

THE GENERAL ASSEMBLY OF PENNSYLVANIA

HOUSE BILL

No. 2438 Session of
2000

INTRODUCED BY L. I. COHEN, M. COHEN, ORIE, RAMOS AND YOUNGBLOOD,
APRIL 3, 2000

REFERRED TO COMMITTEE ON JUDICIARY, APRIL 3, 2000

AN ACT

1 Amending Title 42 (Judiciary and Judicial Procedure) of the
2 Pennsylvania Consolidated Statutes, providing for
3 international commercial arbitration.

4 The General Assembly of the Commonwealth of Pennsylvania
5 hereby enacts as follows:

6 Section 1. Chapter 73 of Title 42 of the Pennsylvania
7 Consolidated Statutes is amended by adding a subchapter to read:

8 SUBCHAPTER D

9 INTERNATIONAL COMMERCIAL ARBITRATION

10 Sec.

11 7371. Short title of subchapter.

12 7372. Scope of subchapter.

13 7373. Definitions.

14 7374. Receipt of written communications.

15 7375. Waiver of right to object.

16 7376. Judicial involvement.

17 7377. Arbitration agreement.

18 7378. Composition of arbitral tribunal.

1 7379. Jurisdiction of arbitral tribunal.
2 7380. Conduct of arbitral proceedings.
3 7381. Making of award and termination of proceedings.
4 7382. Recourse against award.
5 7383. Recognition and enforcement of award.
6 § 7371. Short title of subchapter.

7 This subchapter shall be known and may be cited as the
8 International Commercial Arbitration Law.

9 § 7372. Scope of subchapter.

10 (a) General rule.--This subchapter shall apply to
11 international commercial arbitration, subject to any agreement
12 in force between the United States, including, but not limited
13 to, any of its territories or possessions, and any other country
14 or countries.

15 (b) Territorial application.--Except for sections 7377(b)
16 and (c) (relating to arbitration agreement), 7383 (a) and (b)
17 (relating to recognition and enforcement of award), the
18 provisions of this subchapter shall apply only if the place of
19 arbitration is located within this Commonwealth.

20 (c) International character.--An arbitration shall be
21 conclusively presumed to be international if:

22 (1) the parties to an agreement, at the time of the
23 conclusion of the agreement, have their places of business in
24 different countries;

25 (2) one of the following places is situated outside the
26 country in which the parties have their places of business:

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

29 (ii) any place where a substantial part of the
30 obligations of the commercial relationship is to be

1 performed; or

2 (iii) the place with which the subject matter of the
3 dispute is most closely connected; or

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

7 (d) Interpretation of subchapter.--For purposes of
8 subsection (c):

9 (1) If a party has more than one place of business, the
10 place of business is that which has the closest relationship
11 to the arbitration agreement.

12 (2) If a party does not have a place of business,
13 reference shall be made to that party's habitual residence.

14 (3) Where a provision of this subchapter, except section
15 7381(a) (relating to making of award and termination of
16 proceedings), leaves the parties with the right to determine
17 a certain issue, the right includes the right of the parties
18 to authorize a third party, including, but not limited to, an
19 institution, to make that determination.

20 (4) Where a provision of this subchapter refers to the
21 fact that the parties have agreed or that they may agree or
22 in any other way refers to an agreement of the parties, that
23 agreement includes, but is not limited to, any arbitration
24 rules referred to in that agreement.

25 (5) Where a provision of this subchapter, other than
26 section 7380(h)(1) (relating to conduct of arbitral
27 proceedings) and 7381(e)(2)(i) (relating to making of award
28 and termination of proceedings), refers to a claim, the
29 provision shall also apply to a counterclaim, and where it
30 refers to a defense, the provision shall also apply to a

1 defense to that counterclaim.

2 (e) Limitation.--This subchapter shall not affect any other
3 law of this Commonwealth by virtue of which certain disputes may
4 not be submitted to arbitration or may be submitted to
5 arbitration only according to provisions other than the
6 provisions of this subchapter.

7 § 7373. Definitions.

8 The following words and phrases when used in this subchapter
9 shall have the meanings given to them in this section unless the
10 context clearly indicates otherwise:

11 "Arbitral tribunal." A sole arbitrator or panel of
12 arbitrators.

13 "Arbitration." Any arbitration, whether or not administered
14 by a permanent arbitral institution.

15 "Arbitration agreement." An agreement by parties to submit
16 to arbitration all or certain disputes which have arisen or
17 which may arise between them of a defined legal relationship,
18 whether contractual or not. An arbitration agreement may be in
19 the form of an arbitration clause in a contract or in any form
20 of a separate agreement.

21 "Court." A body or organ of the judicial system of a
22 country.

23 § 7374. Receipt of written communications.

24 (a) General rule.--Unless otherwise agreed by the parties:

25 (1) Any written communication shall be deemed to have
26 been received if it is delivered to the addressee personally,
27 or at the addressee's place of business, habitual residence
28 or mailing address, or if none of these can be found after
29 making a reasonable inquiry, a written communication shall be
30 deemed to have been received if it is sent to the addressee's

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

4 (2) The communication shall be deemed to have been
5 received on the day it is delivered.

6 (b) Limitation.--The provisions of this subchapter shall not
7 apply to communications in court proceedings.

8 § 7375. Waiver of right to object.

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

16 § 7376. Judicial involvement.

17 (a) Extent of court intervention.--In matters governed by
18 this subchapter, no court shall intervene except where so
19 provided in this subchapter.

20 (b) Court or other authority for certain functions of
21 arbitration assistance and supervision.--The functions referred
22 to in sections 7378(b)(3) and (4), (d)(3) and (e) (relating to
23 composition of arbitral tribunal), 7379 (a)(3) (relating to
24 jurisdiction of arbitral tribunal) and 7382(a)(2) (relating to
25 recourse against award), shall be performed by the president
26 judge of the court of common pleas where the action is located.

27 § 7377. Arbitration agreement.

28 (a) Form of arbitration agreement.--An arbitration agreement
29 shall be in writing. An agreement shall be in writing if it is
30 contained in a document signed by the parties or in an exchange

1 of letters, telex, telegrams or other means of telecommunication
2 which provide a record of the agreement or in an exchange of
3 statements of claim and defense in which the existence of an
4 agreement is alleged by one party and not denied by another. The
5 reference in a contract to a document containing an arbitration
6 clause constitutes an arbitration agreement provided that the
7 contract is in writing and the reference is such as to make that
8 clause part of the contract.

9 (b) Arbitration agreement and substantive claim before
10 court.--

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

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

22 (c) Arbitration agreement and interim measures by court.--It
23 shall not be incompatible with an arbitration agreement for a
24 party to request, before or during arbitral proceedings, from a
25 court an interim measure of protection and for a court to grant
26 such measure.

27 § 7378. Composition of arbitral tribunal.

28 (a) Number of arbitrators.--

29 (1) The parties may determine the number of arbitrators.

30 (2) Failing such determination, the number of

1 arbitrators shall be three.

2 (b) Appointment of arbitrators.--

3 (1) No person shall be precluded by reason of his
4 nationality from acting as an arbitrator unless otherwise
5 agreed by the parties.

6 (2) The parties may agree on a procedure of appointing
7 the arbitrator or arbitrators, subject to paragraphs (4) and
8 (5).

9 (3) Failing such agreement:

10 (i) In an arbitration with three arbitrators, each
11 party shall appoint one arbitrator, and the two
12 arbitrators thus appointed shall appoint the third
13 arbitrator. If a party fails to appoint the arbitrator
14 within 30 days of receipt of a request to do so from the
15 other party or if the two arbitrators fail to agree on
16 the third arbitrator within 30 days of their appointment,
17 the appointment shall be made, upon request of a party,
18 by the court or other authority specified in section
19 7376(b) (relating to judicial involvement).

20 (ii) In an arbitration with a sole arbitrator, if
21 the parties are unable to agree on the arbitrator, he
22 shall be appointed, upon request of a party, by the court
23 or other authority specified in section 7376.

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

26 (i) a party fails to act as required under such
27 procedure;

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

30 or

1 (iii) a third party, including an institution, fails
2 to perform any function entrusted to it under such
3 procedure,

4 any party may request the court or other authority specified
5 in section 7376 to take the necessary measure unless the
6 agreement on the appointment procedure provides other means
7 for securing the appointment.

8 (5) A decision on a matter entrusted by paragraph (3) or
9 (4) to the court or other authority specified in section 7376
10 shall not be subject to appeal. The court or other authority,
11 in appointing an arbitrator, shall have due regard to any
12 qualifications required of the arbitrator by the agreement of
13 the parties and to such considerations as are likely to
14 secure the appointment of an independent and impartial
15 arbitrator and, in the case of sole or third arbitrator,
16 shall take into account as well the advisability of
17 appointing an arbitrator of a nationality other than those of
18 the parties.

19 (c) Grounds for challenge.--

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

28 (2) An arbitrator may be challenged only if
29 circumstances exist that give rise to justifiable doubts as
30 to his impartiality or independence or if he does not possess

1 qualifications agreed to by the parties. A party may
2 challenge an arbitrator appointed by him or in whose
3 appointment he has participated only for reasons of which he
4 becomes aware after the appointment has been made.

5 (d) Challenge procedure.--

6 (1) The parties may agree on a procedure for challenging
7 an arbitrator, subject to the provisions of paragraph (3).

8 (2) Failing such agreement, a party who intends to
9 challenge an arbitrator shall, within 15 days after becoming
10 aware of the constitution of the arbitral tribunal or after
11 becoming aware of any circumstance referred to in subsection
12 (c)(2), send a written statement of the reasons for the
13 challenge to the arbitral tribunal. Unless the challenged
14 arbitrator withdraws from his office or the other party
15 agrees to the challenge, the arbitral tribunal shall decide
16 on the challenge.

17 (3) If a challenge under any procedure agreed upon by
18 the parties or under the procedure of paragraph (2) is not
19 successful, the challenging party may request, within 30 days
20 after having received notice of the decision rejecting the
21 challenge, the court or other authority specified in section
22 7376 to decide on the challenge, which decision shall be
23 subject to no appeal, while such a request is pending, the
24 arbitral tribunal, including the challenged arbitrator, may
25 continue the arbitral proceedings and make an award.

26 (e) Failure or impossibility to act.--

27 (1) If an arbitrator becomes de jure or de facto unable
28 to perform his functions or for other reasons fails to act
29 without undue delay, his mandate terminates if he withdraws
30 from his office or if the parties agree on the termination.

1 Otherwise, if a controversy remains concerning any of these
2 grounds, any party may request the court or other authority
3 specified in section 7376 to decide on the termination of the
4 mandate, which decision shall not be subject to appeal.

5 (2) If, under this subsection or subsection (d)(2), an
6 arbitrator withdraws from his office or a party agrees to the
7 termination of the mandate of an arbitrator, this does not
8 imply acceptance of the validity of any ground referred to in
9 this subsection or subsection (d)(2).

10 (f) Appointment of substitute arbitrator.--Where the mandate
11 of an arbitrator terminates under subsection (d) or (e) or
12 because of his withdrawal from office for any other reason or
13 because of the revocation of his mandate by agreement of the
14 parties or in any other case of termination of his mandate, a
15 substitute arbitrator shall be appointed according to the rules
16 that were applicable to the appointment of the arbitrator being
17 replaced.

18 § 7379. Jurisdiction of arbitral tribunal.

19 (a) Competence of arbitral tribunal to rule on its
20 jurisdiction.--

21 (1) The arbitral tribunal may rule on its own
22 jurisdiction, including any objections with respect to the
23 existence or validity of the arbitration agreement. For that
24 purpose, an arbitration clause which forms part of a contract
25 shall be treated as an agreement independent of the other
26 terms of the contract. A decision by the arbitral tribunal
27 that the contract is null and void shall not operate, as a
28 matter of law, to decide the invalidity of the arbitration
29 clause.

30 (2) A pleas that the arbitral tribunal does not have

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

10 (3) The arbitral tribunal may rule on a plea referred to
11 in paragraph (2) either as a preliminary question or in an
12 award on the merits. If the arbitral tribunal rules as a
13 preliminary question that it has jurisdiction, any party may
14 request, within 30 days after having received notice of that
15 ruling, the court specified in section 7376 (relating to
16 judicial involvement) to decide the matter, which decision
17 shall be subject to no appeal; while such a request is
18 pending, the arbitral tribunal may continue the arbitral
19 proceedings and make an award.

20 (b) Power of arbitral tribunal to order interim measures.--
21 Unless otherwise agreed by the parties, the arbitral tribunal
22 may, at the request of a party, order any party to take such
23 interim measure of protection as the arbitral tribunal may
24 consider necessary in respect of the subject matter of the
25 dispute. The arbitral tribunal may require any party to provide
26 appropriate security in connection with such measure.

27 § 7380. Conduct of arbitral proceedings.

28 (a) Equal treatment of parties.--The parties shall be
29 treated with equality and each party shall be given a full
30 opportunity of presenting his case.

1 (b) Determination of rules of procedure.--

2 (1) Subject to the provisions of this subchapter, the
3 parties may agree on the procedure to be followed by the
4 arbitral tribunal in conducting the proceedings.

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

11 (c) Place of arbitration.--

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

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

23 (d) Commencement of arbitral proceedings.--Unless otherwise
24 agreed by the parties, the arbitral tribunal proceedings in
25 respect of a particular dispute commence on the date on which a
26 request for that dispute to be referred to arbitration is
27 received by the respondent.

28 (e) Language.--

29 (1) The parties may agree on the language or languages
30 to be used in the arbitral proceedings. Failing such

1 agreement, the arbitral tribunal shall determine the language
2 or languages to be used in the proceedings. This agreement of
3 determination, unless otherwise specified therein, shall
4 apply to any written statement by a party, any hearing and
5 any award, decision or other communication by the arbitral
6 tribunal.

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

11 (f) Statements of claim and defense.--

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

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

26 (g) Hearings and written proceedings.--

27 (1) Subject to any contrary agreement by the parties,
28 the arbitral tribunal shall decide whether to hold oral
29 hearings for the presentation of evidence or for oral
30 argument or whether the proceedings shall be conducted on the

1 basis of documents and other materials. However, unless the
2 parties have agreed that no hearings shall be held, the
3 arbitral tribunal shall hold such hearings at an appropriate
4 stage of the proceedings, if so requested by a party.

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

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

14 (h) Default of party.--Unless otherwise agreed by the
15 parties, if, without showing sufficient cause:

16 (1) The claimant fails to communicate his statement of
17 claim in accordance with subsection (f), the arbitral
18 tribunal shall terminate the proceedings.

19 (2) The respondent fails to communicate his statement of
20 defense in accordance with subsection (f), the arbitral
21 tribunal shall continue the proceedings without treating such
22 failure in itself as an admission of the claimant's
23 allegations.

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

27 (i) Expert appointed by arbitral tribunal.--

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

30 (i) may appoint one or more experts to report to it

1 on specific issues to be determined by the arbitral
2 tribunal; or

3 (ii) may require a party to give the expert any
4 relevant information or to produce, or to provide access
5 to, any relevant documents, goods or other property for
6 his inspection.

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

13 (j) Court assistance in taking evidence.--The arbitral
14 tribunal or a party with the approval of the arbitral tribunal
15 may request from a competent court of this Commonwealth
16 assistance in taking evidence. The court may execute the request
17 within its competence and according to its rules on taking
18 evidence.

19 § 7381. Making of award and termination of proceedings.

20 (a) Rules applicable to substance of dispute.--

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

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

1 (3) The arbitral tribunal shall decide on equitable
2 principles only if the parties have expressly authorized it
3 to do so.

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

8 (b) Decision making by panel of arbitrators.--In arbitral
9 proceedings with more than one arbitrator, any decision of the
10 arbitral tribunal shall be made, unless otherwise agreed by the
11 parties, by a majority of all its members. However, questions of
12 procedure may be decided by a presiding arbitrator, if so
13 authorized by the parties or all members of the arbitral
14 tribunal.

15 (c) Settlement.--

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

21 (2) An award on agreed terms shall be made in accordance
22 with the provisions of subsection (d) and shall state that it
23 is an award. The award shall have the same status and effect
24 as any other award on the merits of the case.

25 (d) Form and contents of award.--

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

1 is stated.

2 (2) The award shall state the reasons upon which it is
3 based unless the parties have agreed that no reasons are to
4 be given or the award is an award on agreed terms under
5 subsection (c).

6 (3) The award shall state its date and the place of
7 arbitration as determined in accordance with section 7380(c)
8 (relating to conduct of arbitral proceedings). The award
9 shall be deemed to have been made at that place.

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

13 (e) Termination of proceedings.--

14 (1) The arbitral proceedings shall be terminated by the
15 final award or by an order of the arbitral tribunal in
16 accordance with paragraph (2).

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

19 (i) the claimant withdraws his claim unless the
20 respondent objects thereto and the arbitral tribunal
21 recognizes a legitimate interest on his part in obtaining
22 a final settlement of the dispute;

23 (ii) the parties agree on the termination of the
24 proceedings; or

25 (iii) the arbitral tribunal finds that the
26 continuation of the proceedings has for any other reason
27 become unnecessary or impossible.

28 (3) The mandate of the arbitral tribunal terminates with
29 the termination of the arbitral proceedings, subject to the
30 provisions of subsection (f) and section 7382(a)(4) (relating

1 to recourse against award).

2 (f) Correction and interpretation of award and additional
3 award.--

4 (1) Within 30 days of receipt of the award, unless
5 another period of time has been agreed upon by the parties:

6 (i) A party, with notice to the other party, may
7 request the arbitral tribunal to correct in the award any
8 errors in computation, any clerical or typographical
9 errors or any errors of similar nature.

10 (ii) If so agreed by the parties, a party, with
11 notice to the other party, may request the arbitral
12 tribunal to give an interpretation of a specific point or
13 part of the award.

14 If the arbitral tribunal considers the request to be
15 justified, it shall make the correction or give the
16 interpretation within 30 days of receipt of the request. The
17 interpretation shall form part of the award.

18 (2) The arbitral tribunal may correct any error of the
19 type referred to in paragraph (1)(i) on its own initiative
20 within 30 days of the date of the award.

21 (3) Unless otherwise agreed by the parties, a party,
22 with notice to the other party, may request, within 30 days
23 of receipt of the award, the arbitral tribunal to make an
24 additional award as to claims presented in the arbitral
25 proceedings but omitted from the award. If the arbitral
26 tribunal considers the request to be justified, it shall make
27 the additional award within 60 days.

28 (4) The arbitral tribunal may extend, if necessary, the
29 period of time within which it shall make a correction,
30 interpretation or an additional award under paragraph (1) or

1 (3).

2 (5) The provisions of subsection (d) shall apply to a
3 correction or interpretation of the award or to an additional
4 award.

5 § 7382. Recourse against award.

6 (a) Application for setting aside as exclusive recourse
7 against arbitral award.--

8 (1) Recourse to a court against an arbitral award may be
9 made only by an application for setting aside in accordance
10 with paragraphs (2) and (3).

11 (2) An arbitral award may be set aside by the court
12 specified in section 7376(b) (relating judicial involvement)
13 only if:

14 (i) the party making the application furnishes proof
15 that:

16 (A) a party to the arbitration agreement
17 referred to in section 7377 (relating to arbitration
18 agreement) was under some incapacity; or the said
19 agreement is not valid under the law to which the
20 parties have subjected it or, failing any indication
21 thereon, under the law of this Commonwealth;

22 (B) the party making the application was not
23 given proper notice of the appointment of an
24 arbitrator or of the arbitral proceedings or was
25 otherwise unable to present his case;

26 (C) the award deals with a dispute not
27 contemplated by or not falling within the terms of
28 the submission to arbitration or contains decisions
29 on matters beyond the scope of the submission to
30 arbitration, provided that, if the decisions on

1 matters submitted to arbitration can be separated
2 from those not so submitted, only that part of the
3 award which contains decisions on matters not
4 submitted to arbitration may be set aside; or

5 (D) the composition of the arbitral tribunal or
6 the arbitral procedure was not in accordance with the
7 agreement of the parties unless such agreement was in
8 conflict with a provision of this subchapter from
9 which the parties cannot derogate or, failing such
10 agreement, was not in accordance with this
11 subchapter; or

12 (ii) the court finds that:

13 (A) the subject matter of the dispute is not
14 capable of settlement by arbitration under the law of
15 this Commonwealth; or

16 (B) the award is in conflict with the public
17 policy of this Commonwealth.

18 (3) An application for setting aside may not be made
19 after three months have elapsed from the date on which the
20 party making that application had received the award or, if a
21 request had been made under section 7381 (f) (relating to
22 making of award and termination of proceedings), from the
23 date on which that request had been disposed of by the
24 arbitral tribunal.

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

1 grounds for setting aside.

2 § 7383. Recognition and enforcement of award.

3 (a) Recognition and enforcement.--

4 (1) An arbitral award, irrespective of the country in
5 which it was made, shall be recognized as binding and, upon
6 application in writing to the competent court, shall be
7 enforced subject to the provisions of this subsection and of
8 subsection (b).

9 (2) The party relying on an award or applying for its
10 enforcement shall supply the duly authenticated original
11 award or a duly certified copy thereof, and the original
12 arbitration agreement referred to in section 7377 (relating
13 to arbitration agreement) or a duly certified copy thereof.
14 If the award or agreement is not made in an official language
15 of this Commonwealth, the party shall supply a duly certified
16 translation thereof into such language.

17 (b) Grounds for refusing recognition or enforcement.--

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

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

24 (A) a party to the arbitration agreement
25 referred to in section 7377 was under some incapacity
26 or the agreement is not valid under the law to which
27 the parties have subjected it or, failing any
28 indication thereon, under the law of the country
29 where the award was made;

30 (B) the party against whom the award is invoked

1 was not given proper notice of the appointment of an
2 arbitrator or of the arbitral proceedings or was
3 otherwise unable to present his case;

4 (C) the award deals with a dispute not
5 contemplated by or not falling within the terms of
6 the submission to arbitration or it contains
7 decisions on matters beyond the scope of the
8 submission to arbitration, provided that, if the
9 decisions on matters submitted to arbitration can be
10 separated from those not so submitted, that part of
11 the award which contains decisions on matters
12 submitted to arbitration may be recognized and
13 enforced;

14 (D) the composition of the arbitral tribunal or
15 the arbitral procedure was not in accordance with the
16 agreement of the parties or, failing such agreement,
17 was not in accordance with the law of the country
18 where the arbitration took place;

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

23 (ii) if the court finds that:

24 (A) the subject matter of the dispute is not
25 capable of settlement by arbitration under the law of
26 this Commonwealth; or

27 (B) the recognition or enforcement of the award
28 would be contrary to the public policy of this
29 Commonwealth.

30 (2) If an application for setting aside or suspension of

1 an award has been made to a court referred to in paragraph
2 (1)(i)(E), the court where recognition or enforcement is
3 sought may, if it considers it proper, adjourn its decision
4 and may also, on the application of the party claiming
5 recognition or enforcement of the award, order the other
6 party to provide appropriate security.

7 Section 2. This act shall take effect in 60 days.



BILL SUMMARY

<u>COMMITTEE:</u>	Judiciary	<u>DATE:</u>	07/06/2000
<u>PRIME SPONSOR:</u>	Cohen, L.I.	<u>BILL NO.:</u>	HB 2438
<u>PREPARED BY:</u>	Susan E. Good	<u>PRINTER'S NO.:</u>	3282
		<u>PHONE NO.:</u>	2-6947

A. SUMMARY OF THE BILL:

This legislation would amend Title 42 (Judiciary and Judicial Procedure) to provide for international commercial arbitration by adding a new subchapter, cited as the International Commercial Arbitration Law. Specifically, the subchapter will follow the guidelines of the model law put forth by the United Nations Commission on International Trade Law (UNCITRAL), by addressing the following:

SCOPE OF SUBCHAPTER

This subchapter shall apply to international commercial arbitration, subject to any agreement in force between the United States and any of its territories or possessions, and any other country or countries. Except for sections 7377(b) and (c) (relating to arbitration agreement) and 7383(a) and (b) (relating to recognition and enforcement of award), the provisions of this subchapter shall apply only if the place of arbitration is located within the Commonwealth.

An arbitration shall be presumed international if the parties to an agreement, at the time of the agreement, have their places of business in different countries; or the parties have agreed that the subject matter of the arbitration agreement relates to more than one country; or one of the following places is situated outside the country in which the parties have their places of business: the place of arbitration; or any place where a substantial part of the obligations of the commercial relationship is performed; or the place where the subject matter of the dispute is most closely connected.

The scope of this subchapter shall not affect any other law of this Commonwealth by virtue of which certain disputes may or may not be submitted to arbitration only according to provisions other than the provisions of this subchapter.

JUDICIAL INVOLVEMENT

Except where provided in the subchapter, no court shall intervene in arbitration matters governed by the subchapter. The provisions for judicial involvement include functions relating to composition and jurisdiction of arbitral tribunal and recourse against award. In those cases, the president judge of the court of common pleas where the action is located shall perform those functions.

ARBITRATION AGREEMENT

An arbitration agreement shall be in writing. An agreement is considered in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegram or other means of telecommunication which provide a record of the agreement. An exchange of statements of claim and defense in which the existence of an agreement is alleged by one party or denied by another is considered to be in writing. An arbitration agreement exists if it is referenced in a contract to a document containing an arbitration clause, provided that the contract is in writing.

When an action is brought in court regarding a matter which is the subject of an arbitration agreement, the court shall, if a party requests no later than when submitting the first statement on the substance of the dispute, refer the parties to arbitration. The court shall not refer the matter to arbitration if it finds that the agreement is null and void, inoperative or incapable of being performed. While an action is pending before the court, arbitral proceedings may be commenced or continued, and an award may be made.

It shall be consistent 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.

ADDITIONAL PROVISIONS

- Definitions:

When used in this subchapter, the following words and phrases shall have the meanings given to them in this section unless the context clearly indicates otherwise. "Arbitral tribunal," shall mean a sole arbitrator or panel of arbitrators. "Arbitration," shall mean any arbitration, whether or not administered by a permanent arbitral institution. "Court," shall mean a body or organ of the judicial system of a country.

- Receipt of written communications:

Any written communication shall be deemed to have been received if it is delivered to the addressee personally, or at the addressee's place of business, habitual residence or mailing address. If, after making reasonably inquiry, none of these can be found, a written communication

shall be 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 other means which provides a record of the attempt to deliver. The provisions in this subchapter shall not apply to communications in court proceedings.

- Waiver of right to object:

A party shall waive his right to object if the party knows that any provision of this subchapter from which the parties may detract or any requirement under the arbitration agreement has not been complied with and yet proceeds with the arbitration without stating his objection without undue delay.

- Composition of arbitral tribunal:

The number of arbitrators may be determined by the parties. Failing a determination by the parties, the number of arbitrators shall be three. Nationality shall not preclude any person from acting as an arbitrator unless otherwise agreed by the parties.

The parties may agree on a procedure of appointing the arbitrator or arbitrators. Failing such agreement, in an arbitration with three arbitrators, each party shall appoint one arbitrator and the two arbitrators shall appoint the third. If a party fails to appoint the arbitrator within 30 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 30 days of appointment, the appointment shall be made, upon request of a party, by the court or other authority specified in the section 7376(b) (relating to judicial involvement). In an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, he shall be appointed, upon request of a party, by the court or authority specified in section 7376.

Where, under the appointment procedure agreed upon by the parties, a party fails to act as required under such procedure; or the parties, or two arbitrators, are unable to reach an agreement expected of them under an appointment procedure; or a third party, including an institution, fails to perform any function entrusted to it under such procedure, any party may request the court or other authority to take the necessary measure unless the agreement on the appointment procedure provides other means for securing the appointment. A decision on a matter regarding appointment shall not be subject to appeal.

A person being considered for an appointment as an arbitrator shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator may be challenged only if circumstances exist that give rise to justifiable doubts as to his impartiality or if he does not possess qualifications agreed to by the parties.

The parties may agree on a procedure for challenging an arbitrator, subject to the provisions under appointment procedure. Failing an agreement on challenging an arbitrator, a party who intends to challenge an arbitrator shall, within 15 days after becoming aware of the arbitral tribunal or after becoming aware of circumstances giving rise to a challenge, send a

written statement of the reasons for the challenge to the arbitral tribunal. Unless the challenged arbitrator withdraws from his office or the other party agrees to the challenge, the arbitral tribunal shall decide on the challenge. If a challenge is not successful, the challenging party may request, within 30 days after receipt of the decision rejecting the challenge, the court or other authority to decide on the challenge, which shall not be subject to appeal. The challenged arbitrator and the arbitral tribunal may continue the arbitration proceedings and make an award, pending the request to the court.

If an arbitrator is unable to perform his functions or for other reasons fails to act without undue delay, his mandate terminates if he withdraws from office or if the parties agree on the termination. Otherwise, any party may request the court or other authority to decide on the termination of the mandate, which decision shall not be subject to appeal.

- **Jurisdiction of arbitral tribunal:**

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 operate, as a matter of law, to decide the invalidity of the arbitration clause.

A plea that the arbitral tribunal does not have jurisdiction shall be raised no later than the submission of the statement of defense. Participating in an appointment of an arbitrator does not preclude a party from raising a plea of jurisdiction. An arbitral tribunal may rule on a plea either as a preliminary question or in an award on the merits. If an arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request, within 30 days, the court to decide the matter, which shall not be subject to appeal.

- **Conduct of arbitral proceedings:**

The parties in an arbitration shall be treated with equality and each party shall be given a full opportunity to present his case. In conducting a proceeding, the parties may agree on the procedure to be followed by the arbitral tribunal. Failing such agreement, the arbitral tribunal may conduct the arbitration in a manner it considers appropriate. The power given to the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of evidence.

The parties are free to agree on the place of arbitration. Failing to agree, the place of arbitration shall be determined by the arbitral tribunal in regard to the circumstances of the case, including the convenience of the parties. The arbitral proceedings shall commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent.

Within the agreed upon period of time, the claimant shall state the facts supporting his claim, the points at issue and the relief or remedy sought, and the respondent shall state his

defense unless the parties have otherwise agreed as to the required elements of such statements. Along with their statements, the parties may submit documents they consider to be relevant.

If, without showing sufficient cause, the claimant fails to communicate his statement of claim in accordance with the provisions, the arbitral tribunal shall terminate the proceedings. If the respondent fails to communicate his statement of defense, the arbitral tribunal shall continue the proceeding without treating such failure in itself as an admission of the claimant's allegations. If any party fails to appear at a hearing or to produce documentary evidence, the arbitral tribunal may continue the proceeding and make an award on the evidence before it.

- Making of award and termination of proceedings:

The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given country shall be construed as directly referring to the substantive law of that country and not to its conflict of laws rules. Failing a designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

In arbitral proceedings with more than one arbitrator, any decision shall be made by a majority of all its members. Questions of procedures, however, may be decided by the presiding arbitrator, if so authorized by the parties or all members of the arbitral tribunal.

If the parties settle the dispute during arbitral proceedings, the arbitral tribunal shall terminate the proceedings, and if requested by the parties, record the settlement in the form of an arbitral award on agreed terms. An award on agreed terms shall have the same status and effect as any other award on the merits of the case.

The award shall be made in writing and shall be signed by the arbitrator or arbitrators. The award shall state the reasons upon which it is based unless the parties agree that no reasons are to be given. After the award is made, a copy signed by the arbitrators shall be delivered to each party.

The arbitral proceedings shall be terminated by the final award or by an order of the arbitral tribunal. An arbitral tribunal shall issue an order for the termination of proceedings when the claimant withdraws his claim; or the parties agree on the termination of the proceedings; or the arbitral tribunal finds that the continuation of the proceedings has become unnecessary. The mandate of the arbitral tribunal terminates with the termination of the proceedings.

- Recourse against award:

An arbitral award may be set aside by the court only if the party making the application furnishes proof of the following:

- (1) that a party to the arbitration agreement was under some incapacity; or the agreement is not valid under the law to which the parties have subjected it, or the law of this Commonwealth;
- (2) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;
- (3) 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 matter submitted to arbitration can be separated from those not submitted, only that part of the award which contains decisions on matters not submitted to arbitration may be set aside;
- (4) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties.

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. When asked to set aside an award, the court may suspend the setting aside proceedings for a period of time determined by it in order to give the arbitral tribunal an opportunity to resume proceedings or to take other action that, in the arbitral tribunal's opinion, will eliminate the grounds for setting aside.

- Recognition and enforcement of award:

An arbitral award shall be recognized as binding and, upon written application to the competent court, shall be enforced subject to the provisions under this subsection. The party applying for its enforcement, shall provide the duly authenticated original award or duly certified copy thereof, along with the original arbitration agreement.

Recognition or enforcement of an arbitral award may be refused only at the request of the party against whom it is invoked, if that party furnishes proof of the following: that a party to the arbitration agreement was under some incapacity or the agreement is not valid under the law, the party was not given proper notice of the proceedings, the award contains decisions on matters beyond the scope of the submission to arbitration, the composition of the arbitral tribunal or the proceeding was not in accordance with the agreement of the parties, 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.

This act shall take effect in 60 days.

B. SUMMARY OF RELEVANT EXISTING LAW:

Current statute does not provide for international commercial arbitration. Title 42 does provide for statutory arbitration in Chapter 73 (arbitration). Specifically, 42 Pa.C.S. §7302 states in pertinent part:

(a) General rule. -- An agreement to arbitrate a controversy on a nonjudicial basis shall be conclusively presumed to be an agreement to arbitrate pursuant to Subchapter B (relating to common law arbitration) unless the agreement to arbitrate is in writing and expressly provides for arbitration pursuant to this subchapter or any other similar statute, in which case the arbitration shall be governed by this subchapter.

According to UNCITRAL, California, Connecticut, Oregon and Texas have all enacted UNCITRAL's Model Law on Commercial Arbitration. Mexico and Canada, the Commonwealth's major trading partners, have also adopted UNCITRAL's Model Law.