to no appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

7.04B.130
Grounds for Challenge.

(1) When a person is approached in connection with the person's possible appointment as an arbitrator, the person shall disclose any circumstances likely to give rise to justifiable doubts as to the person's impartiality or independence. An arbitrator, from the time of the arbitrator's 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 the arbitrator.

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

7.04B.140
Challenge Procedure.

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

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in RCW 7.04B.130 (2), send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from the arbitrator's office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

Comment [A13]: California and Oregon include additional provisions that identify a non-exclusive list of instances in which disclosure would be required. Under Washington's current arbitration act, the standard for challenging an arbitrator is whether a "reasonable person would consider likely to affect the impartiality of the arbitrator." Under the Model Law, and the international arbitration laws of California and Oregon, the standard is whether "circumstances exist that give rise to justifiable doubts as to [the arbitrator's] impartiality or independence."

The Committee recommends against identifying instances of disclosure and against retaining the standard for challenge contained in the Model Law and in California and Oregon's international arbitration laws. As to the first, the Committee believes that it is unnecessary and potentially unhelpful to identify instances of mandatory disclosure. Foreign parties and their counsel, as well as arbitrators experienced in the practice of international arbitration, will be familiar with disclosure requirements, which have been the subject of extensive discussion and culminated in the IBA Guidelines on Conflicts of Interest in International Arbitration. Identifying certain instances of mandatory disclosure might suggest that other instances are less important or do not require disclosure. The Model Law has been successfully implemented in dozens of jurisdictions without identifying mandatory disclosures, and to retain the perceptual advantages of enacting the Model Law, the Committee believes that Washington should mirror the Model Law in this respect.

As to the second, the Committee believes that the standard for challenge under RCW 7.04A is inappropriate in the context of international arbitration as it significantly lowers the threshold barrier to removing arbitrators by incorporating essentially a negligence standard. While such a standard may be appropriate in the context of certain small scale or consumer arbitrations, it is not appropriate for the typically high-dollar, company-versus-company, international dispute. A lower standard would invite litigants to disrupt arbitral proceedings by invoking the supervision of local courts to decide challenges. The Model Law's standard affords adequate protection to ensure impartiality and independence, and would be expected by international parties and counsel. Any other standard would raise a red flag potentially and deter entities from selecting Washington as a place for international arbitration.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of paragraph (2) of this section is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court specified in RCW 7.04B.070 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.

7.04B.150
Failure or Impossibility to Act.

(1) If an arbitrator becomes *de jure* or *de facto* unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from the arbitrator's office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court specified in RCW 7.04B.070 to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this section or RCW 7.04B.140 (2), an arbitrator withdraws from the arbitrator's office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or RCW 7.04B.130 (2).

7.04B.160
Appointment of Substitute Arbitrator.

Where the mandate of an arbitrator terminates under RCW 7.04B.140 or RCW 7.04B.150 or because of the arbitrator's withdrawal from office for any other reason or because of the revocation of the arbitrator's mandate by agreement of the parties or in any other case of termination of the arbitrator's mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

Comment [A14]: This is the Model Law's formulation. California and Oregon have supplemented the Model Law with a provision requiring hearings to be repeated if a sole or presiding arbitrator is replaced.

The Committee recommends adopting the Model Law's language without the additional provision requiring hearings to be repeated. Such a decision should not be mandatory, but reserved to the discretion of the arbitral tribunal after the substituted arbitrator is appointed.

Jurisdiction of Arbitral Tribunal

7.04B.170
Competence of Arbitral Tribunal to Rule on its Own Jurisdiction.

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

Comment [A15]: Compare RCW 7.04A.060, which provides that the "court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate," and is a significant departure from international arbitration norms. This provision alone would deter international parties from selecting or accepting Washington as a place for their arbitration.

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

(3) The arbitral tribunal may rule on a plea referred to in paragraph (2) of this section either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in RCW 7.04B.070 to decide the matter, which decision shall be subject to no appeal; while such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

Interim Measures and Preliminary Orders

7.04B.180

Power of Arbitral Tribunal to Order Interim Measures.

(1) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

- (a) Maintain or restore the status quo pending determination of the dispute;
- (b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;
- (c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or
- (d) Preserve evidence that may be relevant and material to the resolution of the dispute.

7.04B.190

Conditions of Granting Interim Measures.

(1) The party requesting an interim measure under RCW 7.04B.180 (2)(a), (b) and (c) shall satisfy the arbitral tribunal that:

Comment [A16]: The following 10 subsections (7.04B.180 to 7.04B.270) were adopted by UNCITRAL in 2010 as amendments to the original 1985 Model Law. California and Oregon do not include these provisions in their international arbitration statutes presumably because they were enacted prior to 2010 and have not been amended since. Both states, however, have a general provision similar to proposed RCW 7.04B.100 that allows certain interim measures by a court and tribunal.

The Committee recommends that Washington include the provisions on interim measures for three reasons. First, they reflect current customary practice in international arbitration. For example, the major arbitral institutions, (ICDR, ICC, and LCIA) have recently amended their rules to incorporate express provisions on interim measures. Second, these provisions would give Washington a comparative advantage over California and Oregon, which require interim measures be granted by a court. The proposed law preserves the court's ability to grant interim measures (see RCW 7.04B.280), but adds provisions empowering and guiding an arbitral tribunal's grant of interim measures. Third, the Committee sees no harm in including these provisions because they are not mandatory. They can be excluded or modified by the parties.

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted.

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under RCW 7.04B.180 (2)(d), the requirements in paragraphs (1)(a) and (b) of this section shall apply only to the extent the tribunal considers appropriate.

7.04B.200

Applications for Preliminary Orders and Conditions for Granting Preliminary Orders.

(1) Unless otherwise agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under RCW 7.04B.190 apply to any preliminary order, provided that the harm to be assessed under RCW 7.04B.190 (1)(a), is the harm likely to result from the order being granted or not.

7.04B.210

Specific Regime for Preliminary Orders.

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or

modifying the preliminary order, after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

7.04B.220

Modification, Suspension, Termination.

The arbitral tribunal may modify, suspend or terminate an interim measure or a preliminary order it has granted, upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

7.04B.230

Provision of Security.

(1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate to do so.

7.04B.240

Disclosure.

(1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, paragraph (1) of this section shall apply.

7.04B.250

Costs and Damages.

The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal

later determines that, in the circumstances, the measure or the order should not have been granted. The arbitral tribunal may award such costs and damages at any point during the proceedings.

7.04B.260
Recognition and Enforcement.

- (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the Superior Court, irrespective of the country in which it was issued, subject to the provisions of RCW 7.04B.270.
 - (2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension or modification of that interim measure.
 - (3) The court of the state where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.
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7.04B.270
Grounds for Refusing Recognition or Enforcement.

- (1) Recognition or enforcement of an interim award may be refused only:
 - (a) At the request of the party against whom it is invoked if the court is satisfied that:
 - (i) Such refusal is warranted on the grounds set forth in RCW 7.04B.470 (1)(a)(i), (ii), (iii) or (iv); or
 - (ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or
 - (iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted; or
 - (b) If the court finds that:
 - (i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in RCW 7.04B.470 (1)(b)(i) or (ii), apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in paragraph (1) of this section shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

7.04B.280

Court Ordered Interim Measures.

A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this state, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

Conduct of Arbitral Proceedings

7.04B.290

Equal Treatment of Parties.

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

7.04B.300

Determination of Rules of Procedure.

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

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

Comment [A17]: The Model Law, California, and Oregon align on this issue, conferring on the tribunal broad discretion over procedural matters. By contrast, RCW 7.04A.150 (2) - (5) and RCW 7.04A.170 prescribe certain U.S.-style procedures, including motions practice, discovery, and scheduling. Such procedures may be anathema to many international parties and their expectations because they are contrary to the customary practice of international arbitration.

7.04B.310

Place of Arbitration.

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

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

7.04B.320

Commencement of Arbitral Proceedings.

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

7.04B.330

Language.

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

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

7.04B.340

Statements of Claim and Defense.

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

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

7.04B.350

Hearings and Written Proceedings.

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

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

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

7.04B.360

Default of a Party.

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

(1) the claimant fails to communicate its statement of claim in accordance with RCW 7.04B.340 (1), the arbitral tribunal shall terminate the proceedings;

(2) the respondent fails to communicate its statements of defense in accordance with RCW 7.04B.340 (1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;

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

7.04B.370

Expert Appointed by Arbitral Tribunal.

(1) Unless otherwise agreed by the parties, the arbitral tribunal

(a) may appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal;

(b) may require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods or other property for the expert's inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of the expert's written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and to present expert witnesses in order to testify on the points at issue.

7.04B.380

Court Assistance in Taking Evidence; Consolidation.

(1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the Superior Court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

(2) When the parties to two or more arbitration agreements have agreed in their respective arbitration agreements or otherwise, the Superior Court may, on application by one party with the consent of all other parties to those arbitration agreements, do one or more of the following:

(a) Order the arbitration proceedings arising out of those arbitration agreements to be consolidated on terms the court considers just and necessary;

(b) Where all parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with RCW 7.04B.120(4); and

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

Comment [A18]: The Model Law does not include provisions on consolidation. Oregon and California do.

The Committee recommends including provisions allowing for consolidation because they would bolster the state's support of international arbitration, not inhibit it. Moreover, because consolidation is allowed under RCW 7.04A.100, it would be incongruous to not provide for consolidation of international arbitrations on the consent of the parties. Finally, because party consent is required, there would be no harm to facilitating the parties' intent, whereas the alternative might frustrate their intent.

Making of Award and Termination of Proceedings

7.04B.390

Rules Applicable to Substance of Dispute.

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

7.04B.400

Decision Making by Panel of Arbitrators.

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

7.04B.410

Settlement.

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

(2) An award on agreed terms shall be made in accordance with the provisions of RCW 7.04B.420 and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

7.04B.420

Form and Contents of Award.

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

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under RCW 7.04B.410.

(3) The award shall state its date and the place of arbitration as determined in accordance with RCW 7.04B.310 (1). The award shall be deemed to have been made at that place.

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

7.04B.430

Termination of Proceedings.

Comment [A19]: This is the Model Law's formulation. California and Oregon add a clause providing that "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."

The Committee recommends adopting the Model Law's language without the additional clause encouraging settlement and allowing the tribunal to use other forms of ADR during the proceedings for two reasons. First, the provision is unnecessary because RCW 7.04B.300 allows the tribunal wide discretion to determine procedural rules, so long as the parties are treated equally and fairly. Second, the provision might raise a red flag to foreign parties and their counsel who would expect the tribunal's express authority to be limited to arbitration-related duties. Moreover, there is some question of whether tribunals lose their independence and impartiality by engaging the parties in mediation. The Committee believes it is best to mirror the Model Law's language whenever possible.

Comment [A20]: This is the Model Law's formulation. California and Oregon add an additional clause providing that the tribunal (1) can make interim awards, (2) can award interest, unless otherwise agreed by the parties, and (3) can award costs, unless otherwise agreed by the parties.

The Committee recommends adopting the Model Law's formulation for two reasons. First, to capture the perceptual advantages on enacting an international arbitration statute, it is best to mirror the Model Law. Second, the California and Oregon addition is unnecessary. The power to issue an award includes the power to issue interim awards, interest, and costs, which would be widely understood by the sophisticated parties and arbitrators who might be involved in international commercial arbitration.

- (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with paragraph (2) of this section.
- (2) The arbitral tribunal shall issue an order for the termination of the arbitral proceedings when:
 - (a) the claimant withdraws its claim, unless the respondent objects thereto 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.
- (3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of RCW 7.04B.440 and RCW 7.04B.450 (4).

7.04B.440
Correction and Interpretation of Award; Additional Award.

- (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:
 - (a) a party, with notice to the other party, may request the arbitral tribunal to correct in the award any errors in computation, any clerical or typographical errors or any errors of similar nature;
 - (b) if so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award.

If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

- (2) The arbitral tribunal may correct any error of the type referred to in paragraph (1)(a) of this section on its own initiative within thirty days of the date of the award.
- (3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.
- (4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation or an additional award under paragraph (1) or (3) of this section.

(5) The provisions of RCW 7.04B.420 shall apply to a correction or interpretation of the award or to an additional award.

Recourse Against Award

7.04B.450

Application for Setting Aside as Exclusive Recourse against Arbitral Award.

(1) Recourse to the Superior Court against an arbitral award may be made only by an application for setting aside in accordance with paragraphs (2) and (3) of this section.

(2) An arbitral award may be set aside by the Superior Court only if:

(a) the party making the application furnishes proof that:

(i) a party to the arbitration agreement referred to in RCW 7.04B.080 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case; or

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

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this chapter from which the parties cannot derogate, or, failing such agreement, was not in accordance with this chapter; or

(b) the court finds that:

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

(ii) the award is in conflict with the public policy of this state.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under RCW 7.04B.440, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

Recognition and Enforcement of Awards

7.04B.460

Recognition and Enforcement.

(1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the Superior Court, shall be enforced subject to the provisions of this section and of RCW 7.04B.470.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in English, the court may request the party to supply a translation thereof into English.

Comment [A21]: The Model Law, California, and Oregon align on this point, which permits the Superior Court to enforce any arbitral award whether foreign or made in Washington. By contrast, RCW 7.04A.2060 (2) gives exclusive jurisdiction to the Washington courts, which foreign parties would likely read as preclusive of enforcing the award in a non-Washington court.

7.04B.470

Grounds for Refusing Recognition or Enforcement.

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

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

(i) a party to the arbitration agreement referred to in RCW 7.04B.080 was under some incapacity; or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

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

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

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

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

(b) the court finds that:

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

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

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

BILL REQUEST - CODE REVISER'S OFFICE

BILL REQ. #: H-2750.1/13

ATTY/TYPIST: AA:bbp

BRIEF DESCRIPTION: Creating the international commercial arbitration act.

AN ACT Relating to international commercial arbitration; and adding a new chapter to Title 7 RCW.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

NEW SECTION. **Sec. 1.** SCOPE OF APPLICATION. (1) This chapter applies to international commercial arbitration, subject to any agreement between this state and any other state or states.

(2) The provisions of this chapter, except sections 9, 10, 26, 27, 28, 46, and 47 of this act, apply only if the place of arbitration is in the territory of this state.

(3) An arbitration is international if:

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

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

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

(ii) Any place where a substantial part of the obligations of the commercial relationship is to be performed or the place with which the subject matter of the dispute is most closely connected; or

(c) The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

(4) For the purposes of subsection (3) of this section:

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

(b) If a party does not have a place of business, reference is to be made to the party's habitual residence.

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

NEW SECTION. **Sec. 2.** DEFINITIONS AND RULES OF INTERPRETATION.

For the purpose of this chapter:

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

(2) "Arbitral tribunal" means a sole arbitrator or a panel of arbitrators;

(3) "Commercial" means matters arising from all relationships of a commercial nature, whether contractual or not, including, but not limited to, any of the following transactions:

(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; and
- (r) Professional services;

(4) "Court" means a body or organ of the judicial system of this state;

(5) Where a provision of this chapter, except section 39 of this act, 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;

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

(7) Where a provision of this chapter, other than in sections 36(1) and 43(2)(a) of this act, refers to a claim, it also applies to a counter-claim, and where it refers to a defense, it also applies to a defense to such counter-claim;

(8) For the purpose of interpreting this chapter, recourse may be had, in addition to aids of interpretation ordinarily available under the law of this state, to:

(a) The report of the United Nations commission on international trade law on the work of its eighteenth session (June 3-21, 1985);

(b) The analytical commentary contained in the report of the secretary general to the eighteenth session of the United Nations commission on international trade law; and

(c) The explanatory note by the UNCITRAL Secretariat on the 1985 Model Law on international commercial arbitration as amended in 2006.

NEW SECTION. **Sec. 3.** INTERNATIONAL ORIGIN AND GENERAL PRINCIPLES. (1) In the interpretation of this chapter, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this chapter which are not expressly settled in it are to be settled in conformity with the general principles on which this chapter is based.

NEW SECTION. **Sec. 4.** RECEIPT OF WRITTEN COMMUNICATIONS. (1) Unless otherwise agreed by the parties:

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

(b) The communication is deemed to have been received on the day it is so delivered.

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

NEW SECTION. **Sec. 5.** WAIVER OF RIGHT TO OBJECT. A party who knows that any provision of this chapter from which the parties may derogate or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating the party's objection to such noncompliance without undue delay or, if a time limit is provided therefore, within such period of time, shall be deemed to have waived the party's right to object.

NEW SECTION. **Sec. 6.** EXTENT OF COURT INTERVENTION. In matters governed by this chapter, no court shall intervene except where so provided in this chapter.

NEW SECTION. **Sec. 7.** COURT AUTHORITY FOR CERTAIN FUNCTIONS OF ARBITRATION ASSISTANCE AND SUPERVISION. (1) The functions referred to in sections 12 (3) and (4), 14(3), 15, 17(3), and 45(2) of this act shall be performed by the superior court of the county in which the agreement to arbitrate is to be performed or was made.

(2) If the arbitration agreement does not specify a county where the agreement to arbitrate is to be performed and the agreement was not made in any county in the state of Washington, the functions referred to in sections 12 (3) and (4), 14(3), 15, 17(3), and 45(2) of this act shall be performed in the county where any party to the court proceeding resides or has a place of business.

(3) In any case not covered by subsections (1) or (2) of this section, the functions referred to in sections 12 (3) and (4), 14(3), 15, 17(3), and 45(2) of this act shall be performed in any county in the state of Washington.

NEW SECTION. **Sec. 8.** DEFINITION AND FORM OF ARBITRATION AGREEMENT. (1) For the purposes of this chapter, "arbitration agreement" is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not. An arbitration agreement may be in the form of an arbitration clause in a contract or in the form of a separate agreement.

(2) The arbitration agreement shall be in writing.

(3) An arbitration agreement is in writing if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means.

(4) The requirement that an arbitration agreement be in writing is met by an electronic communication if the information contained therein is accessible so as to be useable for subsequent reference.

For the purposes of this section, "electronic communication" means any communication that the parties make by means of data messages; and "data message" means information generated, sent, received, or stored by electronic, magnetic, optical, or similar means, including, but not limited to, electronic data interchange (EDI), electronic mail, telegram, telex, or telecopy.

(5) An arbitration agreement is in writing if it is contained 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 the other.

(6) The reference in a contract to any document containing an arbitration clause constitutes an arbitration agreement in writing, provided that the reference is such as to make that clause part of the contract.

NEW SECTION. **Sec. 9.** ARBITRATION AGREEMENT AND SUBSTANTIVE CLAIM BEFORE COURT. (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting the party's first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative, or incapable of being performed.

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

NEW SECTION. **Sec. 10.** ARBITRATION AGREEMENT AND INTERIM MEASURES BY COURT. It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

NEW SECTION. **Sec. 11.** NUMBER OF ARBITRATORS; IMMUNITY. (1) The parties are free to determine the number of arbitrators.

(2) Failing such determination, the number of arbitrators shall be three.

(3) An arbitrator has the immunity of a judicial officer from civil liability when acting in the capacity of arbitrator under any statute or contract. The immunity afforded by this section shall supplement, and not supplant, any otherwise applicable common law or statutory immunity.

NEW SECTION. **Sec. 12.** APPOINTMENT OF ARBITRATORS. (1) No person shall be precluded by reason of the person's nationality from acting as an arbitrator, unless otherwise agreed by the parties.

(2) The parties are free to agree on a procedure of appointing the arbitrator or arbitrators, subject to the provisions of subsections (4) and (5) of this section.

(3) Failing such agreement:

(a) In an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within thirty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within thirty days of their appointment, the appointment shall be made, upon request of a party, by the court specified in section 7 of this act; and

(b) In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, the arbitrator shall be appointed, upon request of a party, by the court specified in section 7 of this act.

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

(a) A party fails to act as required under such procedure;

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

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

Any party may request the court specified in section 7 of this act to take the necessary measure, unless the agreement on the appointment procedure provides other means for securing the appointment.

(5) A decision on a matter entrusted by subsection (3) or (4) of this section to the court specified in section 7 of this act shall be subject to no appeal. The court, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator and, in the case of a sole or third arbitrator, shall take into account as well the advisability of appointing an arbitrator of a nationality other than those of the parties.

NEW SECTION. **Sec. 13.** GROUND FOR CHALLENGE. (1) When a person is approached in connection with the person's possible appointment as an arbitrator, the person shall disclose any circumstances likely to give rise to justifiable doubts as to the person's impartiality or independence. An arbitrator, from the time of the arbitrator's 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 the arbitrator.

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

NEW SECTION. **Sec. 14.** CHALLENGE PROCEDURE. (1) The parties are free to agree on a procedure for challenging an arbitrator, subject to the provisions of subsection (3) of this section.

(2) Failing such agreement, a party who intends to challenge an arbitrator shall, within fifteen days after becoming aware of the

constitution of the arbitral tribunal or after becoming aware of any circumstance referred to in section 13(2) of this act, send a written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from the arbitrator's office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge.

(3) If a challenge under any procedure agreed upon by the parties or under the procedure of subsection (2) of this section is not successful, the challenging party may request, within thirty days after having received notice of the decision rejecting the challenge, the court specified in section 7 of this act 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.

NEW SECTION. **Sec. 15.** FAILURE OR IMPOSSIBILITY TO ACT. (1) If an arbitrator becomes *de jure* or *de facto* unable to perform the arbitrator's functions or for other reasons fails to act without undue delay, the arbitrator's mandate terminates if the arbitrator withdraws from the arbitrator's office or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court specified in section 7 of this act to decide on the termination of the mandate, which decision shall be subject to no appeal.

(2) If, under this section or section 14(2) of this act, an arbitrator withdraws from the arbitrator's office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this section or section 13(2) of this act.

NEW SECTION. **Sec. 16.** APPOINTMENT OF SUBSTITUTE ARBITRATOR. Where the mandate of an arbitrator terminates under section 14 or 15 of this act or because of the arbitrator's withdrawal from office for any other reason or because of the revocation of the arbitrator's

mandate by agreement of the parties or in any other case of termination of the arbitrator's mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

NEW SECTION. **Sec. 17.** COMPETENCE OF ARBITRAL TRIBUNAL TO RULE ON ITS OWN JURISDICTION. (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail *ipso jure* the invalidity of the arbitration clause.

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

(3) The arbitral tribunal may rule on a plea referred to in subsection (2) of this section either as a preliminary question or in an award on the merits. If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within thirty days after having received notice of that ruling, the court specified in section 7 of this act to decide the matter, which decision shall be subject to no appeal. While such a request is pending, the arbitral tribunal may continue the arbitral proceedings and make an award.

NEW SECTION. **Sec. 18.** POWER OF ARBITRAL TRIBUNAL TO ORDER INTERIM MEASURES. (1) Unless otherwise agreed by the parties, the

arbitral tribunal may, at the request of a party, grant interim measures.

(2) An interim measure is any temporary measure, whether in the form of an award or in another form, by which, at any time prior to the issuance of the award by which the dispute is finally decided, the arbitral tribunal orders a party to:

(a) Maintain or restore the status quo pending determination of the dispute;

(b) Take action that would prevent, or refrain from taking action that is likely to cause, current or imminent harm or prejudice to the arbitral process itself;

(c) Provide a means of preserving assets out of which a subsequent award may be satisfied; or

(d) Preserve evidence that may be relevant and material to the resolution of the dispute.

NEW SECTION. **Sec. 19.** CONDITIONS OF GRANTING INTERIM MEASURES.

(1) The party requesting an interim measure under section 18(2) (a), (b), and (c) of this act shall satisfy the arbitral tribunal that:

(a) Harm not adequately reparable by an award of damages is likely to result if the measure is not ordered, and such harm substantially outweighs the harm that is likely to result to the party against whom the measure is directed if the measure is granted; and

(b) There is a reasonable possibility that the requesting party will succeed on the merits of the claim. The determination on this possibility shall not affect the discretion of the arbitral tribunal in making any subsequent determination.

(2) With regard to a request for an interim measure under section 18(2)(d) of this act, the requirements in subsection (1)(a) and (b) of this section shall apply only to the extent the tribunal considers appropriate.

NEW SECTION. **Sec. 20.** APPLICATION FOR PRELIMINARY ORDERS AND CONDITIONS FOR GRANTING PRELIMINARY ORDERS. (1) Unless otherwise

agreed by the parties, a party may, without notice to any other party, make a request for an interim measure together with an application for a preliminary order directing a party not to frustrate the purpose of the interim measure requested.

(2) The arbitral tribunal may grant a preliminary order provided it considers that prior disclosure of the request for the interim measure to the party against whom it is directed risks frustrating the purpose of the measure.

(3) The conditions defined under section 19 of this act apply to any preliminary order, provided that the harm to be assessed under section 19(1)(a) of this act is the harm likely to result from the order being granted or not.

NEW SECTION. **Sec. 21.** SPECIFIC REGIME FOR PRELIMINARY ORDERS.

(1) Immediately after the arbitral tribunal has made a determination in respect of an application for a preliminary order, the arbitral tribunal shall give notice to all parties of the request for the interim measure, the application for the preliminary order, the preliminary order, if any, and all other communications, including by indicating the content of any oral communication, between any party and the arbitral tribunal in relation thereto.

(2) At the same time, the arbitral tribunal shall give an opportunity to any party against whom a preliminary order is directed to present its case at the earliest practicable time.

(3) The arbitral tribunal shall decide promptly on any objection to the preliminary order.

(4) A preliminary order shall expire after twenty days from the date on which it was issued by the arbitral tribunal. However, the arbitral tribunal may issue an interim measure adopting or modifying the preliminary order after the party against whom the preliminary order is directed has been given notice and an opportunity to present its case.

(5) A preliminary order shall be binding on the parties but shall not be subject to enforcement by a court. Such a preliminary order does not constitute an award.

NEW SECTION. **Sec. 22.** MODIFICATION, SUSPENSION, TERMINATION. The arbitral tribunal may modify, suspend, or terminate an interim measure or a preliminary order it has granted upon application of any party or, in exceptional circumstances and upon prior notice to the parties, on the arbitral tribunal's own initiative.

NEW SECTION. **Sec. 23.** PROVISION OF SECURITY. (1) The arbitral tribunal may require the party requesting an interim measure to provide appropriate security in connection with the measure.

(2) The arbitral tribunal shall require the party applying for a preliminary order to provide security in connection with the order unless the arbitral tribunal considers it inappropriate to do so.

NEW SECTION. **Sec. 24.** DISCLOSURE. (1) The arbitral tribunal may require any party promptly to disclose any material change in the circumstances on the basis of which the measure was requested or granted.

(2) The party applying for a preliminary order shall disclose to the arbitral tribunal all circumstances that are likely to be relevant to the arbitral tribunal's determination whether to grant or maintain the order, and such obligation shall continue until the party against whom the order has been requested has had an opportunity to present its case. Thereafter, subsection (1) of this section shall apply.

NEW SECTION. **Sec. 25.** COSTS AND DAMAGES. The party requesting an interim measure or applying for a preliminary order shall be liable for any costs and damages caused by the measure or the order to any party if the arbitral tribunal later determines that, in the circumstances, the measure or the order should not have been granted.

The arbitral tribunal may award such costs and damages at any point during the proceedings.

NEW SECTION. **Sec. 26.** RECOGNITION AND ENFORCEMENT. (1) An interim measure issued by an arbitral tribunal shall be recognized as binding and, unless otherwise provided by the arbitral tribunal, enforced upon application to the superior court, irrespective of the country in which it was issued, subject to the provisions of section 27 of this act.

(2) The party who is seeking or has obtained recognition or enforcement of an interim measure shall promptly inform the court of any termination, suspension, or modification of that interim measure.

(3) The court of the state where recognition or enforcement is sought may, if it considers it proper, order the requesting party to provide appropriate security if the arbitral tribunal has not already made a determination with respect to security or where such a decision is necessary to protect the rights of third parties.

NEW SECTION. **Sec. 27.** GROUNDS FOR REFUSING RECOGNITION AND ENFORCEMENT. (1) Recognition or enforcement of an interim award may be refused only:

(a) At the request of the party against whom it is invoked if the court is satisfied that:

(i) Such refusal is warranted on the grounds set forth in section 47(1)(a) (i), (ii), (iii), or (iv) of this act;

(ii) The arbitral tribunal's decision with respect to the provision of security in connection with the interim measure issued by the arbitral tribunal has not been complied with; or

(iii) The interim measure has been terminated or suspended by the arbitral tribunal or, where so empowered, by the court of the state in which the arbitration takes place or under the law of which that interim measure was granted; or

(b) If the court finds that:

(i) The interim measure is incompatible with the powers conferred upon the court unless the court decides to reformulate the interim measure to the extent necessary to adapt it to its own powers and procedures for the purposes of enforcing that interim measure and without modifying its substance; or

(ii) Any of the grounds set forth in section 47(1)(b) (i) or (ii) of this act apply to the recognition and enforcement of the interim measure.

(2) Any determination made by the court on any ground in subsection (1) of this section shall be effective only for the purposes of the application to recognize and enforce the interim measure. The court where recognition or enforcement is sought shall not, in making that determination, undertake a review of the substance of the interim measure.

NEW SECTION. **Sec. 28.** COURT ORDERED INTERIM MEASURES. A court shall have the same power of issuing an interim measure in relation to arbitration proceedings, irrespective of whether their place is in the territory of this state, as it has in relation to proceedings in courts. The court shall exercise such power in accordance with its own procedures in consideration of the specific features of international arbitration.

NEW SECTION. **Sec. 29.** EQUAL TREATMENT OF PARTIES. The parties shall be treated with equality, and each party shall be given a full opportunity of presenting its case.

NEW SECTION. **Sec. 30.** DETERMINATION OF RULES AND PROCEDURE. (1) Subject to the provisions of this chapter, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.

(2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this chapter, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral

tribunal includes the power to determine the admissibility, relevance, materiality, and weight of any evidence.

NEW SECTION. **Sec. 31.** PLACE OF ARBITRATION. (1) The parties are free to agree on the place of arbitration. Failing such agreement, the place of arbitration shall be determined by the arbitral tribunal having regard to the circumstances of the case, including the convenience of the parties.

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

NEW SECTION. **Sec. 32.** COMMENCEMENT OF ARBITRAL PROCEEDINGS. Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

NEW SECTION. **Sec. 33.** LANGUAGE. (1) The parties are free to agree on the language or languages to be used in the arbitral proceedings. Failing such agreement, the arbitral tribunal shall determine the language or languages to be used in the proceedings. This agreement or determination, unless otherwise specified therein, shall apply to any written statement by a party, any hearing, and any award, decision, or other communication by the arbitral tribunal.

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

NEW SECTION. **Sec. 34.** STATEMENT OF CLAIM AND DEFENSE. (1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting its

claim, the point at issue, and the relief or remedy sought, and the respondent shall state its defense in respect of these particulars, unless the parties have otherwise agreed as to the required elements of such statements. The parties may submit with their statements all documents they consider to be relevant or may add a reference to the documents or other evidence they will submit.

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

NEW SECTION. **Sec. 35.** HEARINGS AND WRITTEN PROCEEDINGS. (1)
Subject to any contrary agreement by the parties, the arbitral tribunal shall decide whether to hold oral hearings for the presentation of evidence or for oral argument, or whether the proceedings shall be conducted on the basis of documents and other materials. However, unless the parties have agreed that no hearings shall be held, the arbitral tribunal shall hold such hearings at an appropriate stage of the proceedings, if so requested by a party.

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

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

NEW SECTION. **Sec. 36.** DEFAULT OF A PARTY. Unless otherwise agreed by the parties, if, without showing sufficient cause:

(1) The claimant fails to communicate its statement of claim in accordance with section 34(1) of this act, the arbitral tribunal shall terminate the proceedings;

(2) The respondent fails to communicate its statements of defense in accordance with section 34(1) of this act, the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations; and

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

NEW SECTION. **Sec. 37.** EXPERT APPOINTED BY ARBITRAL TRIBUNAL.

(1) Unless otherwise agreed by the parties, the arbitral tribunal:

(a) May appoint one or more experts to report to it on specific issues to be determined by the arbitral tribunal; and

(b) May require a party to give the expert any relevant information or to produce, or to provide access to, any relevant documents, goods, or other property for the expert's inspection.

(2) Unless otherwise agreed by the parties, if a party so requests or if the arbitral tribunal considers it necessary, the expert shall, after delivery of the expert's written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert and to present expert witnesses in order to testify on the points at issue.

NEW SECTION. **Sec. 38.** COURT ASSISTANCE IN TAKING EVIDENCE;
CONSOLIDATION. (1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from the superior court assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

(2) When the parties to two or more arbitration agreements have agreed in their respective arbitration agreements or otherwise, the superior court may, on application by one party with the consent of all other parties to those arbitration agreements, do one or more of the following:

(a) Order the arbitration proceedings arising out of those arbitration agreements to be consolidated on terms the court considers just and necessary;

(b) Where all parties cannot agree on an arbitral tribunal for the consolidated arbitration, appoint an arbitral tribunal in accordance with section 12(4) of this act; and

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

NEW SECTION. **Sec. 39.** RULES APPLICABLE TO SUBSTANCE OF DISPUTE.

(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(2) Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

(3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.

(4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.

NEW SECTION. **Sec. 40.** DECISION MAKING BY PANEL OF ARBITRATORS.

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

NEW SECTION. **Sec. 41.** SETTLEMENT. (1) If, during arbitral proceedings, the parties settle the dispute, the arbitral tribunal shall terminate the proceedings and, if requested by the parties and not objected to by the arbitral tribunal, record the settlement in the form of an arbitral award on agreed terms.

(2) An award on agreed terms shall be made in accordance with the provisions of section 42 of this act and shall state that it is an award. Such an award has the same status and effect as any other award on the merits of the case.

NEW SECTION. **Sec. 42.** FORM AND CONTENTS OF AWARD. (1) The award shall be made in writing and shall be signed by the arbitrator or arbitrators. In arbitral proceedings with more than one arbitrator, the signatures of the majority of all members of the arbitral tribunal shall suffice, provided that the reason for any omitted signature is stated.

(2) The award shall state the reasons upon which it is based, unless the parties have agreed that no reasons are to be given or the award is an award on agreed terms under section 41 of this act.

(3) The award shall state its date and the place of arbitration as determined in accordance with section 31(1) of this act. The award shall be deemed to have been made at that place.

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

NEW SECTION. **Sec. 43.** TERMINATION OF PROCEEDINGS. (1) The arbitral proceedings are terminated by the final award or by an order of the arbitral tribunal in accordance with subsection (2) of this section.

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

(a) The claimant withdraws its claim, unless the respondent objects thereto 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; or

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

(3) The mandate of the arbitral tribunal terminates with the termination of the arbitral proceedings, subject to the provisions of sections 44 and 45(4) of this act.

NEW SECTION. **Sec. 44.** CORRECTION AND INTERPRETATION OF AWARD; ADDITIONAL AWARD. (1) Within thirty days of receipt of the award, unless another period of time has been agreed upon by the parties:

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

(b) If so agreed by the parties, a party, with notice to the other party, may request the arbitral tribunal to give an interpretation of a specific point or part of the award; and

(c) If the arbitral tribunal considers the request to be justified, it shall make the correction or give the interpretation within thirty days of receipt of the request. The interpretation shall form part of the award.

(2) The arbitral tribunal may correct any error of the type referred to in subsection (1)(a) of this section on its own initiative within thirty days of the date of the award.

(3) Unless otherwise agreed by the parties, a party, with notice to the other party, may request, within thirty days of receipt of the award, the arbitral tribunal to make an additional award as to claims presented in the arbitral proceedings but omitted from the award. If the arbitral tribunal considers the request to be justified, it shall make the additional award within sixty days.

(4) The arbitral tribunal may extend, if necessary, the period of time within which it shall make a correction, interpretation, or an additional award under subsection (1) or (3) of this section.

(5) The provisions of section 42 of this act shall apply to a correction or interpretation of the award or to an additional award.

NEW SECTION. **Sec. 45.** APPLICATION FOR SETTING ASIDE AS EXCLUSIVE RECOURSE AGAINST ARBITRAL AWARD. (1) Recourse to the superior court against an arbitral award may be made only by an application for setting aside in accordance with subsections (2) and (3) of this section.

(2) An arbitral award may be set aside by the superior court only if:

(a) the party making the application furnishes proof that:

(i) A party to the arbitration agreement referred to in section 8 of this act was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of this state;

(ii) The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present its case;

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

(iv) The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this chapter from which the parties cannot derogate, or, failing such agreement, was not in accordance with this chapter; or

(b) The court finds that:

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

(ii) The award is in conflict with the public policy of this state.

(3) An application for setting aside may not be made after three months have elapsed from the date on which the party making that application had received the award or, if a request had been made under section 44 of this act, from the date on which that request had been disposed of by the arbitral tribunal.

(4) The court, when asked to set aside an award, may, where appropriate and so requested by a party, suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume the arbitral proceedings or to take such other action as in the arbitral tribunal's opinion will eliminate the grounds for setting aside.

NEW SECTION. **Sec. 46.** RECOGNITION AND ENFORCEMENT. (1) An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the superior court, shall be enforced subject to the provisions of this section and of section 47 of this act.

(2) The party relying on an award or applying for its enforcement shall supply the original award or a copy thereof. If the award is not made in English, the court may request the party to supply a translation thereof into English.

NEW SECTION. **Sec. 47.** GROUNDS FOR REFUSING RECOGNITION OR ENFORCEMENT. (1) Recognition or enforcement of an arbitral award, irrespective of the country in which it was made, may be refused only:

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

(i) A party to the arbitration agreement referred to in section 8 of this act was under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing

any indication thereon, under the law of the country where the award was made;

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

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

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

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

(b) The court finds that:

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

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

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

NEW SECTION. **Sec. 48.** Sections 1 through 47 of this act constitute a new chapter in Title 7 RCW.