

SOUTH AFRICAN LAW COMMISSION

PROJECT 94

ARBITRATION: AN INTERNATIONAL ARBITRATION ACT FOR SOUTH AFRICA

REPORT

JULY 1998

TO DR AM OMAR, MP, MINISTER OF JUSTICE

I am honoured to submit to you in terms of section 7(1) of the South African Law Commission Act, 1973, (Act 19 of 1973), for your consideration the Commission's report on the investigation into international commercial arbitration.

**I MAHOMED
CHAIRPERSON: SOUTH AFRICAN LAW COMMISSION
JULY 1998**

ACKNOWLEDGEMENT

This report was prepared on behalf of the Commission by Prof David Butler who is a member of the Project Committee.

INTRODUCTION

The South African Law Commission was established by the South African Law Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are -

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SUMMARY OF RECOMMENDATIONS

The ending of the economic isolation of South Africa is leading to increased regional trade and economic links with other countries. As parties to international business transactions favour arbitration as a speedy method for dispute resolution, it is important that the country's arbitration law should be in line with international norms.

It is however widely argued that South African law does not currently promote international commercial arbitration. The Arbitration Act 42 of 1965 contains no provisions which expressly deal with international arbitration, while the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 is limited to the enforcement of foreign awards only. It is also generally considered that the court's statutory powers of supervision during the arbitral process are inappropriate, given in particular the inherently expeditious requirements of that process.

The Commission proposes that an effective legislative framework for the resolution of international trade disputes should be created. The Commission has resolved to adopt a holistic approach to international arbitration legislation. In this process, with a single statute on international arbitration in mind, consideration is given to three matters: South Africa's response to the UNCITRAL Model Law; possible changes to the legislation on the New York Convention (currently set out in Act 40 of 1977); and the proposed accession by South Africa to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID).

The Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985. The Model Law was drawn up as a result of an initiative by the Asian-African Legal Consultative Committee. It provides a framework within which international commercial arbitrations can be conducted with a minimum degree of judicial intervention and a significant degree of party autonomy. Its aim is to promote the harmonisation and uniformity of national laws pertaining to international arbitration procedures. It is intended for adoption by individual countries with a minimum of adaptation. Indeed, significant variation by any individual country from the Model Law in a domestic statute relating to international arbitration is inimical to the comity and harmonisation which underpin it.

Delegates from developing countries played a prominent role in the drafting process of the Model Law; it has been adopted by many Commonwealth and other countries, including important trading partners of South Africa, both within SADEC and beyond it.

The Recognition and Enforcement of Foreign Arbitral Awards, Act 40 of 1977 attempted to give effect to the New York Convention of 1958. It has however been subject to criticism.

The Washington Convention is focussed on the resolution of investment disputes between a contracting state or government entity of the state and a national of another contracting state. The Convention established the International Centre for Settlement of Investment Disputes (ICSID) which has its seat at the principal office of the World Bank in Washington. Its paramount aim is to promote a climate of mutual confidence between states and investors, thereby increasing the flow of resources to developing countries under reasonable conditions.

The Commission recommends:

* The compulsory application of the Model Law to international commercial arbitration. The concept "international arbitration" is defined in article 1(3) of the Model Law and this

definition should be used for determining which arbitrations qualify as international and are therefore subject to the Model Law.

* That Act 40 of 1977 should be repealed and replaced by legislation which deals expressly with both the recognition and enforcement of foreign arbitral awards and rectifies certain other defects in the wording of the existing legislation regarding the definition of "foreign arbitral award" and the grounds on which recognition and enforcement may be refused.

* That South Africa should follow the example of most other African countries and ratify the Washington Convention, as this would create the necessary legal framework to encourage foreign investment and further economic development in the region.

It seems desirable that all South African legislation on international arbitration should be embodied in a single statute, the International Arbitration Act. This would not only ensure that South Africa's arbitration legislation is readily available to foreign contracting parties, but it would also enable the legislature to deal with all relevant legislation in a single Bill.

The legislation implementing the Model Law can usefully be consolidated with legislation replacing the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. The proposed statute should furthermore include legislation implementing the Washington Convention. The International Arbitration Act will only apply to commercial arbitrations pursuant to an agreement between the parties. It will not be available (on an "opt-in" basis) for domestic arbitrations. This is because the Law Commission's inquiry into domestic arbitration is still at an early stage. The Commission does not wish to anticipate the consultative process that this investigation will entail.

CHAPTER 1

INTRODUCTION

(a) *The objects of the proposed Draft International Arbitration Bill*

1.1 When South Africa emerged from the era of isolation in 1994, it was faced with the fact that many of its laws relevant in the field of international trade and investment are outdated and inadequate. An obvious example is in the field of international arbitration.

1.2 The problem is a serious one. One of the first questions which a foreign trading entity or investor is likely to ask before doing business in or with South Africa is: What provision does South African law make for resolving international trade and investment disputes? The present answer is not encouraging.

1.3 The Arbitration Act 42 of 1965 was designed with domestic arbitration in mind and has no provisions at all expressly dealing with international arbitrations. By present-day standards, the Act is characterised by excessive opportunities for parties to involve the court as a tactic for delaying the arbitration process, inadequate powers for the arbitral tribunal to conduct the arbitration in a cost-effective and expeditious manner and insufficient respect for party autonomy (ie the principle that the arbitral tribunal's jurisdiction is derived from the parties' agreement to resolve their dispute outside the courts by arbitration). In short, the 1965 Act is widely perceived by those involved in international arbitration as being totally inadequate for this purpose.¹

1.4 One of the main reasons why arbitration is used for resolving international trade disputes in preference to litigation is the great success achieved by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention of 1958): a foreign arbitration award is usually easier to enforce in a jurisdiction which is a party to the Convention than the judgment of a foreign court.² Although South Africa acceded to the Convention in 1976, the legislation enacted to give effect to its accession, namely the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 contains serious

¹ See generally Christie R H "South Africa as a Venue for International Commercial Arbitration" (1993) 9 *Arbitration International* 153 at 165.

² See ch 3 paras 3.3-3.5 below.

defects.³ In any event, because of its limited scope, the 1977 Act does little to alleviate the shortcomings of the 1965 Act in relation to international arbitration.

1.5 Defects in both statutes expose foreigners and South Africans alike who are parties to international arbitrations held in South Africa or to an international arbitration agreement to the risk that the arbitration process may be derailed or retarded by an inappropriate resort to the courts prior to or during the course of the arbitration.

1.6 The standard by which a country's laws pertaining to international arbitration is measured today is the UNCITRAL Model Law on International Commercial Arbitration of 1985.⁴ The aims and contents of the Model Law are discussed in Chapter 2 of this report.

1.7 The Draft International Arbitration Bill which is the subject of this report is based on three core proposals: the introduction in South Africa of the UNCITRAL Model Law for international arbitrations; the implementation of changes to the legislation on the New York Convention; and the proposed accession by South Africa to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington or ICSID Convention of 1965).

1.8 The aim of the UNCITRAL Model Law is to promote the harmonisation and uniformity of national laws pertaining to international arbitration procedures. As its name suggests, it is intended for adoption by individual countries with a minimum of adaptation. The Law Commission strongly supports the adoption of the Model Law with only a few adaptations, expressly with a view to making the South African version user-friendly and attractive to foreign parties and their lawyers. In Africa itself, South Africa is now seriously behind those jurisdictions like Kenya and Zimbabwe, which have adopted the Model Law.

1.9 The two main strands in the Model Law are the liberalisation of international arbitration by limiting the role of national courts, and the emphasising of party autonomy by allowing parties the freedom to choose how their disputes should be determined. There is furthermore a defined core of mandatory provisions intended to

³ See ch 3 paras 3.14-3.15 below.

⁴ The Model Law was adopted by the United Nations Commission on International Trade Law (UNCITRAL) on 21 June 1985. A list of most of the countries which have adopted it appears in ch 2 para 2.3 n 4 below.

ensure fairness and due process. In addition, the Model Law contains a framework for conducting an international commercial arbitration so that in the event of the parties being unable to agree on procedure, the arbitration can still be completed. Finally, there is the incorporation of provisions to aid in the enforcement of awards and to clarify certain controversial practical issues. In 1985 the General Assembly of the United Nations recommended that all states give due consideration to adopting the Model Law in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice.

1.10 While other countries - Kenya, Zimbabwe, India and New Zealand are recent examples - have applied the Model Law to both domestic and international arbitrations, it is not proposed that South Africa should adopt that route. The optional application of the Model Law to domestic arbitrations is the route which has been followed in Scotland, Australia, Bermuda and Singapore. This route is also not recommended for South Africa. A revision of domestic arbitration legislation is presently under way, and the Law Commission accordingly considers it inappropriate to touch upon any aspect material to that process while dealing with international arbitration.⁵

1.11 A striking feature of the proposed legislation is the conferral of a broad discretion on the arbitral tribunal to award interest on awards, and to determine the basis and terms on which interest should be awarded.⁶ This approach is modelled on that adopted in British Columbia. It strikes directly at a frequent abuse of arbitration mechanisms: calculated delay by a defendant, well knowing that the deferment of an award is to its advantage.

1.12 The Draft Bill with this report differs from the previous version by containing certain provisions on conciliation proceedings between parties to an international arbitration agreement.⁷ These provisions are aimed at encouraging such parties to consider using conciliation to resolve their dispute in view of the substantial costs often associated with international arbitrations. The provisions deal with certain practical difficulties, which may arise when parties to an arbitration agreement resort to conciliation.

⁵ See ch 2 para 2.275 below for other arguments against an opt-in provision.

⁶ See the Draft Bill sch 1 article 31(5) and ch 2 paras 2.239-2.246.

⁷ See the Draft Bill ss 11-15 and ch 2 paras 2.74-2.101.

1.13 As stated above, it is important that the Model Law be implemented in South Africa with minimum changes to further the goal of uniformity with other Model Law jurisdictions. To this end, only two minor changes⁸ to the wording of the Model Law have been proposed. First, the definition of an arbitration agreement in writing has been extended slightly to deal with certain difficulties experienced in international practice.⁹ Secondly, it is proposed that the arbitral tribunal should consist of a single arbitrator, instead of three arbitrators, unless the parties otherwise agree.¹⁰ To ensure that the Model Law is interpreted and applied in South Africa as was intended by its drafters, thereby furthering the goal of uniformity, the Draft Bill provides for the *travaux préparatoires* relating to the Model Law to be used as an interpretation aid.¹¹

1.14 Certain additions are also proposed to enable the Model Law to operate more effectively in South Africa. These include provisions on costs, interest,¹² arbitral immunity¹³ and, as mentioned above, conciliation. The Model Law is not intended to alter national law on arbitrability. To reassure foreigners about possible pitfalls in this regard, the South African law on arbitrability has been clarified.¹⁴ The Draft Bill also makes it clear that the consent of the parties is the only basis for the consolidation of arbitration proceedings in South African law.¹⁵ To reduce inappropriate resort by the parties to court proceedings, the extent of the court's powers regarding interim measures has been carefully spelt out.¹⁶ The procedure in

⁸ "Change" is used here as meaning a departure from the substance of a provision of the Model Law. Additions aimed at clarifying the operation of the Model Law's provisions in South Africa or dealing with matters not referred to in the Model Law are discussed in the next paragraph.

⁹ See s 2(1) of the Draft Bill and ch 2 paras 2.130-2.136 below.

¹⁰ See sch 1 article 10(2). One minor change in wording which does not affect the substance of the Model Law is the removal of all references to gender (see para 2.15 below). The decision to omit the footnote to article 1(1) explaining the meaning of the term "commercial", as being unnecessary, is also not considered as a change to the substance of article 1(1) (see paras 2.102-2.105 below).

¹¹ See s 8 and paras 2.52-2.61 below.

¹² See sch 1 article 31(5) and (6).

¹³ See s 9 and ch 2 paras 2.62-2.67 below.

¹⁴ See s 7 and ch 2 paras 2.40-2.51 below.

¹⁵ See s 10 and ch 2 paras 2.68-2.73 below.

¹⁶ See sch 1 article 9 and ch 2 paras 2.140-2.158 below. The default power to appoint an arbitrator when the parties' own mechanism has failed to function is also vested in a designated arbitral institution rather than the court (see sch 1 article 6(2) and paras 2.127-2.129 below).

the Model Law for court assistance in taking evidence has also been clarified by an appropriate addition.¹⁷ The concept "public policy" as a ground for the setting aside of an arbitral award by the court or the refusal of an application to court for the enforcement of an award has been clarified by the inclusion of an express reference to serious procedural irregularities involving a breach of the arbitral tribunal's duty to act fairly.¹⁸ Usually, an application for the setting aside of an award has to be brought within three months of receipt of the award. A qualification has been added to exclude the operation of this time limit where the award is attacked on the basis of fraud or corruption.¹⁹ Finally, two additions have been made to the provision regarding the power of an arbitral tribunal to order interim measures. First, it is made clear that the arbitral tribunal has the power to order appropriate security for costs, unless the arbitration agreement provides otherwise. Secondly, the arbitral tribunal's order on interim measures may be enforced as if it were an award.²⁰

1.15 The second major component of the proposed Draft Bill is improved legislation to ensure the proper application of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The existing South African legislation, Act 40 of 1977, has been subjected to stringent criticism, particularly relating to the definition of "foreign arbitral award"; the failure to make adequate provision for the enforcement of arbitration agreements; problems with the grounds on which enforcement of a foreign award may be refused; and difficulties arising from the enforcement of an award in a foreign currency. These matters and other areas of difficulty are addressed in Chapter 3 of the annexed Draft Bill, which is proposed as a replacement for Act 40 of 1977.²¹ This Act will be repealed if the proposal is accepted.

1.16 The last major proposal is the adoption of the Washington Convention of 1965. This is focused on the resolution of investment disputes between a contracting state or government entity of that state and a national of another contracting state.

¹⁷ See sch 1 article 27(2) and paras 2.211-2.220 below.

¹⁸ See sch 1 articles 34(5) and 36(3) and paras 2.261-2.163 and 2.269 below.

¹⁹ See sch 1 article 34(3) and para 2.264 below.

²⁰ See sch 1 article 17(2) and (3) and paras 2.183-2.191 below.

²¹ A further potential difficulty to the enforcement of foreign arbitral awards in South Africa is posed by certain provisions of the Protection of Businesses Act 99 of 1978. The Law Commission therefore recommends that the references to arbitral awards in this legislation should be deleted. See paras 3.89-3.95 below and Annexure G.

The Convention established the International Centre for Settlement of Investment Disputes (ICSID), which has its seat at the principal office of the World Bank in Washington DC to administer this arbitration and conciliation system. Its paramount aim is to promote a climate of mutual confidence between states and foreign investors, thereby increasing the flow of resources to developing countries under reasonable conditions. The Washington Convention enjoys a high degree of international acceptance. It has been signed or ratified by 139 states. The only states in our region which have yet to accede to the Convention are South Africa, Namibia and Angola.²²

1.17 The importance to South Africa of ratifying the convention lies in the creation of the necessary legal framework to encourage foreign investment. Bilateral investment treaties between states, particularly between a developed and a developing state, commonly contain a provision for arbitration under ICSID as a means of encouraging private investment in the developing country. Moreover, those South African companies currently looking for investment opportunities in other African countries - nearly all of which are members of ICSID - are likely to find that ratification of the convention by South Africa would facilitate such investment and further the economic development of the region. Moreover, the inclusion of ICSID arbitration clauses in bilateral investment treaties recently entered into by the South African government with the governments of, for example, Germany, France, Switzerland, Denmark, Korea and Canada has created the expectation among potential investors in those countries that South Africa intends acceding to the Washington Convention.

1.18 ICSID enjoys unique standing as the only arbitral institution available for State/investor disputes operating under public international law. Its mechanisms moreover reduce the involvement of foreign state courts to an absolute minimum, thereby reducing sensitivity concerning national sovereignty. It is also a considerable advantage that, in the absence of an agreement to the contrary, the arbitral tribunal is usually obliged to apply the law of the state party.

1.19 The Law Commission proposes that legislation to give effect to South African ratification of the Washington Convention be included in legislation implementing the UNCITRAL Model Law and giving effect to South Africa's obligations under the New York Convention. It would seem desirable that all South Africa's legislation

²² See ch 4 below for a detailed discussion of the Washington Convention.

pertaining to international arbitration should be embodied in a single statute. This will be convenient for foreign users of the legislation. Moreover, the legislature will be able to deal with all legislation relevant to international arbitration in a single Bill.

1.20 The proposals in the Draft Bill represent a major step forward in the drive to modernise South African law in the field of international trade law and to ensure that it complies with international standards. The Draft Bill enhances the prospect of South Africa becoming an important regional centre for international arbitrations.

(b) A brief history of the Law Commission's arbitration project

1.21 On 1 August 1994, the Executive Director of the Association of Arbitrators (Southern Africa) wrote to the Secretary of the South African Law Commission, submitting a draft bill intended for domestic arbitration, together with an explanatory memorandum. The draft bill consisted of a revised version of the existing Arbitration Act 42 of 1965, having regard to certain problems which have been experienced with the existing Act in practice and recent changes to arbitration legislation in other jurisdictions.

1.22 On 29 August 1994 the Minister of Justice approved the inclusion of an investigation entitled "Arbitration" in the Law Commission's programme of law reform.

1.23 Because the submissions of the Association of Arbitrators were primarily directed at the reform of domestic arbitration legislation, they did not deal in sufficient detail with how South Africa should respond to the UNCITRAL Model Law, beyond recommending that it should be adopted for international arbitrations only.

1.24 The Law Commission decided that the logical starting point for the investigation into the reform of South African arbitration legislation was to investigate how South Africa should respond to the UNCITRAL Model Law. As a result a discussion document, Working Paper 59 "Arbitration", was produced and circulated in September 1995.

1.25 Responses were invited on how South Africa should respond to the Model Law. These responses could be:

- (a) to reject the Model Law for both international and domestic arbitration; or
- (b) to adopt the Model Law for both international and domestic arbitration; or
- (c) to adopt the Model Law for international arbitration, while retaining a separate statute for domestic arbitration.

1.26 Comments were also called for, in the event of it being decided to adopt the Model Law, on the form in which the Model Law should be adopted and what modifications would be required. If proposal (c) were to be adopted, the possibility of opt-in and opt-out provisions would also have to be considered.²³

1.27 The extended date for comments to Working Paper 59 was 31 December 1995. An overview of the response is given below.

1.28 On 1 January 1996 the membership of the South African Law Commission was reconstituted and the new Commission recommended to the Minister of Justice that a Project Committee should be established for the arbitration project. This Project Committee was established with effect from 1 May 1996. The membership of the committee appears from Annexure A.

1.29 During its first two meetings, the Project Committee decided that international arbitration was a separate specialised aspect of the investigation which required urgent attention. The reform of domestic arbitration was potentially a more controversial topic involving a much broader range of interest groups, with the result that the investigation of this aspect would be more protracted, particularly if the Project Committee should be mandated to consider the promotion of alternative dispute resolution techniques as well.²⁴

²³ S A Law Commission *Arbitration* Working Paper 59 1995 (hereinafter referred to as "Working Paper 59") para 51; regarding opt-in and opt-out provisions, see ch 2 paras 2.270-2.280 below.

²⁴ This subsequently happened and an expanded Project Committee was appointed to deal with this aspect of the investigation. Issue Paper 8 *Alternative Dispute Resolution*, with a closing date for comments of 15 July 1997 has since been published on this aspect of the investigation.

1.30 As appears from paragraph (a) above, the Project Committee also decided to adopt a holistic approach to international arbitration legislation, to include not only South Africa's response to the Model Law but also possible changes to the legislation on the New York Convention (discussed in Chapter 3 of this report) as well as whether or not South Africa should accede to the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States (discussed in Chapter 4). The Project Committee also decided to draw up draft legislation and a commentary and recommend to the Law Commission that the proposals contained in the draft legislation and commentary should be widely circulated to give interested parties an adequate opportunity to respond to the proposals.

1.31 When Working Paper 59 was circulated in September 1995, comments were originally called for by 25 October 1995. At the request of certain of the respondents, this date was subsequently extended until 31 December 1995. Notwithstanding the extended date, only twelve responses were received. A list of the respondents is contained in Annexure B. Some of the responses dealt with specific aspects of arbitration only and only two detailed submissions on the Model Law were received.²⁵

1.32 Of those respondents who adopted a position on the Model Law, only one favoured its adoption for domestic arbitrations.²⁶ The rest in principle supported the adoption of the Model Law for international arbitrations only, although some of these respondents were not able to make detailed submissions in the time available.

(c) *The response to Discussion Paper 69*

1.33 Discussion Paper 69, containing the Project Committee's Draft Bill (referred to in para 1.30 above) and commentary was published during December 1996.²⁷ The closing date for comments was 31 March 1997.

²⁵ These were the submissions by Professors Butler and Christie on behalf of the Association of Arbitrators and by Adv A Findlay SC on behalf of the Society of Advocates of Natal.

²⁶ See the response on behalf of the Council of South African Bankers (COSAB), dated 20 October 1995. In COSAB's response to Discussion Paper 69, dated 5 March 1997, the Project Committee's recommendation that the Model Law be adopted for international arbitration only (subject to an opt-in provision for domestic arbitration) was accepted and the call for the Model Law to be adopted for both international and domestic arbitration was not repeated.

²⁷ SA Law Commission *Arbitration: A Draft International Arbitration Act for South Africa* Project 94 Discussion Paper 69 1996 (hereinafter referred to as "Discussion Paper 69").

1.34 Thereafter a major international conference was held in Johannesburg. The conference was presented jointly by the Association of Arbitrators (Southern Africa), the International Court of Arbitration of the International Chamber of Commerce (ICC), the London Court of International Arbitration (LCIA) and the International Centre for Settlement of Investment Disputes (ICSID). The theme of the conference was the Resolution of International Trade and Investment Disputes in Africa. It was held in Sandton, Johannesburg on 6 and 7 March 1997. The Discussion Paper was circulated to the conference speakers in advance of the conference.²⁸

1.35 The conference was attended by a large number of very prominent persons in the world of international arbitration, especially from Europe and Africa. The conference was also addressed by the Minister of Justice and the Minister of Trade and Industry. Both supported South Africa's adoption of the UNCITRAL Model Law for international arbitration as a matter of urgency. The Discussion Paper was well received by those international delegates and speakers who referred to it at the conference, although there were criticisms on points of detail.

1.36 The conference was also attended by the Secretary of UNCITRAL, Dr Gerold Herrmann, who has vast experience in assisting a number of jurisdictions who have adopted the Model Law. He had a fruitful meeting with the Project Committee after the conference on 10 March 1997 when matters referred to at the conference and other areas of difficulty were discussed.

1.37 This conference and the contributions of a number of foreign respondents to the Discussion Paper have facilitated the task of the Law Commission in ensuring that the revised draft legislation in this report will be highly acceptable to both foreign and local users of the legislation.

1.38 Twenty-six written responses were received to the Discussion Paper, of which sixteen contained specific comments. A list of the respondents is contained in Annexure C1. Those who commented on the substance of the proposals were, with one exception,²⁹ very supportive of the proposals contained in the Discussion Paper and reserved their criticism for points of detail.

²⁸ Two very prominent lawyers in the field of international arbitration, who were not able to attend the conference, namely Arthur Marriott of London and Jan Paulsson of Paris, made very helpful written responses to the Discussion Paper.

²⁹ Although Dr Amazu Asouzu of the Faculty of Law of the University of Liverpool accepted that the adoption of the UNCITRAL Model Law for international arbitrations only would be an improvement on the present position (para 02 of his submission) he also pressed for its

1.39 After carefully considering the responses, the Project Committee recommended a number of changes to the Draft Bill contained in Discussion Paper 69. To facilitate a comparison, an abbreviated version of this Draft Bill, containing all the provisions to which substantial changes have been made, is included as Annexure D to this report. An annotated version of the Draft International Arbitration Bill proposed by the Law Commission in this report, highlighting additions to and deletions from the Draft Bill with Discussion Paper 69 forms annexure E to this report. The final version of the Draft Bill proposed by the Law Commission in this report, without annotations, forms Annexure F to the report.

1.40 The main changes recommended in this report regarding Chapter 2 of the Draft Bill on international commercial arbitration and the implementation of the Model Law relate to the definition of an arbitration agreement in writing (s 2(1)), the restatement of the definition of matters subject to arbitration (s 7), the inclusion of provisions on the immunity of arbitrators and arbitral institutions (s 9), consolidation (s 10) and conciliation (ss 11-15), the vesting of the default power to appoint an arbitrator in an arbitral institution rather than the court (sch 1 articles 6 and 11) and changes regarding the power of the court to grant interim measures (sch 1 article 9). An addition has been made to facilitate the enforcement of an order by the arbitral tribunal for interim measures (sch 1 article 17(3)). A new article 17(2) gives the arbitral tribunal the power to order appropriate security for costs at the request of a party, unless the parties agree otherwise. The concept "public policy" regarding the setting aside or refusal of enforcement of an award has also been clarified to include an express reference to serious procedural irregularities involving a breach of the arbitral tribunal's duty to act fairly (sch 1 articles 34(5) and 36(3)).

1.41 Three changes have been recommended concerning Chapter 3 of the Draft Bill, on the New York Convention. A new s 17(1) identifies the purpose of Chapter 3 of the bill as the application of the Convention in South Africa, subject to the provisions of the chapter. S 17(2) expressly provides for the enforcement of arbitration agreements under the New York Convention. S 19 contains a new proviso giving the court the discretion to dispense with the strict evidentiary requirements imposed by the section in appropriate circumstances.

adoption for domestic arbitration as well in a single statute (para 04). This overlooks the fact that the consideration of domestic arbitration legislation would need to be preceded by its own extensive consultative process with interested parties and the urgency relating to the enactment of the Model Law for international arbitration (compare Discussion Paper 69 para 1.9).

1.42 The reasons for these changes appear from the commentary below.

(d) *Regional workshops and the draft report*

1.43 At its meeting on 17 April 1998, the Law Commission resolved that the recommendations and draft report prepared by the Project Committee should form the subject of a further consultative process before final consideration by the Commission itself.

1.44 An intensive process followed of identifying respondents to the draft report, particularly with regard to ensuring a duly representative body of respondents. A summary of recommendations was sent to some 100 bodies and individuals.³⁰ Of these, 32³¹ accepted an invitation to attend one of the three workshops held on 25, 26 and 27 May 1998 at Johannesburg, Durban and Cape Town respectively. A list of those indicating acceptance of this invitation and those attending the workshops is attached as Annexure C2.

1.45 The workshops considered the draft report and Bill. These were the subject of elucidation and discussion led by Professors R H Christie QC and David Butler. Minor changes, mainly of a technical nature, were made to the Draft Bill in the light of the discussions at the workshops.³²

1.46 It is evident from the consultative process followed throughout this project that strong and widespread support exists for the adoption of the contemplated International Arbitration Bill.

CHAPTER 2

SOUTH AFRICA'S RESPONSE TO THE UNCITRAL MODEL LAW

³⁰ This figure excludes advocates of colour at the Johannesburg, Pretoria, Durban, Pietermaritzburg and Cape Town bars who also received individual invitations.

³¹ One of those invited, Adv N A Cassim SC of the Johannesburg bar, wrote to the Commission declining the invitation on the basis that he was entirely satisfied with the proposals as they stood. He also stressed the need for the Draft Bill to be adopted as soon as possible.

³² These changes are noted in the commentary in ch 2 below. The two most important changes to the substance of the Draft Bill concern the change to sch 1 article 17(2), enabling the arbitral tribunal to order appropriate security for costs unless the power is excluded in the arbitration agreement (see para 2.190 below) and the change to sch 1 article 34 (3), concerning the time limit for an application for setting aside an award tainted with fraud or corruption (see para 2.264 below).

(a) ***Proposed draft legislation***

(i) South Africa's basic response to the Model Law

2.1 In Discussion Paper 69, the Law Commission recommended that the Model Law should be adopted for international arbitrations³³ only, while retaining a separate statute for domestic arbitrations, subject to the possibility of an opt-in provision (see the discussion in para (c) below).

2.2 It was stated in Discussion Paper 69 that the reasons why South Africa should adopt the Model Law for international arbitration only and as a matter of urgency had been well aired and did not require detailed repetition.³⁴ Respondents to Discussion Paper 69 also emphasised the need for urgency in the implementation of the Model Law.³⁵

2.3 The urgency of the matter arises because South Africa's existing arbitration law is seriously defective by international standards for use in international arbitrations. Except for those countries which are established international arbitration centres, many of South Africa's existing or potential trading partners, including several African countries have either adopted or are in the process of adopting the Model Law. In Africa, the most recent examples are Kenya and Zimbabwe, although it should be noted that both the Kenyan Arbitration Act of 1995 and the Zimbabwean Arbitration Act of 1996 apply the Model Law to domestic as well as to international arbitration.³⁶ However, this approach is understandable in that both those countries'

³³ The concept "international arbitration" is defined in article 1(3) of the Model Law. See the discussion in para 2.102 below.

³⁴ Discussion Paper 69 para 2.4, citing Working Paper 59 paras 10-28; Christie R H "Arbitration: Party Autonomy or Curial Intervention II: International Commercial Arbitrations" (1994) 111 *SALJ* 360 (hereinafter referred to as "Christie (1994)") especially 370-2; Christie R H "South Africa as a Venue for International Commercial Arbitration" (1993) 9 *Arbitration International* 153 (hereinafter referred to as "Christie (1993)") especially 165; Butler D W "South African Arbitration Legislation - the Need for Reform" (1994) 27 *CILSA* 118 (hereinafter referred to as "Butler") especially 134-5; Adv A Findlay SC Submission in response to Working Paper 59 para 5.

³⁵ See eg the responses of the Association of Arbitrators and Karrer.

³⁶ Sanders P "Unity and Diversity in the Adoption of the Model Law" (1995) 11 *Arbitration International* 1 (hereinafter referred to as "Sanders") at 2-3 lists the following countries or states as having adopted the Model Law: Canada in 1986 (at both federal and provincial level - in the provinces, with the exception of Quebec, it applies to international arbitrations only); Cyprus in 1987; Bulgaria and Nigeria in 1988; Australia (at federal level for international arbitrations only) and Hong Kong in 1989; Scotland in 1990; Peru in 1992; Bermuda, the

existing arbitration legislation and their case law on arbitration were much less developed than that of South Africa. Two other states in Southern Africa, namely Mozambique and Lesotho, are now giving active consideration to implementing new arbitration statutes based on the Model Law.

2.4 The Law Commission is strongly of the view that the Model Law should be adopted with a minimum of alterations, for two main reasons. First, the goal of the Model Law is to promote the harmonisation and thus the uniformity of national laws pertaining to international arbitration procedures. Secondly, the absence of changes will make the South African version more user-friendly and attractive to foreign parties and their lawyers.³⁷

2.5 Notwithstanding the recommendation of the Law Commission that the Model Law should be adopted for international arbitrations only, two respondents to Discussion Paper 69 advocated its adoption for domestic arbitrations as well,³⁸ while a third requested that this possibility be considered once the issue of international

Russian Federation, Mexico and Tunisia in 1993; and Egypt and Ukraine in 1994. Sanders also lists eight states of the United States of America as having adopted the Model Law, including California, Florida and Texas. However, whereas Connecticut totally adopted the Model Law (Sanders 3) it appears from a commentary on the Florida International Arbitration Act (see Loumiet C M "United States: Florida International Arbitration Act – Introductory Note" (1987) 26 *ILM* 949 at 960 n 13) that there are significant philosophical and textual differences between the Florida statute and the Model Law. Singapore adopted it for international arbitrations in 1994. Of the major industrial countries in Western Europe, as yet only Germany has adopted the Model Law. (See the New German Arbitration Law, being the Tenth Book of the German Code of Civil Procedure, which commenced on 1 January 1998. An English translation is published in (1998) 14 *Arbitration International* 1-18.) The new German Arbitration Law adopts the Model Law with minimum changes and applies to both international and domestic arbitrations (see s 1025 and Böckstiegel K-H "An Introduction to the New German Arbitration Act Based on the UNCITRAL Model Law" (1998) 14 *Arbitration International* 19 at 22-23). New Zealand has also adopted the Model Law for both domestic and international arbitrations (see the Arbitration Act 99 of 1996, which commenced on 1 July 1997). (The New Zealand legislation is discussed by Richardson M "Arbitration Law Reform: the New Zealand Experience" (1996) 12 *Arbitration International* 57-66 and "Arbitration Law Reform: the New Zealand Experience - an Update" (1997) 13 *Arbitration International* 229-31.) In India a new Arbitration and Conciliation Act 26 of 1996, based largely on the Model Law, commenced on 25 January 1996 (see s 1(3); Kawatra G K and Khurana S L "Indian Arbitration Law Existing and Proposed" (1995) Vol 12 No 3 *Journal of International Arbitration* 5-38). The Kenyan Arbitration Act 4 of 1995 and the Zimbabwean Arbitration Act 6 of 1996 referred to in the text came into force on 1 January 1996 and 13 September 1996 respectively.

³⁷ UNCITRAL Secretariat *Explanatory note by the UNCITRAL Secretariat on the Model Law on International Commercial Arbitration* United Nations Vienna 1994 (hereinafter referred to as "UNCITRAL Secretariat") para 3.

³⁸ Asouzu paras 1-24; Goodman. At least one respondent, BIFSA, supported the retention of a separate user-friendly statute for domestic arbitrations.

arbitrations has been dealt with.³⁹ Respondents to Discussion Paper 69 were not asked to assess the suitability of the Model Law for domestic arbitrations. For this reason and because of the generally accepted urgency of the need to introduce the Model Law for international arbitrations, the further examination of this question will have to await the next phase of the Law Commission's investigation of arbitration legislation regarding the revision or replacement of the Arbitration Act 42 of 1965 for domestic arbitrations.

2.6 The recently adopted Arbitration Act of 1996 in England, which is influenced by rather than based on the Model Law, contains some important innovations aimed at rectifying problems which are prevalent in both English and South African practice.⁴⁰ Apart from the advantages of retaining those familiar provisions of the 1965 Act which have worked well in practice, it has been argued that the retention of a separate statute for domestic arbitration will offer the opportunity of incorporating elements of the new English statute which can more effectively reform domestic arbitration practice than the Model Law.⁴¹

2.7 The aims of the drafters of the Model Law were: first, the liberalisation of international arbitration by limiting the role of national courts and emphasising party autonomy by allowing the parties the freedom to choose how their disputes should be determined; secondly the establishment of a defined core of mandatory provisions to ensure fairness and due process; thirdly to provide a framework for conducting an international commercial arbitration so that in the event of the parties being unable to

³⁹ See Scholtz para 6.

⁴⁰ See eg s 1 (founding principles), s 33 (general duty of the arbitral tribunal), s 34(2) (procedural powers of the arbitral tribunal), s 40 (general duty of the parties), s 41 (powers of arbitral tribunal in case of party's default) and s 65 (power of arbitral tribunal to limit recoverable costs). The Hong Kong Arbitration (Amendment) Ordinance of 1996 amended the Arbitration Ordinance by inserting provisions based on certain sections of the English Arbitration Act 1996, including some of those referred to above (see eg ss 2AA, 2GA, 2GB and 2GL of the Ordinance as amended). These provisions apply to both domestic and international arbitrations (see s 2AD), although certain other provisions still apply to domestic arbitrations only. It is now at least arguable that the Hong Kong Arbitration Ordinance (as amended in 1996) adapts rather than adopts the Model Law for international arbitrations, thereby undermining the goal of uniformity. Hong Kong is apparently now sufficiently well established as an international arbitration centre to be able to do this.

⁴¹ See Butler D W "A New Domestic Arbitration Act for South Africa: What Happens after the Adoption of the UNCITRAL Model Law for International Arbitration?" (1998) 9 *Stel LR* 3-20. These innovations could not be incorporated in a South African version of the Model Law applying to both international and domestic arbitration without losing the benefit of harmonisation and uniformity gained by adopting the Model Law with minimum changes referred to in para 2.4 above. Compare the previous footnote regarding the latest developments in Hong Kong.

agree on the procedure, the arbitration could still be completed; and finally the incorporation of provisions to aid in the enforcement of awards and to clarify certain controversial practical issues.⁴² Although there have been attempts to show that the Model Law pays insufficient regard to the interests of developing countries,⁴³ the decision to undertake the drafting of the Model Law resulted from an initiative from the Asian-African Legal Consultative Committee.⁴⁴ Moreover, a perusal of the *travaux préparatoires* reveals that delegates from developing countries played a prominent role in the drafting process and the Model Law has been adopted by a growing number of developing countries.⁴⁵

2.8 In 1985 the General Assembly of the United Nations recommended that all states give due consideration to adopting the Model Law "in view of the desirability of uniformity of the law of arbitral procedures and the specific needs of international commercial arbitration practice". It is also significant that the Secretary-General was instructed to transmit the *travaux préparatoires* together with the Model Law itself to interested bodies.⁴⁶

2.9 Therefore, it is not only important to ensure that a new South African statute on international arbitration achieves the objects of the drafters of the Model Law, but does so in a way that ensures uniformity with international standards. This can best be achieved by adopting the Model Law with the minimum alterations possible. The object of the Law Commission has therefore been to restrict alterations to those which are essential for the effective implementation of the Model Law in South Africa and which will promote South Africa as an attractive Model Law jurisdiction for holding international arbitrations. A summary of the proposed changes and additions is given in Chapter 1 para (a) above.

⁴² *Report of the Secretary-General: Possible Features of a Model Law on International Commercial Arbitration* A/CN.9/207 of 14 May 1981 (hereinafter referred to as "A/CN.9/207") paras 16-17; Redfern A & Hunter M *Law and Practice of International Commercial Arbitration* 2 ed Sweet & Maxwell London 1991 (hereinafter referred to as "Redfern & Hunter") 509; Butler 131.

⁴³ See Sornarajah M "The UNCITRAL Model Law: a Third World Viewpoint" (1989) Vol 6 No 4 *Journal of International Arbitration* 7-20.

⁴⁴ See Redfern & Hunter 508.

⁴⁵ See para 2.3 n 4 above and compare Asante S K B "The Perspectives of African Countries on International Commercial Arbitration" in Muller S and Mijs W (eds) *The Flame Rekindled* Martinus Nijhoff Dordrecht 1994 133 at 137.

⁴⁶ See *UN General Assembly Resolution 40/72* of 11 December 1985.

2.10 An area of arbitration law, which has recently enjoyed much attention, is the relationship between arbitration and the courts.⁴⁷ On the one hand, arbitration cannot function effectively without the assistance of the courts, where a party does not comply voluntarily with its obligations under the arbitration agreement or the award. Therefore, court assistance may be required for the enforcement of the arbitration agreement and the enforcement of the award. In exchange for its supportive powers, the court also has the power to supervise the arbitral process by setting aside the award in certain circumstances. The danger exists that powers of the court relating to intervention in the arbitral process prior to the award, which at first sight may appear to be intrinsically beneficial, can be abused as a tactical ploy to gain time.⁴⁸ There is therefore a need to strike a balance, by providing adequate powers of support while avoiding excessive interference by the court in the arbitral process.⁴⁹

2.11 A powerful reason for arbitral reform in England has been the desire to protect and promote London as a leading centre for international arbitrations. Yet the suspicion has existed, particularly among foreigners, that the English courts were only too ready to interfere in the arbitral process "and to impose their own *dictat* on the parties, notwithstanding the agreement of the parties to arbitrate rather than litigate".⁵⁰ As a result, the drafters of the new English Arbitration Act have provided the courts "only with powers that can properly be said to be supportive of the arbitral process" and excluded others.⁵¹

2.12 In the view of the Law Commission the Model Law achieves the desired balance regarding the powers of the court, at least in the context of international commercial arbitration. Significant departures from the Model Law in this regard would adversely affect South Africa's chances of developing into an important

⁴⁷ See inter alia Herrmann G "The Role of the Courts under the UNCITRAL Model Script" in Lew J D M (ed) *Contemporary Problems in International Arbitration* Centre for Commercial Law Studies Queen Mary College London 1986 164-75; Kerr M "Arbitration and the Courts – the UNCITRAL Model Law" (1984) 50 *Arbitration* 3-16 (referred to hereinafter as "Kerr"); Christie (1993) 153-65; Christie (1994) 360-72; and Butler 123-9.

⁴⁸ See Kerr 5.

⁴⁹ See Paulsson J "Accepting International Arbitration in Fact – and Not Only in Words" in Cotran E & Amisshah A *Arbitration in Africa* Kluwer The Hague 1996 31 (referred to hereinafter as "Paulsson 1996") at 34-5.

⁵⁰ Saville M "The Arbitration Act 1996 and its Effect on International Arbitration in England" (1997) 63 *JCI Arb* 104 (referred to hereinafter as "Saville (1997)") at 107.

⁵¹ See Saville 111. The view adopted by Saville in 1997 is significantly different from the wider role for the courts advocated by Kerr in 1984.

regional centre for international commercial arbitrations.⁵² The powers of the court under the Model Law were discussed in detail at the three regional workshops and participants supported the Commission's recommendations concerning the powers of the court as contained in this report.

(ii) Basic form and contents of implementing legislation

2.13 In the view of the Law Commission, it is vitally important that the South African version of the Model Law should follow the official English text as closely as possible,⁵³ for the reasons set out in para (a)(i) above for adopting the Model Law with a minimum of alterations: namely, uniformity and making the legislation user-friendly to foreign parties and their lawyers.

2.14 Because the Model Law is not in the same form and language usually used in South African statutes, we strongly recommend that the Model Law should be contained in a schedule to the legislation implementing the Model Law to get around this difficulty.⁵⁴ The Law Commission recommends that some minor modifications should be incorporated in the schedule itself. These include a provision defining the power of the court to grant interim measures in article 9 and provisions on costs and interest in article 31. This approach facilitates interpretation of the schedule.

2.15 One minor drafting change, to which there can be no objection, has been to remove references to gender, following the drafting style of the legislature in British Columbia and in keeping with the spirit of the Constitution of the Republic of South

⁵² See too the basic standards regarding powers of the court proposed by Paulsson (1996) 34-40, which must be met before a jurisdiction can genuinely be regarded as supportive of arbitration.

⁵³ Compare the submission of Adv A Findlay SC in response to Working Paper 59 on behalf of the Society of Advocates of Natal, para 4, who appears to favour the modification of the text to facilitate its interpretation according to South African principles of interpretation.

⁵⁴ This technique of retaining the language of the Model Law by incorporating the Model Law in a schedule to the enacting legislation has been used *inter alia* by the federal legislature in Canada (see the Commercial Arbitration Act of 1986), the provincial legislature in Ontario (Davidson P J "International Commercial Arbitration Law in Canada" (1991) 12 *Northwestern Journal of International Law and Business* 97 (hereinafter referred to as "Davidson") at 115), the United Kingdom for Scotland (see the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s 66(2) and sch 7), the federal legislature in Australia (see the International Arbitration Act 1974, as amended by Act 25 of 1989, ss 15(1) and 16(1) and sch 2), the legislature in New Zealand (see the Arbitration Act of 1996 s 6(1) and sch 1) and in the Zimbabwe Arbitration Act of 1996 s 2 and sch 1.

Africa Act, 1996, where the Model Law refers to the gender of an arbitrator or a party (see for example article 12 in Schedule 1 to the Draft Bill).

2.16 If the legislature were to redraft the official English text in wording of its own, much of the value of referring to the *travaux préparatoires* (see the commentary on s 8 of the Draft Bill in para (b) below) would be lost, the growing international jurisprudence on the interpretation and application of the Model Law could be rendered largely inapplicable and uncertainty as to the meaning of the redrafted provisions will inevitably be created for persons, both local and foreign, when they have to apply the local version.

2.17 The Law Commission is of the opinion that the legislation implementing the Model Law could usefully be consolidated with the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, particularly as certain revisions to this statute should be made to coincide with the implementation of the Model Law (see Chapter 3 of the commentary below and Chapter 3 of the Draft Bill). The Law Commission also believes that the legislation should include legislation implementing the Washington Convention (see Chapter 4 of the Draft Bill and Chapter 4 of the commentary). All South African legislation on international arbitration would then be contained in one statute, which would make it more readily accessible, particularly for foreign parties.

2.18 Some arbitration statutes⁵⁵ have a provision applying the statute to statutory arbitrations, that is a compulsory reference to arbitration in terms of another statute, outside the arbitration legislation itself. In our opinion, no such provision is required in the proposed International Arbitration Act for South Africa, as it only applies to arbitrations pursuant to an agreement between the parties (compare s 1(a) of the Draft Bill).

(iii) Overview of the contents of the Draft Bill

2.19 The Draft Bill in Annexures E and F to this commentary comprises five Chapters and five schedules. Chapter 1 comprises certain general provisions including an introductory section setting out the purposes of the Act. Chapter 2 implements the UNCITRAL Model Law in the form set out in Schedule 1. A table of

⁵⁵ Compare the Arbitration Act 42 of 1965 s 40, the New Zealand Act of 1996 s 9, the Zimbabwean Act of 1996 s 5. All these statutes apply to both domestic and international arbitrations.

contents for the Model Law has been included at the start of Schedule 1, which indicates the structure and contents of the Model Law. Schedule 2 identifies the *travaux préparatoires* which may be used as an interpretation aid for the Model Law. Chapter 2 also includes certain provisions designed to facilitate conciliation in the context of an arbitration agreement. Schedule 5 contains the UNCITRAL Conciliation Rules which parties may use, if they wish to do so. Chapter 3 contains revised legislation for implementing the New York Convention, the text of which is set out in Schedule 3. Chapter 4 implements the Washington Convention, the text of which is contained in Schedule 4. Chapter 5 contains the necessary transitional and related provisions.

(b) Brief commentary on the Model Law including recommended additions and changes

2.20 In this section the following portions of the proposed Draft Bill will be discussed, namely Chapter 1 (General Provisions), Chapter 2, dealing with the implementation of the UNCITRAL Model Law, Schedule 1 containing the modified text of the Model Law, and Schedule 2 (documents which may be used as an interpretation aid). The headings in this Chapter of the memorandum correspond to those in the Draft Bill. The commentary should be read together with the text of the Draft Bill.

CHAPTER 1: GENERAL PROVISIONS

2.21 This Chapter was originally entitled 'Statement of Principles' in the Draft Bill in Discussion Paper 69 and comprised a single section (s 1). The title has been changed in the Draft Bill with this Report (see Annexures E and F), because of the addition of three further sections to the chapter.

S 1 Purposes of this Act

2.22 This provision is based on s 5 of the New Zealand Arbitration Act of 1996. Its object is to set out the purposes of the Draft Bill more fully than is appropriate in the long title. Like s 5(a) of its New Zealand counterpart, the Draft Bill aims at encouraging the use of arbitration as an agreed method of resolving international commercial⁵⁶ and investment disputes. The legislation is therefore concerned with arbitration pursuant to an agreement between the parties, as opposed to statutory (non-consensual) arbitration. The statement also emphasises the importance attached to party autonomy in the Model Law itself. As appears from the rest of the section, the intention of the Draft Bill is to enact the UNCITRAL Model Law in South Africa,⁵⁷ and to provide legislation to give proper effect to the New York Convention and to implement the Washington Convention. To facilitate access to the two conventions, their English text appears in schedules 3 and 4 to the Draft Bill.

2.23 The Model Law is enacted for international arbitrations only, for the reasons discussed in para 2(a)(i) above. The Model Law also only applies to commercial arbitrations. To emphasise this, the long title to the Draft Bill commences with the words "To amend and consolidate the law relating to international commercial arbitration ...".

2.24 S 1 of the Draft Bill differs from the English Arbitration Act of 1996 s 1 ("General principles") which sets out the objects of arbitration as a consensual method of dispute resolution by an impartial adjudicator, without unnecessary delay and expense. The English Act also aims to rid arbitration in England of certain defects acquired from the traditional adversarial system which have resulted in arbitration being unnecessarily expensive and protracted.

2.25 Consideration can be given to including such a provision in a revision of the Arbitration Act 42 of 1965 for domestic arbitrations. It would however be inappropriate in the context of Chapter 2 of the Draft Bill, the purpose of which is to

⁵⁶ See paras 2.102-2.105 below regarding the meaning of 'commercial'.

⁵⁷ The New Zealand Act of 1996 in s 5(b) does not merely refer to the adoption of the Model Law as being one of the aims of the Act (compare s 1(b) of the Draft Bill with this report). It also has the stated aim of promoting international consistency of arbitral regimes based on the Model Law. This object is however undermined by those jurisdictions, which while purporting to adopt the Model Law, have in reality adapted it by making substantial amendments.

implement the UNCITRAL Model Law for international commercial arbitrations with as few changes as possible.

s 2 Interpretation

2.26 S 2 is a new provision which had no equivalent in the Draft Bill annexed to Discussion Paper 69.

2.27 The definition of 'arbitration agreement' in s 2(1) performs two functions. First, the expression 'arbitration agreement' is used on several occasions in the Draft Bill, for example in ss 3, 4, 7, 10, 11, and 13-15. COSAB⁵⁸ therefore suggested that the term should be defined immediately to avoid the need to search for the definition in the Model Law. Secondly, it was decided to recommend changes to the definition of an 'arbitration agreement' in article 7 of the Model Law because of certain problems which have occurred in practice.⁵⁹ It was decided that these changes could be more easily accommodated and their existence highlighted by including them in the definition in s 2(1). Because this definition applies to both Chapters 2 and 3 of the Draft Bill it belongs more logically in Chapter 1 (General Provisions).

2.28 Inconsistencies could occur when the Draft Bill and the official English texts of the Model Law and the two Conventions contained in Schedules 3 and 4 are translated into Afrikaans. Particularly for the benefit of foreigners relying on the English text, s 2(2) provides that the English text should prevail where there is an inconsistency between the English and Afrikaans texts. This provision is based on similar provisions in the Constitution of the Republic of South Africa of 1996 s 240 and s 2(9) of the Wreck and Salvage Act 94 of 1996.

s 3 Exclusion of Act 42 of 1965

2.29 This provision appeared as s 4 of the Draft Bill annexed to Discussion Paper 69 and applied to Chapter 2 (International Commercial Arbitration) only. SAICE⁶⁰ suggested that it should apply to the Act as a whole and not merely to Chapter 2. This suggestion has been accepted, subject to a qualification discussed below, relating to

⁵⁸ In their response to Discussion Paper 69 para 2.

⁵⁹ See the discussion of article 7 in paras 2.130-2.136 below.

⁶⁰ SAICE's response to Discussion Paper 69, Paper 1 para 3.3.

matters which are not arbitrable. The provision has therefore been moved to Chapter 1 (General Provisions).

2.30 The Model Law does not deal with certain matters which are regulated by the Arbitration Act 42 of 1965. For example, the Model Law contains no equivalent to s 34 of the 1965 Act which deals with the arbitrator's remuneration and lien on the award and there is also no equivalent to the provision in s 8 of the 1965 Act for the court to remove a contractual time-bar on the commencement of arbitration proceedings.⁶¹

2.31 To the extent that it is not considered necessary to amplify the Model Law to fill these gaps,⁶² it is important that parties to an international commercial arbitration with a South African connection should have the assurance that the legislation implementing the Model Law contains all the relevant statutory provisions on arbitration and that they do not have to refer to other arbitration legislation as well.

2.32 S 3 of the Draft Bill therefore provides expressly that the Arbitration Act 42 of 1965 does not apply to arbitration agreements, proceedings and awards which are subject to the Model Law. Foreign users of the Model Law in South Africa will therefore know that they do not have to search outside the enacting legislation for possible hidden pitfalls.

2.33 However, s 7 in Chapter 2 of the Draft Bill, dealing with matters which are not arbitrable, is only intended to apply to international *commercial* arbitrations falling under Chapter 2 and not to arbitration agreements or foreign arbitral awards relating to a non-commercial matter, which are subject to Chapter 3, the chapter of the Draft Bill implementing the New York Convention. A subsection (2) has therefore been added to s 3 of the Draft Bill to make it clear that the usual restrictions on arbitrability, for example in relation to a matrimonial cause, will continue to apply to non-commercial disputes with an international connection.⁶³

⁶¹ See further para (c) below.

⁶² Compare the commentary to article 31 of the Model Law below, where amplifications regarding costs and interest are recommended.

⁶³ The proposed subsection (2) includes the heading to s 2 of the Arbitration Act 42 of 1965 and not merely a reference to the section number, so that a foreigner, who may only have immediate access to the international arbitration legislation, will be informed at once of the general subject-matter of s 2 of the 1965 Act.

s 4 *This Act binds the State*

2.34 This section originally appeared as s 17 in Chapter 5 of the Draft Bill with Discussion Paper 69. Because of its importance, it was moved to Chapter 1 to give it greater prominence.

2.35 S 39 of Arbitration Act 42 of 1965 provides expressly that the Act binds the State. This suggests that a similar provision is required when the Model Law is implemented. The suggestion is fortified by provisions to this effect in the Canadian and Australian federal legislation adopting the Model Law in those jurisdictions.⁶⁴ Sanders⁶⁵ points out that these Acts do not deal with sovereign immunity. The answer to this appears to be that sovereign immunity in the context of international arbitration is concerned with the position of court and arbitration proceedings against foreign states and the execution of the judgment or award.⁶⁶ The purpose of the proposed provision is to ensure the efficacy of arbitration agreements where one of the parties is a South African organ of government or a South African state corporation. The position of a foreign state and court proceedings in South Africa concerning an arbitral agreement or proceedings to which the foreign state is a party are regulated by ss 10 and 14 of the Foreign States Immunities Act 87 of 1981.

⁶⁴ See the (Canadian) Commercial Arbitration Act of 1986 s 10 and the (Australian) International Arbitration Act of 1974 s 2B. S 41 of the (Kenyan) Arbitration Act of 1995 contains a similar provision.

⁶⁵ *Op cit* 11-12.

⁶⁶ See Fox H "Sovereign Immunity and Arbitration" in Lew J D M (ed) *Contemporary Problems in International Arbitration* Centre for Commercial Law Studies Queen Mary College London 1986 323, who says:

"The plea of sovereign immunity in the sense of a procedural bar to jurisdiction based on the personal capacity of the litigant, has little immediate relevance in arbitration proceedings. Based on the assumption that states are equal, the essence of the plea is to correct the lop-sided situation where one state by reason of its control of the legislation and courts of the legal system operating in its territory has an unfair advantage over a foreign state which appears as litigant in these courts. Arbitration proceedings depend totally on the consent of the parties A party can never be brought before an arbitration tribunal without its consent."

For a discussion of the possible disadvantages of contemporary developments in the doctrine of sovereign immunity from the perspective of developing countries see Osode P C "State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective" (1997) 30 *CILSA* 37 at 39-42.

CHAPTER 2: INTERNATIONAL COMMERCIAL ARBITRATION

s 5 *Definitions*

2.36 The purpose of s 5(1) and (2) is to define the term "Model Law" as used in Chapter 2 of the Draft Bill and to make it clear that expressions in Chapter 2 should be interpreted in the same way as the expression in question is used in the Model Law itself. The wording of s 5(1) and (2) is largely based on the Australian International Arbitration Act of 1974 s 15. The Zimbabwean Arbitration Act of 1996 (s 2(1) and (2)) contains similar provisions.

2.37 Following suggestions made by respondents to Discussion Paper 69,⁶⁷ the definition of "the Model Law" has been amplified to make it clear that it refers to the Model Law as adapted in Schedule 1. This change necessitated minor modifications to the wording of other sections, eg ss 6, 7 and 9.

2.38 As appears from the commentary on ss 11-16 below, the Law Commission has altered its position adopted in Discussion Paper 69 and decided to recommend the inclusion of certain provisions on conciliation. Although the better view is that there is no fundamental difference between conciliation and mediation, attempts are still sometimes made to distinguish these concepts.⁶⁸ For the avoidance of doubt, a definition of "conciliation" has been included to make it clear that the term for purposes of chapter 2 also includes mediation and that a "conciliator" also includes a mediator. The definition is based on that in the Bermuda legislation.⁶⁹

s 6 *Model Law to have force of law*

2.39 The purpose of this section is to give the Model Law, in the form in which it appears in Schedule 1, force of law in South Africa, subject to Chapter 2. The reason for having the text of the Model Law in a Schedule appears from para 2.14 above.

⁶⁷ See COSAB para 1 and SAICE Paper 1 para 3.2.

⁶⁸ See Sanders 26; Butler D W & Finsen E *Arbitration in South Africa - Law and Practice* Juta Cape Town 1993 (hereinafter referred to as "Butler & Finsen") 10-11.

⁶⁹ See the Bermuda International Conciliation and Arbitration Act 1993 s 2.

s 7 *Matters subject to arbitration*

2.40 Article 1(5) of the Model Law makes it clear that the Model Law is not intended to affect other laws of the relevant state regarding the arbitrability of disputes. ("Arbitrability" is used here in its usual meaning as to whether or not a particular issue in terms of the applicable law is capable of being resolved by arbitration instead of by the courts.) In South Africa, apart from the common-law prohibition on arbitration in criminal matters and the restrictions in s 63(1) of the Insurance Act 27 of 1943 on arbitration regarding disputes pertaining to insurance matters⁷⁰ further restrictions on arbitrability are contained in s 2 of the Arbitration Act 42 of 1965. By excluding Chapter 2 of the Draft Bill (the legislation enacting the Model Law) from the operation of the 1965 Act (see the commentary to s 3 above) it becomes necessary to include in Chapter 2 a provision equivalent to s 2 of the Arbitration Act. Similar provisions making it clear that the enactment of the Model Law does not affect arbitrability of disputes appear in the New Zealand and Zimbabwean legislation.⁷¹

2.41 The Draft Bill in Discussion Paper 69 addressed this problem with the following provision:

"Matters not subject to arbitration

6. (1) A reference to arbitration shall not be permissible in respect of any matter relating to status.

(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

⁷⁰ Butler & Finsen 55-6.

⁷¹ See the (New Zealand) Arbitration Act of 1996 s 10(1) and (2) (discussed by Richardson M "Arbitration Law Reform: the New Zealand Experience" (1996) 12 *Arbitration International* 57 at 61-2 and "Arbitration Law Reform: the New Zealand Experience - an Update" (1997) 13 *Arbitration International* 229 (hereinafter referred to as "Richardson (1997)" at 230) and the Zimbabwean Arbitration Act of 1996 s 4.

(3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration."

2.42 The first potential difficulty with this provision is the meaning of the term "status". Although arbitration in matters pertaining to status is prohibited by both s 2 of the Arbitration Act 42 of 1965 and the common law,⁷² our courts have not as yet had the occasion to attempt a comprehensive definition.⁷³ The term "status" in s 6(1) could therefore create problems for South African users, which would be even greater for foreigners. However, SAICE⁷⁴ expressed the view that an attempt to define "status" would create more problems than it would solve.

2.43 In these circumstances, the Project Committee recommended that the better course would be to delete the reference to "status" and to circumscribe arbitrability in another way with reference to some of the recently revised provisions on arbitrability in civil-law jurisdictions. The Swiss Private International Law Act 1987 article 177(1) provides that "[a]ny dispute involving property can be the subject-matter of an arbitration".⁷⁵

2.44 Article 177(1) of the Swiss legislation provides the basis for the first part of article 1030(1) of the new German Code of Arbitration, which reads "Any claim involving an economic interest can be the subject of an arbitration agreement."⁷⁶ The remainder of article 1030(1) provides "An arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to come to a settlement on the issue of the dispute." The second part appears to reflect the law prior to the implementation of the revision.⁷⁷

⁷² See Voet 4.8.10.

⁷³ Compare *Re Curators of Church of England v Colley* (1888) 9 NLR 45 at 47 and see generally Butler & Finsen 52-54, especially regarding *Grobbelaar v De Villiers NO* 1984 2 SA 649 (C) 656B-C, 657C.

⁷⁴ In its response to Discussion Paper 69, Paper 2 para 2.3.

⁷⁵ As translated in Redfern & Hunter 784 Appendix 19. They add that the German text refers to "vermögensrechtliche Anspruch".

⁷⁶ The English translation quoted in the text is that published in (1998) 14 *Arbitration International* 3. "[C]laim involving an economic interest" is a translation of "vermögensrechtlicher Anspruch".

⁷⁷ See Lörcher G "Towards a Reform of the German Rules Governing Arbitration" (1996) 62 *JCI Arb* 306 at 307 who refers to article 1025 of the Tenth Book of the Code of Civil Procedure prior to its substitution from 1 January 1998. Lörcher states that the effect of the

2.45 The second part of the proposed German Article 130(1) is similar to the provision in the Netherlands Arbitration Act of 1986 which defines arbitrability negatively as follows: "The arbitration agreement shall not serve to determine the legal consequences of which the parties cannot freely dispose."⁷⁸

2.46 The Law Commission considered that a provision to the effect that all disputes concerning "patrimonial rights" were arbitrable would probably result in difficulties of interpretation in practice as to which claims are included by that term. In the Law Commission's opinion the phrase "a matter which the parties are entitled to dispose of by agreement" is wide enough to include disputes relating to patrimonial rights while still being narrow enough to exclude matters relating to status.⁷⁹

2.47 The definition of arbitrability with reference to matters which the parties are entitled to dispose of by agreement is still subject to public policy and any restrictions on arbitrability imposed by any other law. Dr Gerold Herrmann⁸⁰ suggested that s 6(2) of the Draft Bill quoted above should be amplified by the inclusion after "under any other law" of the words "of this State". This is just to clarify that the intention is not to overrule other restrictions on arbitrability which may from time to time exist in South African law. However, where an issue is not arbitrable under foreign law, without there being a similar restriction in South African law, the issue could still be arbitrated in South Africa, although the award would probably be unenforceable in the relevant foreign jurisdiction.

2.48 COSAB suggested that "excluding" would be more appropriate than "preventing" in s 6(3) of the previous draft.

2.49 At the regional workshops it became apparent that confusion could arise when applying s 7 of the Draft Bill in practice as to whether it was intended to apply to non-

addition from Swiss law would enlarge the field of arbitration under German law by opening the way for arbitration on claims regarding matters like the invalidity of a patent or concerning a shareholders' resolution.

⁷⁸ Article 1020(3) as translated in Redfern & Hunter 764 Appendix 18. The Dutch text reads: "De overeenkomst tot arbitrage mag niet leiden tot de vaststelling van rechtsgevolgen welke niet ter vrije bepaling van de partijen staan."

⁷⁹ Compare Butler & Finsen 53-4 where the non-arbitrability of a matter relating to status is explained as being a matter "which the parties could not themselves determine by agreement".

⁸⁰ During a meeting with the Project Committee on 10 March 1997.

commercial disputes. It is clear from the heading to Chapter 2 of the Draft Bill as well as from article 1 of the Model Law that the Model Law and s 7 are only intended to apply to international commercial disputes.⁸¹ To highlight this, a new introduction has been added to the provision: "For purposes of this chapter, ...". Separate provision has been made regarding arbitrability in relation to a dispute between two parties from different states relating to a non-commercial matter.⁸²

2.50 The Law Commission therefore recommends that s 6 of the previous Draft Bill should be substituted by a new provision reading as follows:

"Matters subject to arbitration

7. (1) For purposes of this chapter, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless the arbitration agreement is contrary to the public policy of South Africa or, under any other law of South Africa, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as excluding determination of the matter by arbitration."

2.51 Finally, on arbitrability, Asouzu⁸³ asks whether it is necessary to retain article 1(5) of the Model Law in view of s 7. Although there is some duplication, the Law Commission nevertheless recommends that article 1(5) should be retained in view of our declared policy of restricting changes to the text and substance of the Model Law to a minimum.

s 8 Interpretation of Model Law

2.52 The Model Law's provisions sometimes represent a compromise between different legal traditions and its wording differs from that customarily used by some

⁸¹ See the commentary on article 1 in paras 2.102-2.105 below, regarding the meaning of "commercial" and why it was decided not to include a definition of the term in the Draft Bill.

⁸² See the commentary on s 3(2) of the Draft Bill in para 2.33 above.

⁸³ Response to Discussion Paper 69 para 25. Article 1(5) was deleted from the Zimbabwe version of the Model Law in view of the comprehensive provision on arbitrability in s 4 of the Arbitration Act 6 of 1996.

legislatures. Therefore, courts, arbitrators, parties to arbitrations and their legal advisers may have some difficulty in interpreting some of its provisions. Moreover, the choice of wording for the English text was sometimes influenced by the need to facilitate translation without ambiguity into all six languages used by UNCITRAL. A primary goal of the Model Law is to promote uniformity of national laws applying to international arbitration procedure. Therefore, it is highly desirable that the Model Law should be uniformly interpreted. For these reasons, it is desirable that those interpreting the law should have access to and refer to the *travaux préparatoires*.

2.53 This technique has traditionally not been permitted for courts applying rules of statutory interpretation derived from English law,⁸⁴ although there has recently been some relaxation of the exclusionary rule.⁸⁵ It is noteworthy that several Commonwealth countries expressly permit reference to the *travaux préparatoires* for purposes of interpreting the Model Law, as enacted in those jurisdictions. These countries include Hong Kong, Canada, Scotland, Australia, Bermuda, Singapore, New Zealand and Zimbabwe. However, the Kenyan Arbitration Act of 1995 appears to contain no such provision.

2.54 For the reasons stated above, the Law Commission is strongly of the view that the South African legislation implementing the Model Law should expressly permit access to the *travaux préparatoires*.

2.55 However, as the Model Law is the product of several drafts and several sessions of UNCITRAL's working group, the working papers used in its preparation are fairly numerous.⁸⁶ Therefore the legislatures referred to above in permitting

⁸⁴ See eg Davidson 107 regarding the traditional approach in Canada; Christie (1994) 364. Nevertheless, when construing the words of a statute *which are not clear and unambiguous*, a court is entitled to refer to the report of a judicial commission of inquiry whose investigations shortly preceded the passing of the statute in order to ascertain the mischief aimed at (see *Westinghouse Brake & Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 2 SA 555 (A) 562I-563A; *S v Makwanyane* 1995 3 SA 391 (CC) 405B per Chaskalson P; *Fundtrust (Pty) Ltd (In Liquidation) v Van Deventer* 1997 1 SA 710 (A) 729H-I).

⁸⁵ *S v Makwanyane* 1995 3 SA 391 (CC) 405C-E. In *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 (HL) 634D-E, references to parliamentary material in court were declared to be permissible to clarify an ambiguity, but only "where such material clearly discloses the mischief aimed at or the legislative intention lying behind the ambiguous or obscure words".

⁸⁶ See the documents referred to by Broches A *Commentary on the UNCITRAL Model Law on International Commercial Arbitration* Kluwer Deventer 1990 (hereinafter referred to as "Broches 1990") VIII-IX and for an even more comprehensive list Holtzmann H M & Neuhaus J E A *Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* Kluwer Deventer 1989 (hereinafter referred to as "Holtzmann & Neuhaus") 1252-63 (appendix B).

access to the *travaux préparatoires* as an aid to interpretation have adopted one of two methods, a reference to specific documents, or a general reference to the *travaux préparatoires*.

2.56 The statutes of Canada (apart from that of the province of British Columbia) and Hong Kong refer to specific documents. Canada's (Federal) Commercial Arbitration Act of 1986, s 4(2), the Hong Kong Ordinance, s 2(3)⁸⁷ and the legislation of the Canadian provinces apart from British Columbia⁸⁸ permit reference to two specific documents, namely (a) the report of the Secretary-General dated 25 March 1985 entitled *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration*⁸⁹ and (b) the *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* (3-21 June 1985).⁹⁰ To ensure the general availability of the documents, the Canadian Minister of Justice was required to effect their publication in the *Canada Gazette*.⁹¹

2.57 British Columbia, Scotland, Bermuda, Singapore, Australia, New Zealand and Zimbabwe preferred a general reference. The legislature of British Columbia allows a court or arbitral tribunal to have access to "the documents of the United Nations Commission on International Trade Law and its working group respecting the preparation of the UNCITRAL Model Arbitration Law".⁹² The Scottish legislation provides that "[t]he documents of the United Nations Commission on International Trade Law and its working group relating to the preparation of the Model Law may be considered in ascertaining the meaning or effect of any provision of the Model

⁸⁷ See Kaplan N "The Model Law in Hong Kong - Two Years On" (1992) 8 *Arbitration International* 223 at 235 and the Law Reform Commission of Hong Kong *Report on the Adoption of the UNCITRAL Model Law on Arbitration* Topic 17 1987 (hereinafter referred to as "Hong Kong Report") paras 4.18 - 4.26. S 2(3) provides that the documents to which reference may be made are those specified in sch 6. These include the report of the Law Commission of Hong Kong. S 48 of the Ordinance (as inserted by s 16 of the Arbitration (Amendment) Ordinance of 1996) gave the power to amend sch 6 to the Governor in Council.

⁸⁸ See eg Davidson 97 regarding s 12 of the International Commercial Arbitration Act of Ontario (Ont. Stat. ch 30 (1988)).

⁸⁹ *Analytical Commentary on Draft Text of a Model Law on International Commercial Arbitration* A/CN.9/264 of 25 March 1985 (hereinafter referred to as "A/CN.9/264").

⁹⁰ *Report of the United Nations Commission on International Trade Law on the Work of its Eighteenth Session* A/40/17 of 21 August 1985 (hereinafter referred to as "A/40/17").

⁹¹ See the Commercial Arbitration Act 1986 s 7.

⁹² See the International Commercial Arbitration Act of 1986 s 6.

Law as set out in schedule 7 of this Act".⁹³ The Australian, Bermudan, Singapore, New Zealand and Zimbabwean legislation is to the same effect as that of Scotland.⁹⁴

2.58 Although the reference to two specified documents has the apparent advantage of simplicity, those working with the Model Law will find that one needs to consult more of the working papers than just the two documents referred to above. Both documents, which were prepared in the final months of the drafting process, have a concise drafting style and contain references to other working papers. In some places, the two documents can only be properly understood with reference to the other working papers. Therefore, in our view, the South African legislation should authorise wider access to the documents of the Commission and its working group than to just the two documents referred to above. However, a general reference undermines legal certainty: the parties' legal representatives would like the security of knowing that they have prepared their case after referring to the complete set of what are officially considered to be the *travaux préparatoires*. The Law Commission therefore recommends that the enacting legislation should authorise the list of documents referred to below being referred to as an interpretation aid and that the list of documents should be contained in Schedule 2 to the Draft Bill. If this suggestion is accepted, methods of making the documents reasonably accessible to potential users will have to be considered.

2.59 The suggested list is:

- (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN9/207 of 14 May 1981);
- (b) Report of the Working Group on International Contract Practices on the work of its third session (A/CN9/216 of 23 March 1982);
- (c) Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN9/232 of 10 November 1982);

⁹³ See the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s 66(3).

⁹⁴ See the (Australian) International Arbitration Act of 1974 (as amended in 1989) s 17(1); the Bermuda International Conciliation and Arbitration Act 1993 s 24; the (Singapore) International Arbitration Act 1994 s 4; the (New Zealand) Arbitration Act of 1996 s 3; the (Zimbabwean) Arbitration Act of 1996 s 2(3).

- (d) Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN9/233 of 28 March 1983);
- (e) Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN9/245 of 22 September 1983);
- (f) Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN9/246 of 6 March 1984);
- (g) Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN9/263 of 19 March 1985), including the three addenda dated 15 April 1985, 21 May 1985 and 31 July 1985;
- (h) Analytical Commentary on draft text of a model law on international commercial arbitration (A/CN9/264 of 25 March 1985); and
- (i) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (A/40/17 of 21 August 1985).

2.60 No opposition to this proposal was expressed by respondents to Discussion Paper 69, although one respondent⁹⁵ emphasised the need for care to be taken that the documents referred to in Schedule 2 as well as reported decisions on the Model Law in other jurisdictions are sufficiently available to practitioners.

2.61 At the regional workshop in Durban, it was suggested that in addition to the UNCITRAL documents referred to above, the Law Commission's Report should also be expressly sanctioned as an interpretation aid for the Model Law and the implementing legislation. Support for this idea was expressed at the subsequent workshop in Cape Town. A precedent for this is provided by the Hong Kong statute.⁹⁶ The goal of promoting harmonisation and the desirability of the Model Law being applied in South Africa in a way which is compatible with the intention of its drafters, are the main justifications for a further relaxation of the ordinary rules

⁹⁵ Scholtz para 7.

⁹⁶ See n 55 above.

applying to statutory interpretation⁹⁷ in this specific case. S 8 and Schedule 2 in the Draft Bill have been amended to give effect to this proposal.

s 9 Immunity of arbitrators and arbitral institutions

2.62 In Discussion Paper 69, the Law Commission surveyed developments regarding legislation on arbitral immunity in other jurisdictions and invited comments.⁹⁸ The background to this request was as follows:

2.63 Although an arbitrator under both English and South African law has traditionally been regarded as not liable for negligence, uncertainty on this point was created by some of the views expressed in the decision of the House of Lords in *Arenson v Casson Beckman Rutley and Co.*⁹⁹ Because of this uncertainty, some common-law jurisdictions have supplemented the Model Law by incorporating a provision limiting the arbitrator's liability. These jurisdictions include Australia and New Zealand.¹⁰⁰

2.64 Originally, those working on the reform of arbitration law in England favoured this matter being left to the courts.¹⁰¹ However, the 1996 Arbitration Act now provides that an arbitrator is not liable for anything done or omitted in the discharge or purported discharge of his or her functions as arbitrator unless the act or omission is shown to have been done in bad faith. The issue of arbitral immunity is one of public policy. Ultimately, the drafters of the new English Act were influenced by the two most compelling arguments in favour of arbitral immunity. These are first that

⁹⁷ Compare n 53 above.

⁹⁸ Discussion Paper 69 paras 2.190-2.192.

⁹⁹ 1977 AC 405. See Mustill M J & Boyd S C *Commercial Arbitration* 2ed Butterworths London 1989 224-6; Butler & Finsen 101-2.

¹⁰⁰ See the Australian International Arbitration Act of 1974 s 28 and the New Zealand Arbitration Act of 1996 s 13. Under the Australian provision, the arbitrator is exempted from liability for negligence, but is liable for fraud. The provision does not deal expressly with the position regarding grossly negligent or reckless conduct and is therefore less clear than the English provision discussed below. In s 13 of the New Zealand Act, the reference to fraud was omitted at a late stage. It was felt that the reference to fraud could have unintended implications for other forms of liability and that as the section was concerned with negating liability for negligence it would be preferable to deal with just that topic. (See the *Report of the Government Administration Committee on the Arbitration Bill* as submitted to Parliament (New Zealand) 1996 vi and Richardson (1997) 230.)

¹⁰¹ See the Working Paper of the Commercial Court Committee (Sub-Committee on Arbitration) of 1 February 1985 paras 34-6.

immunity (except in the case of bad faith) is necessary to enable the arbitrator properly to perform an impartial decision-making function. Secondly, unless a degree of immunity is afforded, the finality of the arbitral process could well be undermined.¹⁰²

2.65 Apart from the policy arguments referred to above, additional arguments in favour of including a statutory provision on arbitral immunity in the Draft Bill include the following. First, a provision on arbitral immunity could promote South Africa as a venue for international arbitration and is not in conflict with any provision of the Model Law. Secondly, it would be in line with the position traditionally adopted in South-African law and remove any uncertainty on this point.

2.66 Respondents to Discussion Paper 69 who commented on this issue were all in favour of the inclusion of a provision on arbitrators' immunity.¹⁰³ Two of the respondents, Marriott and Asouzu, were also in favour of immunity being extended to arbitral institutions, in line with s 74 of the English Arbitration Act of 1996.¹⁰⁴ At the regional workshop held in Cape Town, it was pointed out that this immunity should also be extended to apply to the appointing authority specified in article 6(2) of the Model Law.¹⁰⁵

2.67 The Law Commission therefore recommends statutory immunity for arbitrators and arbitral institutions except for acts or omissions in bad faith.¹⁰⁶ The

¹⁰² See the Departmental Advisory Committee on Arbitration Law *Report on the Arbitration Bill* February 1996 (hereinafter referred to as "1996 Saville Report") 32 paras 131-136. See also Butler & Finsen 102-3.

¹⁰³ See the responses of the Department of Foreign Affairs para 4, BIFSA para 4.16, the Department of Justice par 3, Asouzu paras 27-30, SAICE Paper 1 paras 2.11 and 3.10 and Paper 2 para 6.1 and Marriott. Dr Gerold Herrmann, at his meeting with the Project Committee on 10 March 1997, was also in favour of providing for arbitrators' immunity.

¹⁰⁴ The possibility of proceedings against the institution could be used as a means of reopening matters referred to in the arbitration. Most arbitral institutions or other bodies providing such services also do not have the resources to defend legal proceedings involving substantial costs. See the 1996 Saville Report paras 300-1.

¹⁰⁵ By Hendrik Kotze of the Arbitration Forum. See para 2.126-2.128 below regarding the appointing authority.

¹⁰⁶ The term "bad faith" from the English legislation has been chosen rather than the terminology of the Australian and New Zealand legislation referred to in n 68 above. This has the effect of giving a wider indemnity to arbitrators. The phrase "bad faith" will also probably be more readily understood and easier to apply than the phrase "conscious and deliberate wrongdoing" used in s 34 of the Bermuda International Conciliation and Arbitration Act 1993 (compare Landau T "The Effect of the New English Arbitration Act on Institutional Arbitration" (1996)

wording of s 9 of the Draft Bill is based on ss 29 and 74 of the English Arbitration Act 1996. However, the immunity given to arbitral institutions by s 74(1) is restricted to where the institution has been involved in the appointment or nomination of an arbitrator. S 9(2) gives a wider immunity in that it applies to other functions as well.¹⁰⁷ Whereas ss 29 and 74 of the English statute extend immunity to agents and employees of arbitrators and arbitral institutions, s 9(3) of the Draft Bill only protects employees. Agents cover a much wider group of persons responsible for a wider range of services. Extension of immunity to agents could therefore result in unintended and undesirable consequences. Nevertheless, appointments of arbitrators are often made on behalf of arbitral institutions by office bearers, like the president or chairperson, who are not necessarily employees of the institution concerned. For this reason, it is proposed that immunity should also extend to officers of such institutions.

s 10 Consolidation

2.68 As pointed out in Discussion Paper 69,¹⁰⁸ the desirability of a statutory provision for the consolidation of arbitration proceedings, where the arbitration agreements of the various parties make no provision for this possibility, is a highly controversial subject.¹⁰⁹

2.69 There are divergent approaches by legislatures in adopting provisions on consolidation in their international arbitration statutes concerning the contents of

Vol 13 No 4 *Journal of International Arbitration* 113 (hereinafter referred to as "Landau") at 128 with the 1996 Saville Report para 134).

¹⁰⁷ The reason why s 74 was restricted to immunity for acts of appointment was because it was considered that there was no good reason to provide for immunity in relation to purely administrative matters. It would also have been difficult to differentiate clearly between "judicial" and "administrative" functions. See Landau 128. However, as arbitrators are given immunity in respect of both "judicial" and "administrative" functions, it appears preferable to extend the same protection to arbitral institutions. Moreover, the keen competition between arbitral institutions, particularly in the field of international commercial arbitration, is an important deterrent against institutions providing poor administrative service.

¹⁰⁸ See Discussion Paper 69 para 2.187.

¹⁰⁹ On the complexity of the task of legislating on consolidation see Mustill M J "Multipartite Arbitrations: an Agenda for Law Makers" (1991) 7 *Arbitration International* 393-402. Among the abundant literature on consolidation, see Stipanowich T J "Arbitration and the Multiparty Dispute: the Search for Workable Solutions" (1987) 72 *Iowa Law Review* 473-529; Diamond A "Multiparty Arbitrations - a Plea for a Pragmatic Piecemeal Solution" (1991) 7 *Arbitration International* 403-9; and the debate between Jarvin and Van den Berg in Jarvin S "Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986 - a Critique of Dr Van den Berg" (1987) 3 *Arbitration International* 254-62.

those provisions.¹¹⁰ The new English Arbitration Act of 1996, in dealing with consolidation and joint hearings, emphasises the consensual basis of arbitration. S 35 provides that the parties are free to agree to consolidation or joint hearings, but the arbitral tribunal has no power to order consolidation or joint hearings unless that power is conferred on it by the parties.

2.70 A number of respondents to Discussion Paper 69 referred to consolidation, but adopted different positions. Marriott favoured the inclusion of a provision for compulsory consolidation by the courts on the lines of article 1046 of the Netherlands Arbitration Act of 1986.¹¹¹ There are two main objections to this approach. First, it violates the principle of party autonomy. Secondly, where the court has ordered consolidation of the proceedings without the agreement of the parties, problems could be experienced with the enforcement of the award under the New York Convention in certain circumstances.¹¹² Whereas Asouzu favoured a provision on consolidation, it should not violate the principle of party autonomy.¹¹³

2.71 As an alternative to compulsory consolidation, a "contract-in" provision could be considered. This provision could then give certain powers regarding consolidation to the court or to the arbitral tribunal.¹¹⁴ However, such provisions have been difficult to apply satisfactorily in practice.¹¹⁵

¹¹⁰ Examples of divergent approaches in provisions on consolidation added to the UNCITRAL Model Law are s 27(2) of the International Commercial Arbitration Act of 1986 (British Columbia) and s 24 of the International Arbitration Act of 1974 (Australia). Examples of consolidation provisions in modern arbitration statutes influenced by the Model Law are article 1046 of the Netherlands Arbitration Act of 1986 (see also article 1045 on joinder) and the Florida International Arbitration Act of 1986 s 648.12. See also Sanders 29-31 for further examples. One important point of divergence concerns the body who can order consolidation in the absence of a comprehensive consensual arrangement between all the parties involved. Some statutes give this power to the court while others give it to the arbitration tribunal, at least in the first instance.

¹¹¹ He also refers to Hong Kong. However, in the context of an international arbitration, the power to consolidate conferred on the courts by s 6B of the Hong Kong Arbitration Ordinance is a "contract-in" provision (see s 2M and Sanders 30).

¹¹² On the basis that the "composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties" (article V(1)(d)).

¹¹³ See paras 37-44 of his response.

¹¹⁴ See s 24 of the Australian International Arbitration Act of 1974 (as amended) which gives the power to the arbitral tribunal(s).

¹¹⁵ Information furnished by Dr Gerold Herrmann at a meeting with the Project Committee on 10 March 1997.

2.72 Under the circumstances, the best approach appears to be that adopted in s 35 of the English Arbitration Act 1996, referred to in para 2.69 above. This stresses that any power to consolidate or to hold joint hearings can only be acquired by the arbitral tribunal with the consent of the parties. This also reflects the existing position in South African law. The advantage of confirming this position in s 10 of the Draft Bill¹¹⁶ is that it assures potential foreign parties to international arbitrations in South Africa that there are no hidden traps regarding consolidation and that if the parties want the tribunal to have this power, they must provide for it.

2.73 When read with article 5 of the Model Law, s 10 also makes it clear that a South African court has no power to order consolidation. Where there is a contractual provision for consolidated arbitration proceedings the court will, where necessary, enforce this agreement under article 8.

s 11 Appointment of conciliator

2.74 In Discussion Paper 69, the Law Commission considered the possibility of incorporating provisions on conciliation to solve certain practical difficulties but decided not to recommend the inclusion of any such provisions.¹¹⁷ However, although one respondent to the Discussion Paper agreed with this recommendation,¹¹⁸ other respondents to the Discussion Paper favoured the inclusion of provisions on conciliation, particularly to resolve certain problems which can occur in practice.¹¹⁹

2.75 From a survey of some of those jurisdictions which have included provisions on conciliation in their versions of the Model Law,¹²⁰ it is possible to identify two

¹¹⁶ This was the method favoured by the Department of Foreign Affairs in para 3 of its response to Discussion Paper 69. SAICE in its response (Paper 2 para 2.10) recommended that no attempt should be made to regulate consolidation at this stage. The proposed s 10 however has the advantage of promoting certainty.

¹¹⁷ See Discussion Paper 69 paras 2.183-2.186.

¹¹⁸ The Department of Foreign Affairs para 2.

¹¹⁹ These respondents were Goodman, Marriott and Asouzu paras 47-49. In an intervention at the international conference on the resolution of international trade and investment disputes in Africa held in Johannesburg during March 1997, Dr Asouzu, speaking from an African perspective, also made a strong plea for the inclusion of provisions on conciliation. At his meeting with the Project Committee on 10 March 1997, Dr Gerold Herrmann was also supportive of the idea of including limited provisions on conciliation and indicated the problems which such provisions should address.

¹²⁰ These jurisdictions are British Columbia, Hong Kong, Singapore, Bermuda, India and Nigeria. See also Sanders 26-29 regarding certain states in the USA.

basic approaches. One is to provide comprehensive provisions on conciliation.¹²¹ The second is to restrict the provisions to dealing with certain practical difficulties relating to conciliation.¹²²

2.76 Whereas some legislatures intend their provisions on conciliation to be freestanding and to apply to any conciliation proceedings,¹²³ other jurisdictions follow a more restrictive approach and restrict the operation of the provisions to conciliation proceedings between parties to an arbitration agreement.¹²⁴

2.77 The Commission is currently busy with an investigation into alternative dispute resolution, which includes conciliation.¹²⁵ On the one hand, the Law Commission does not want to anticipate the results of this investigation, by recommending detailed statutory provisions on conciliation for international commercial disputes, which would then set a precedent for implementing such legislation for domestic dispute resolution as well. Moreover, several respondents to Discussion Paper 69 stressed the need for South Africa to enact legislation implementing the Model Law for international arbitration as a matter of urgency. The Law Commission therefore does not want to hold back its report on international arbitration pending the completion of the investigation into alternative dispute resolution. On the other hand, the areas where problems can be experienced with conciliation in the context of international commercial arbitration have been identified with sufficient clarity by the respondents to Discussion Paper 69 and the Law Commission's survey of foreign arbitral legislation to enable remedial action to be recommended.

2.78 The areas requiring remedial attention are the following:

¹²¹ This was the approach adopted in Bermuda (Bermuda International Conciliation and Arbitration Act 1993 ss 3-21 and sch 1); Nigeria (Arbitration and Conciliation Act 1988 ss 37-42, s 55 and sch 3) and India (Arbitration and Conciliation Act 26 of 1996 s 30(1), ss 61-81).

¹²² See the (British Columbia) International Commercial Arbitration Act of 1986 s 30(1); the (Hong Kong) Arbitration Ordinance 22 of 1963 (as amended) ss 2A-2B and the (Singapore) International Arbitration Act 23 of 1994 ss 16-17.

¹²³ See eg the legislation of India, Nigeria, Bermuda and Singapore referred to in the previous two footnotes.

¹²⁴ See the British Columbian and Hong Kong legislation referred to in n 90 above.

¹²⁵ See South African Law Commission *Alternative Dispute Resolution* Issue Paper 8 (1997) especially paras 3.4-3.7.

- (a) the need for court or other assistance in the appointment of a conciliator where the parties cannot agree on an appointment;
- (b) the question whether or not a person who has been involved as conciliator should be able to continue as arbitrator if the conciliation attempt fails;
- (c) the effect of conciliation attempts on the running of prescription; and
- (d) the enforcement of a settlement reached by conciliation, particularly outside the jurisdiction where the settlement was reached.

2.79 There are, moreover, two policy arguments in favour of including limited provisions on conciliation in South Africa's proposed new legislation on international commercial arbitration:

- (a) It is notorious that international commercial arbitrations are often protracted and very expensive. Therefore disputants who are interested in resolving their dispute as opposed to delaying payment should logically consider conciliation as their first option. The inclusion of some provisions on conciliation would indicate an official policy supportive of the cost-effective and expeditious resolution of commercial disputes through conciliation.
- (b) Conciliation as a method of dispute resolution is apparently more in keeping with traditional African methods of dispute resolution than the adversarial procedure of the (English) common law.¹²⁶

2.80 In the light of the above considerations, the Law Commission therefore recommends the inclusion of provisions to deal with the problems referred to in para 2.78 above. The proposed conciliation provisions are not of general application and apply only to conciliation between parties to an international commercial dispute, which is the subject of an arbitration agreement. Therefore, in view of the limited application of the conciliation provisions, it was not considered necessary to refer to conciliation in the long and short titles of the Draft Bill or in s 1 ("Purposes of this Act").

¹²⁶ See Asouzu A A "Conciliation under the 1988 Arbitration and Conciliation Act of Nigeria" (1993) 5 *African Journal of International and Comparative Law* 825 at 829.

2.81 S 11 provides for the appointment of a conciliator and is based on s 2A of the Hong Kong Arbitration Ordinance and s 16 of the Singapore International Arbitration Act.

2.82 Whereas s 16 of the Singapore legislation applies to any agreement providing for conciliation, s 11 of the Draft Bill follows s 2A of the Hong Kong legislation in that it only applies to a provision for conciliation in an arbitration agreement. S 11(1) is wider than the corresponding Hong Kong and Singapore models, in that it also applies to the situation where the parties are unable to agree on a conciliator, and not only to the case where a designated third person has failed or refused to make the appointment. As in the case of the appointment of an arbitrator under article 11(3) and (4) of the Model Law, it is recommended that the power to appoint a conciliator should be vested in the chairperson for the time being of the authority specified for this purpose by the Chief Justice by notice in the *Government Gazette*.¹²⁷ This authority would, in the nature of things, have to be an independent and representative body.

2.83 S 11(1) also differs from the equivalent Hong Kong and Singapore legislation in that it provides that the chairperson of the authority "*shall* appoint a conciliator", as opposed to "may appoint a conciliator". The reason for the change is to emphasise that the chairperson's function is restricted to establishing whether there is *prima facie* a dispute covered by a valid arbitration agreement providing for conciliation. In that event, the chairperson must appoint a conciliator on the application of a party. It is not for the chairperson to usurp the function of the conciliator by deciding on the chances of the conciliation attempt succeeding or by deciding any objections which the other party may raise regarding the conciliator's jurisdiction.

2.84 The Chief Justice is empowered to replace the person designated as appointing authority, if, for example, the authority originally specified for this purpose, should cease to exist or if the service provided by it is considered to be inadequate.¹²⁸

2.85 S 11(2) makes it clear that a person who has acted as conciliator prior to the commencement of the arbitration may only be appointed as arbitrator with the

¹²⁷ See the commentary on article 6 in paras 2.127-2.128 below for the reason for this recommendation.

¹²⁸ See article 6(3). The Singapore legislation s 16(2) contains a similar provision. See the commentary on article 6(3) in para 2.128 below as to why it is proposed that this power should be vested in the Chief Justice.

agreement of the parties.¹²⁹ However, a party who has agreed to the appointment of a conciliator as arbitrator cannot use the arbitrator's previous involvement as conciliator as the sole basis for a challenge to the arbitrator or for an application for the termination of the arbitrator's mandate. The conciliator before acting as arbitrator must furthermore disclose confidential information received from one party during the conciliation, which the conciliator considers material to the arbitration, to the other parties. This provision cannot be excluded in the arbitration agreement and guards against the tribunal being influenced in its award by information provided by one party (albeit during conciliation) which is unknown to the other parties.

2.86 S 11(3) is a safeguard against the conciliation proceedings being used as a delaying tactic by a party who has no intention of agreeing to a settlement. The period for conciliation in the Hong Kong legislation is three months, compared to the four-month period in the Singapore legislation. Both allow the parties to agree on a longer period. A period of less than three months as a general standard is probably unreasonably short in the context of an international arbitration. However s 11(4) allows the parties to agree "such other" period as they consider appropriate. They could therefore agree on a shorter period.

2.87 The appointing authority specified in article 6, its officers and employees, are given statutory immunity in s 9 in relation to the appointment of an arbitrator. S11(4) confers similar immunity in relation to the appointment of a conciliator. The Draft Bill however does not confer the immunity proposed for arbitrators in s 9 *generally* on persons acting as conciliators. This is because the Law Commission currently has a separate investigation under way regarding the need for and the possible content of legislation on conciliation and other ADR techniques. The Law Commission does not wish to anticipate the result of this investigation. However, the Commission believes that a person who has already been appointed as arbitrator in an international commercial dispute, should receive the same immunity enjoyed in his or her capacity as arbitrator, if that person is subsequently asked by the parties to attempt to resolve their dispute by conciliation. This protection is provided by s 11(4)(a) of the Draft Bill.

¹²⁹ Where a person has been involved as conciliator, a party may have legitimate reservations about that person's suitability as an arbitrator on at least two grounds. First, the conciliator may have formed a definite view on the merits of the dispute and could thus not comply with the requirement that the arbitrator must be impartial. Secondly, that person may have received relevant confidential information from one party which is unknown to the other and may then be consciously or subconsciously influenced by that information when making the award. Therefore the parties must both agree to the conciliator acting as arbitrator and s 11(2)(c) requires relevant confidential information to be disclosed.

s 12 Power of arbitral tribunal to act as conciliator

2.88 Whereas s 11 is primarily concerned with conciliation proceedings prior to the commencement of the arbitration, s 12 deals with conciliation during arbitration proceedings, particularly with the situation where the parties agree to the arbitrator acting as conciliator. The arbitrator may not act as conciliator without the written agreement of the parties.

2.89 S 12 is based on s 2B of the Hong Kong Arbitration Ordinance and s 17 of the Singapore legislation. The British Columbian statute s 30(1), which also appears as s 30(1) of the Indian Act of 1995, likewise provides that the arbitrator may, with the agreement of the parties, use conciliation at any time during the arbitration proceedings, without regulating the effect of such an agreement in any way. It also states expressly that it is not incompatible with an arbitration agreement for the arbitral tribunal to encourage settlement. This addition appears to be unnecessary.

s 13 Settlement agreement

2.90 A party to an agreement reached pursuant to a successful conciliation may experience difficulties in enforcing that agreement in the absence of voluntary compliance. Where the conciliation takes place in terms of an arbitration agreement after the arbitral tribunal has been appointed, any agreement arrived at as a result of conciliation should provide for it to be made an award on agreed terms under article 30(1) of the Model Law. This award will then be enforceable like any other arbitral award. The problem is therefore confined to conciliation before the arbitral tribunal has been appointed.

2.91 The legislature in India addressed this problem by providing that the "settlement agreement shall have the same status and effect as if it is an arbitral award on agreed terms on the substance of the dispute rendered by an arbitral tribunal under [article] 30".¹³⁰ To the extent that this provision may have been intended to make the settlement agreement enforceable outside India as an arbitral award under the New York Convention, it is unlikely to achieve this effect. It would be permissible for the foreign court asked to enforce the "award" to say that it is merely a settlement

¹³⁰ See the Arbitration and Conciliation Act 26 of 1996 s 74.

agreement achieved through conciliation, not an award, and that it therefore cannot be enforced as an award.

2.92 S 13 of the Draft Bill¹³¹ therefore differs from the Indian legislation in that it is clear that the provision only operates for the enforcement of the settlement agreement in South Africa. It is therefore clearly not intended to give the agreement the status of an arbitral award for enforcement outside South Africa, either in another Model Law jurisdiction or under the New York Convention. Conversely, as presently drafted, the section is not restricted to a settlement agreement entered into in South Africa. Therefore a settlement between parties to an arbitration agreement outside South Africa could be enforced under this section in South Africa.

s 14 Resort to arbitral proceedings

2.93 Where an arbitration agreement expressly provides for conciliation of any dispute covered by that agreement as a prerequisite for the commencement of arbitration, a South African court will probably be prepared to regard submission to conciliation in terms of that provision as sufficient to regard the claim as one which has been subjected to **arbitration**, thereby delaying the completion of prescription under s 13(1)(f) of the Prescription Act 68 of 1969.¹³²

2.94 In the context of an international commercial dispute however, the South African Prescription Act will not necessarily apply. The purpose of s 14¹³³ is therefore to enable a party to an arbitration agreement involved in conciliation attempts to commence arbitration proceedings where this is considered necessary to delay the completion of prescription, notwithstanding the fact that the party is precluded by the conciliation agreement from commencing arbitration until a specified time period has elapsed. The expression "commencing arbitration proceedings" is used to be consistent with article 21 of the Model Law.

¹³¹ S 13 is based mainly on s 20 of the Bermuda International Conciliation and Arbitration Act 1993. S 13 differs from the Bermudan provision by making it clear that it is only intended to apply until the arbitral tribunal has been appointed. Once this has occurred a settlement should be made an award on agreed terms under article 30(1) of the Model Law so that it becomes an award capable of enforcement as such outside South Africa.

¹³² See *Murray and Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A) 582B-G.

¹³³ S 14 is based on article 16 of the UNCITRAL Conciliation Rules, with certain adaptations. The reason for the adaptations appears from para 2.96 below.

s 15 *Application of UNCITRAL Conciliation Rules*

2.95 The Law Commission recommends that the UNCITRAL Conciliation Rules of 1980 should be included as Schedule 5 to the Draft Bill.¹³⁴ This has been done for the convenience of parties to an arbitration agreement and for ease of access. It is up to the parties to decide whether or not to use the rules.

2.96 The UNCITRAL Conciliation Rules are basically designed for conciliation as a separate means of dispute resolution. The statutory provisions recommended by the Law Commission are however intended only for conciliation in the context of an arbitration agreement. This is a source of potential conflict between the UNCITRAL Conciliation Rules and the provisions of the Draft Bill. Partly for this reason, but also because of the consensual or voluntary basis of conciliation, we do not recommend that the Rules should apply to conciliation unless the parties otherwise agree (i.e. on a "contract-out" basis).¹³⁵

2.97 Article 1(2) of the UNCITRAL Conciliation Rules gives the parties the right to agree to exclude or vary the rules at any time. Under Article 1(3) the rules are made subject to a provision of law from which the parties cannot derogate. Therefore, to the extent that ss 11-15 are compulsory, they override the rules. Moreover, ss 11-14 have been designed to address certain problems which can arise in relation to conciliation proceedings between parties to an arbitration agreement and, to prevent abuse, certain of the provisions apply notwithstanding the agreement of the parties.¹³⁶ For these reasons, s 15 provides that if the parties agree to use the rules, that agreement is "[s]ubject to the provisions of this Act".

2.98 Article 10 of the rules provides that a conciliator should disclose factual information obtained from one party to the other, unless the information is disclosed to the conciliator subject to the specific condition that it be kept confidential. This rule is not necessarily in conflict with ss 11(2)(b) and 12(3) of the Draft Bill. The

¹³⁴ The Bermuda International Conciliation and Arbitration Act of 1993 includes the rules as Schedule 1. The Nigerian Arbitration and Conciliation Act of 1988 has the rules in the Third Schedule, with minor adaptations. In the Indian Arbitration and Conciliation Act 26 of 1996 the rules, with the exception of article 1, are incorporated in the body of the statute as ss 62-73 and 75-81.

¹³⁵ S 55 of the Nigerian Act provides that if the parties agree to use the UNCITRAL Rules, they apply *notwithstanding* the provisions of that Act, thereby apparently excluding the Act to the extent that it may conflict with the rules.

¹³⁶ See eg ss 11(1), 11(2)(a) and (b), 12(3) and (4), 13 and 14.

latter two provisions apply to the disclosure of "*confidential*" information", which would include confidential information in the context of article 10, once conciliation has failed and the conciliator is about to assume the role of arbitrator, with the agreement of the parties. The provisions on disclosure in the Draft Bill are compulsory, once the parties agree to a conciliator acting as arbitrator.

2.99 Article 15 of the rules, unlike s 11(3) of the Draft Bill, contains no provision for termination of conciliation through lapse of time. Particularly where the parties have already agreed to arbitration, it is important that a party should not be allowed to delay the commencement of arbitration by dragging out conciliation attempts. Therefore this provision should also normally apply to conciliation under the rules, although s 11(3) is a "contract-out" provision.

2.100 Article 16 of the rules allows a party to institute *court* or arbitration proceedings for the protection of rights. S 14 of the Draft Bill applies to conciliation proceedings as a prelude to arbitration which has already been agreed upon. Court proceedings under article 9 of the Model Law (interim measures of protection) are clearly permissible, but not court proceedings in violation of the arbitration agreement (compare article 8 of the Model Law). Therefore, where parties to an arbitration agreement agree to use the UNCITRAL Conciliation Rules, s 14 will override article 16 to the extent that they are in conflict.

2.101 It follows logically from the above that s 15 of the Draft Bill is not "subject to the agreement of the parties": where they decide to use the UNCITRAL Conciliation Rules, they cannot contract out of compulsory provisions of the Draft Bill.

SCHEDULE 1: MODIFIED TEXT OF THE UNCITRAL MODEL LAW

CHAPTER I: GENERAL PROVISIONS

Article 1 Scope of application

Model Law applies to international commercial arbitration

2.102 Article 1(1) provides that the Model Law "applies to international commercial arbitration", with a definition of "commercial" being provided in a footnote.¹³⁷ The

¹³⁷

The definition in the footnote reads:

"The term 'commercial' should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not.

Law Reform Commission of Hong Kong recommended that the reference to "commercial" in article 1(1) of the Model Law plus the definition in the footnote should be deleted.¹³⁸ The Australian version of the Model Law retains the definition in a footnote. The use of a semi-official definition in a footnote is contrary to South African practice. If the definition is retained therefore, it should rather be incorporated as a separate subarticle.¹³⁹

2.103 The Law Commission is not in favour of omitting the word "commercial" in article 1(1). Its inclusion emphasises that the Model Law is intended to apply to commercial relationships, and not to a non-commercial dispute between two states. Notwithstanding the reservations of some of the respondents to Discussion Paper 69 on this point,¹⁴⁰ we are also of the view that the inclusion of a definition of "commercial" is not necessary.

2.104 Although the drafters of the Model Law went to great lengths to make the definition as comprehensive as possible,¹⁴¹ the main reason why the definition was included in a footnote was the drafters' inability to formulate a generally acceptable definition.¹⁴² The definition may therefore have certain gaps, or a party trying to

Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road."

It is clear from the *travaux préparatoires* that "commercial" is intended to be broadly interpreted. It is not to be limited to contracts between merchants, but it is not intended to infringe on the doctrine of sovereign immunity. It is not restricted to the subject-matter of commercial codes in civil-law jurisdictions. However, it is not intended to cover labour disputes or consumer claims. (See Holtzmann & Neuhaus 34.)

¹³⁸ Hong Kong Report paras 4.11-4.16 and the Hong Kong Arbitration Ordinance of 1963 s 34C(2). For the response of other countries, see Sanders 10-11.

¹³⁹ This is the approach which has been followed in Scotland, where the legislature has included a definition of "relationships of a commercial nature" with the other definitions in article 2.

¹⁴⁰ BIFSA para 4.6 was in favour of the retention of the word "commercial". SAICE Paper 1 para 3 was concerned that a party may try to escape from the application of the Model Law by arguing that the dispute is not commercial, but was still of the view that the word should be retained. Asouzu para 26 debates the advisability of including a definition of "commercial" without coming to a definite conclusion.

¹⁴¹ It appears to be more extensive than that in the Foreign States Immunities Act 87 of 1981, s 4(3), which by virtue of s 1 "commercial purposes" also applies to s 14(3) of that Act.

¹⁴² See A/40/17 para 20.

evade the Model Law, by arguing that the dispute does not relate to a commercial matter, may attempt to find or create a gap.

2.105 The term "commercial" was extensively discussed in the *travaux préparatoires*¹⁴³ and we are satisfied that persons applying the Model Law in South Africa with the aid of the *travaux préparatoires* would have no real difficulty in interpreting the term satisfactorily.

Extent of extra-territorial application

2.106 Article 1(2) makes it clear that the provisions of the Model Law only apply to international arbitrations held in South Africa, except articles 8, 9, 35 and 36 which also apply to arbitrations held outside South Africa.

Definition of "international"

2.107 Article 1(3) and (4) define an international arbitration for purposes of the Model Law. The definition is important, because a domestic arbitration will continue to be governed by the Arbitration Act 42 of 1965. The definition uses a dual criterion: the arbitration will be international if either (a) the parties have their places of business in different states; or (b) if the nature of the arbitration is such that it is international. In terms of article 1(3)(c), the arbitration will also be international where the parties have expressly agreed that the subject-matter of their agreement relates to more than one country.¹⁴⁴

2.108 Problems can however arise with the application of the definition of international arbitration in article 1(3) read with article 1(4), in the following situation: a foreign company¹⁴⁵ establishes a local subsidiary which enters into a

¹⁴³ See eg *Report of the Working Group on International Contract Practices on the Work of its Sixth Session* A/CN.9/245 of 22 September 1983 (hereinafter referred to as "A/CN.9/245") paras 161-2; *Analytical Compilation of Comments by Governments and International Organisations on the Draft Text of a Model Law on International Commercial Arbitration* A/CN.9/263 of 19 March 1985 (hereinafter referred to as "A/CN.9/263") paras 12-17; A/40/17 paras 19-26.

¹⁴⁴ Possible problems relating to the application of article 1(3)(c) are discussed in the context of a possible opt-in clause: see para 2.273 below.

¹⁴⁵ Even if the foreign company had registered as an external company under the Companies Act 61 of 1973, because its place of business in South Africa is the one with the closest relationship to the arbitration agreement, the arbitration would still not be international (article

contract with a South African company to be performed in South Africa. The contract has an arbitration clause. Unless the parties use article 1(3)(c), the Arbitration Act 42 of 1965 will apply.¹⁴⁶

2.109 The Law Commission seriously considered a modification to the definition in article 1(3) to deal with this problem. The solution adopted in the Washington Convention article 25(2)(b) does not take the matter any further. It allows a foreign-controlled company registered within the territory of the state party to assume the nationality of its controlling shareholders for the purposes of bringing the arbitration under the Convention *if the parties to the arbitration agreement so agree*. The English Arbitration Act of 1996 in its definition of a domestic arbitration excludes a body corporate which, while registered in the United Kingdom, has its central management and control exercised in a state other than the United Kingdom.¹⁴⁷ This definition, like any other definition based on *de facto* control, undermines legal certainty and is difficult to apply. What degree of foreign control entitles a party to require the arbitration to be regarded as an international arbitration? Must that control exist both when the arbitration agreement was entered into and when the dispute arises?¹⁴⁸ Therefore, the Law Commission, while taking note of the problem, decided not to recommend any change. The need for a South African company subject to foreign control to avoid the provisions of the domestic arbitration statute will in any event be reduced when the reform of South Africa's arbitration legislation for domestic arbitration is complete.

2.110 Finally, article 1(5) makes it clear that the Model Law will not affect existing South African law regarding arbitrability. This issue has been discussed in the context of s 7 above.

Article 2 Definitions and rules of interpretation

1(4)(a)) unless the parties have agreed under article 1(3)(c) that it relates to more than one country.

¹⁴⁶ Compare the example furnished in the response of the Association of Arbitrators to Discussion Paper 69, para 1.

¹⁴⁷ See s 85(2)(b). For reasons explained elsewhere (see ch 3 para 3.33 n 33 below), this provision was not implemented along with the rest of the 1996 Act.

¹⁴⁸ Compare the Washington Convention in sch 4 to the Draft Bill article 25(2).

2.111 This article contains a number of definitions and interpretation aids. The Model Law like other arbitration statutes does not attempt to define the substance of the concept "arbitration".

2.112 The definition of "court" in article 2 has two main purposes: (a) to distinguish clearly between a court and an arbitral tribunal when the Model Law is translated into different languages (compare "arbitrasie**hof**" in the Afrikaans text of the Arbitration Act 42 of 1965) and (b) to emphasise that "court" refers to a judicial organ of state and not an arbitral body like the London Court of International Arbitration or the International Court of Arbitration of the International Chamber of Commerce.¹⁴⁹

2.113 Where the Model Law gives the parties the freedom to determine an issue, they may also authorise a third party including an arbitral institution to make that determination, for example a determination of the place of the arbitration under article 20. However, article 2(d) makes it clear that this does not extend to the right to determine the rules of substantive law to be applied by the arbitral tribunal under article 28(1) or the right to authorise the tribunal to decide *ex aequo et bono* under article 28(3).

Article 3 Receipt of written communications

2.114 This article deals with the delivery of written communications, where the parties have not made their own rules. It does not apply to communications in court proceedings. SAICE, in their response to Discussion Paper 69,¹⁵⁰ queried whether the article applies to all modern methods of electronic communication. It should be noted in this regard that article 3 is a "contract-out" provision and the parties can make their own arrangements to clarify this matter.¹⁵¹

Article 4 Waiver of right to object

2.115 This is a useful provision aimed at removing reliance by parties on procedural objections of a technical nature. A party who knows that a non-mandatory provision

¹⁴⁹ A/CN.9/264, commentary on article 2.

¹⁵⁰ Paper 1 para 3.6.

¹⁵¹ See with regard to the use of electronic methods of communication in the context of international arbitration *UNCITRAL Notes on Organizing Arbitral Proceedings* (1996) paras 35-37.

of the Model Law or a provision of the arbitration agreement has not been complied with will be deemed to have waived that party's right to object in the circumstances referred to in the article. No changes to this article are recommended.

Article 5 Extent of court intervention

2.116 It is clear that one of the objects of the Model Law is to limit the involvement of national courts in international commercial arbitration (see para 2.7 above). Article 5 emphasises this object, by providing that "[i]n matters governed by this Law",¹⁵² no court shall intervene except where so provided in the Model Law.

2.117 In the Law Commission's view, bearing in mind the desirability of promoting uniformity in Model Law jurisdictions, no other powers are necessary in the context of an international commercial arbitration. Although the Arbitration Act 42 of 1965 confers powers on the court in respect of matters not covered by the Model Law, for example s 20 ("Statement of case for opinion of court ... during arbitration proceedings") and s 8 ("Power of court to extend time fixed in arbitration agreement for commencing arbitration proceedings") these powers will not be available in an arbitration under the Model Law by virtue of the provisions of s 3 of the Draft Bill, for the reason referred to in the commentary on that section.

Article 6 Court or other authority for certain functions of arbitration assistance and supervision

2.118 Article 6 requires each state adopting the Model Law to specify a court or other competent authority to perform the functions referred to in articles 11(3), 11(4), 13(3), 14, 16(3) and 34(2). These articles are all articles which apply only when the arbitration takes place within the territory of the state adopting the Model Law (compare article 1(2)).

2.119 The article makes no reference to another article involving the court and which applies only to an arbitration taking place within the territory of the state,

¹⁵² The Model Law gives the court certain powers in relation to the appointment of an arbitrator and a challenge to or termination of the arbitrator's mandate (articles 11, 13, and 14). The court also has the power to enforce the arbitration agreement (article 8), the power to order interim measures of protection (article 9), the power to review an arbitral tribunal's ruling on its own jurisdiction in certain circumstances (article 16(3)), the power to grant assistance in taking evidence (article 27) and certain powers regarding the setting aside, recognition and enforcement of the arbitral award (articles 34-36).

namely article 27 ("Court assistance in taking evidence"). This is because in most jurisdictions adopting the Model Law, the court for purposes of article 27 would be identified by another law of the state concerned.

2.120 If our recommendations regarding article 27 are adopted (see the commentary on article 27 below), there will be no need for article 6 to refer to article 27, because the relevant court will be identified by that article.

2.121 Article 6 makes no reference to the four articles given extra-territorial operation by article 1(2), namely articles 8, 9, 35 and 36, all of which involve the courts. Article 2(c) contains a definition of "court" which will also apply to those articles with extra-territorial application (see further the commentary on article 2 above). "Court", for purposes of article 8, needs no further definition: the court before which an action is brought is the one which must stay that action, thereby referring the parties to arbitration. Regarding articles 35 and 36, it may possibly be advisable to follow the example of Scotland¹⁵³ and amplify the list in article 6 to include articles 35 and 36, for purposes of the application of those articles in South Africa. The role of the court under article 9 is discussed below. The South African court to perform the various functions in article 9 (which could relate to an arbitration being held outside the country) can either be determined by referring to the ordinary rules governing jurisdiction, or be specified in the South African version of the Model Law, either in article 6 or article 9. The latter method would promote legal certainty.

2.122 Which South African court should have the powers referred to in article 6? It seems that "court" should be defined as the provincial or local division of the High Court having jurisdiction in the area where the arbitration is to take place,¹⁵⁴ or where the South African party is resident or carries on business, to cover the situation where the court is required to deal with a challenge of an arbitrator under article 13(3) before the place of arbitration within South Africa has been determined.

2.123 Where there is no South African party, and the arbitration agreement provides for arbitration in South Africa without specifying where, the Witwatersrand Local Division (and thus the commercial court) could be given jurisdiction until the place of arbitration has been determined. We are not in favour of the WLD being given

¹⁵³ Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, sch 7 article 6.

¹⁵⁴ This is the solution in s 18 of the International Arbitration Act of 1974 (as amended in 1989) in Australia. See article 20 as to how the place of arbitration is determined under the Model Law.

exclusive jurisdiction in all cases under article 6, because this would discriminate against parties wishing to hold their international arbitrations in other centres in the country, like Cape Town and Durban.

2.124 Article 6 envisages that certain functions of the court (namely the appointment of arbitrators under article 11(3), (4) and (5), determining a challenge of an arbitrator under article 13(3) and the termination of an arbitrator's mandate under article 14(1)) could be officially allocated in the Model Law to a designated arbitral body. The Law Commission is of the opinion that of these functions, only the appointment function could properly be entrusted to an arbitral body rather than to the court.

2.125 In Discussion Paper 69 para 2.71 the Law Commission proposed that the appointment function should also be retained by the court because of the lack of a suitable arbitral body in South Africa to perform this function. It should be noted that this function is only required when the parties are unable to agree on the composition of the tribunal *and* where any method provided in the arbitration agreement for appointing the tribunal has failed to do so.

2.126 However, Dr Gerold Herrmann¹⁵⁵ drew the Law Commission's attention to problems which have been experienced with the appointment of arbitrators under the Model Law in Hong Kong. Much time and money is wasted when it is necessary to serve process relating to the appointment of an arbitrator on a recalcitrant respondent outside the jurisdiction, particularly when the papers have to be translated.¹⁵⁶ As a result, Singapore, in their version of the Model Law, entrusted the function of default appointments to the Chairperson for the time being of the Singapore International Arbitration Centre. Should this body fail to function effectively, the Chief Justice is empowered to designate a substitute appointing authority by notification in the *Government Gazette*.¹⁵⁷ A similar arrangement has now been implemented in Hong Kong.¹⁵⁸

¹⁵⁵ At his meeting with the Project Committee on 10 March 1997.

¹⁵⁶ See also Kaplan N "Is the Need for Writing as Expressed in the New York Convention and the Model Law Out of Step with Commercial Practice?" (1996) 12 *Arbitration International* 27 (hereinafter referred to as "Kaplan 1996") at 43-4.

¹⁵⁷ See the (Singapore) International Arbitration Act 1994 s 8(2).

¹⁵⁸ See s 10 of the Arbitration (Amendment) Ordinance 1996 which amended s 12 of the Arbitration Ordinance. The appointing authority, namely the Hong Kong International Arbitration Centre, has with the approval of the Chief Justice published rules for this purpose made under s 34C(3) of the Arbitration Ordinance, as amended by s 14 of the 1996 Ordinance (see LN 270 of 1997). See also Kaplan (1996) 44.

2.127 This matter was discussed in detail at the three regional workshops. The participants were strongly of the view that the default appointment function in article 11(3) and (4) should not be performed by the court, but by the chairperson of a suitable body to be formed for this purpose. The Law Commission supports this solution.

2.128 The body vested with the power of appointment will have to be independent and sufficiently representative, if it is to be acceptable to the broad legal profession and commercial sector in South Africa as well as to potential foreign users. Although an initiative to form such a body is apparently under way, any delay in its formation should not be allowed to delay South Africa's implementation of the Model Law, bearing in mind the limited role proposed for this body in the Draft Bill. The Law Commission therefore recommends that the Chief Justice should be empowered to nominate an appropriate appointing authority, by notice in the *Government Gazette*.¹⁵⁹ The Law Commission considers it preferable that this power to nominate an appropriate body should be vested in the Chief Justice rather than a member of the executive branch of government. This is because the State, as a potential party to an international commercial arbitration, could have an interest in a particular appointment where this provision applies. Pending the nomination of an appropriate appointing authority, it is proposed that its statutory power of appointment should be exercised by the Chief Justice. It is also recommended that the Chief Justice should have the power to designate a substitute appointing authority, if the chairperson of the designated body fails or refuses to make an appointment, when required to do so, and the Chief Justice considers it necessary to nominate a substitute.

2.129 The appointing authority discussed above is described in the Model Law as "the authority specified in article 6".¹⁶⁰ Consistent with the Law Commission's approach of keeping changes to the language of the Model Law to a minimum, this phrase has therefore been used in the Draft Bill as well.¹⁶¹

¹⁵⁹ An alternative possibility that was suggested to the Project Committee was that the appointing body could be constituted by means of regulations made under the Draft Bill. This possibility was emphatically rejected by the Project Committee. A body created by statute would not meet the independence criterion and would be perceived as an "arbitration control board". The object of the appointing authority is to promote South Africa as an arbitration venue. A body constituted by regulations would have the opposite effect.

¹⁶⁰ See article 11(3) and (4).

¹⁶¹ See s 9(2) and (4) and s 11(1) and (4).

CHAPTER II: ARBITRATION AGREEMENT

Article 7 *Definition and form of arbitration agreement*

2.130 The definition of an arbitration agreement in this article is based on that contained in article II(1) and (2) of the New York Convention. Although the requirements for an arbitration agreement to be recognised as such under the Model Law are fairly strict by international standards,¹⁶² in the interests of uniformity with most other Model Law countries, the Law Commission in Discussion Paper 69¹⁶³ initially recommended that no change should be made to this definition.

2.131 However, two respondents¹⁶⁴ pointed out that the strict definition could cause difficulties in certain situations, particularly in relation to arbitration clauses in certain bills of lading and where a contract is concluded orally or by conduct in response to a written order or with reference to written terms which include an arbitration clause. Problems like these have led some jurisdictions to adopt or to consider adopting a significantly wider definition.¹⁶⁵

¹⁶² Compare the more liberal definition in ss 5 and 6 of the English Arbitration Act of 1996 which still requires an agreement in writing, and the even more liberal position in the New Zealand Arbitration Act 1996 sch 1 article 7 which extends to an oral agreement.

¹⁶³ See para 2.72. BIFSA in para 4.8 of their response to Discussion Paper 69 also supported an adherence to the strict requirements of the New York Convention article II(1) and (2).

¹⁶⁴ A L Marriott in a written response and Dr Gerold Herrmann during a meeting with the Project Committee on 10 March 1997. See also Kaplan (1996) 27-45. One respondent, BIFSA para 4.8, however supported the retention of the strict definition contained in the Model Law.

¹⁶⁵ See the English Arbitration Act 1996 s 5; the Hong Kong Arbitration Ordinance 1963 s 2AC (as inserted by s 4 of the Arbitration (Amendment) Ordinance 1996); and the new German Code of Arbitration article 1031 (as translated in (1998) 14 *Arbitration International* 3). Although the exact wording differs, s 2AC of the Hong Kong legislation is based on s 5 of the English statute. S 2AC(2) and (4) of the Hong Kong Ordinance read as follows:

"(2) An agreement is in writing for the purposes of subsection (1) if -

- (a) the agreement is in a document, whether signed by the parties or not; or
- (b) the agreement is made by an exchange of written communications; or
- (c) although the agreement is not itself in writing, there is evidence in writing of the agreement; or
- (d) the parties to the agreement agree otherwise than in writing by referring to terms that are in writing; or

2.132 In the context of a bill of lading, problems can arise in those situations where the bill of lading, besides being a receipt for the goods and a document of title, is also *prima facie* evidence that a contract of carriage has been concluded between the consignor of the goods and the carrier.¹⁶⁶ The bill of lading may contain an arbitration clause or a reference to such clause. The bill of lading is signed by the carrier but there is no signature by the consignor or writing from the side of the consignor to bring the arbitration clause within the definition in article 7 of the Model Law.¹⁶⁷ The problem of the bill of lading is not expressly addressed by the revised definitions contained in the English Arbitration Act and the proposed Hong Kong amendment.¹⁶⁸ In the interests of clarity, the Law Commission recommends that an appropriate addition should be made to deal expressly with the bill of lading, following the example of Singapore.¹⁶⁹

2.133 The second problem concerns the situation where, for example, a written purchase order contains or refers to an arbitration clause, and a contract is concluded orally or by conduct on the basis of the purchase order without there being any

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- (e) the agreement, although made otherwise than in writing, is recorded by one of the parties to the agreement, or by a third party, with the authority of each of the parties to the agreement; or
 - (f) there is an exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and is not denied by the other party in response to the allegation.

(4) In this section 'writing' includes any means by which information can be recorded."

¹⁶⁶ This will only be the case where the consignor is *not* the charterer of the ship, because where the consignor is charterer of the ship, the charter party constitutes the contract of carriage. See Malan F R & Faul W "Some Aspects of Bills of Lading" (1989) 1 *SA Merc LJ* 322 at 327; Van Niekerk J P "An Introduction to the Carriage of Goods by Sea" (1993) 5 *SA Merc LJ* 78 at 86.

¹⁶⁷ Note too that as the bill of lading is not itself a contract, the situation is not covered by the last sentence of article 7(2) (but compare Holtzmann & Neuhaus 261 n 119).

¹⁶⁸ It is not covered by para 2(d) of the proposed Hong Kong amendment quoted in n 133 above. Para 2(e) of the amendment is based on s 5(4) of the English Act which was primarily intended to cover a situation where the parties agree to changes to a written arbitration agreement at a procedural meeting and the tribunal records that agreement (see the 1996 Saville Report para 37), although it does have a wider ambit. We are not convinced that it deals with the bill of lading problem, however.

¹⁶⁹ See the (Singapore) International Arbitration Act 23 of 1994 s 2(1). See too the new German Arbitration Law article 1031(4).

signature or writing from the side of the seller.¹⁷⁰ The Law Commission therefore recommends an addition to the definition based on s 5(3) of the English Arbitration Act of 1996 to include the situation "[w]here parties agree otherwise than in writing by reference to terms which are in writing".¹⁷¹

2.134 The two proposed additions would be difficult to incorporate in the existing wording of article 7, without extensive rewriting. It was therefore decided that it would be preferable to incorporate the additions in the definition of an "arbitration agreement" in s 2 of the Draft Bill itself, which has the additional advantage of highlighting the existence of the changes.¹⁷²

2.135 It is also intended that the amplified definition should apply to the recognition and enforcement of arbitration agreements in South Africa under the New York Convention in terms of s 17(2) of the Draft Bill.¹⁷³

2.136 The English Arbitration Act of 1996 s 5(5) also changed the wording of article 7(2) of the Model Law regarding an arbitration agreement constituted by "an exchange of statements of claim and defence in which the existence of an [arbitration] agreement is alleged by one party and not denied by the other". The change was considered necessary to make it clear that the mere allegation of the existence of an arbitration agreement by one party could not be accepted as an admission of the existence of an arbitration agreement in a default situation where the other party fails to respond at all.¹⁷⁴ In our view this alteration was unnecessary, because it is clear from the wording of the quoted extract of article 7(2) that it does not apply to a

¹⁷⁰ See *H Smal Ltd v Goldroyce Garment Ltd* (High Court of Hong Kong) (1994) 3 *The Arbitration and Dispute Resolution Law Journal* 298-301; *Robobar Ltd v Finncold sas* (Italian Supreme Court) (1995) XX *Yearbook of Commercial Arbitration* 739-41; Kaplan (1996) 29-30. The well-known English case of *Zambia Steel & Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 (CA) is distinguishable as it was decided on the wider definition in s 7(1) of the now repealed English Arbitration Act 1975 (see Kaplan (1996) 41-3).

¹⁷¹ See also the 1996 Saville Report para 36 and s 2AC(2)(d) of the Hong Kong Ordinance quoted in n 133 above.

¹⁷² See also para 2.27 above.

¹⁷³ See para 3.59 below for the need for this provision.

¹⁷⁴ See the 1996 Saville Report para 38. S 5(5) of the English Arbitration Act reads: "An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged."

default situation in that there has to be an *exchange* of statements of claim and defence before the provision operates.

Article 8 Arbitration agreement and substantive claim before court

2.137 This article requires a court to refer a dispute covered by an arbitration agreement to arbitration, unless it finds that the "agreement is null and void, inoperative or incapable of being performed". Article 8 is based on article II(3) of the New York Convention and the grounds for non-enforcement are identical. Its effect will be to restrict drastically the discretion which a South African court presently enjoys under ss 3 and 6 of the Arbitration Act 42 of 1965 as to whether it should compel the parties to arbitrate where one of them relies on the arbitration agreement.

2.138 The New Zealand Arbitration Act of 1996 contains a further ground for non-enforcement in its version of article 8(1), namely where there is no dispute, under influence of s 1 of the English Arbitration Act of 1975. This additional ground has since been rejected in England as "confusing and unnecessary".¹⁷⁵

2.139 No change to this article is recommended. The restriction on the court's powers to exclude arbitration is in accordance with two of the objects of the Model Law and also brings South African law pertaining to international arbitration agreements into line with generally accepted international standards. Similar provision has been made by s 17(2) in Chapter 3 of the Draft Bill for the enforcement of certain arbitration agreements not covered by article 8 but which are subject to the New York Convention.¹⁷⁶

Article 9 Arbitration agreement and interim measures by court

2.140 In Discussion Paper 69 the Law Commission recommended that article 9 should be amplified by the addition of four additional paragraphs, numbered (2)-(5).¹⁷⁷ The amplified provision read as follows:

¹⁷⁵ See the 1996 Saville Report 19 para 55 and compare the Arbitration Act of 1996 s 9.

¹⁷⁶ See ch 3 para (d) n 58 below.

¹⁷⁷ See Discussion Paper 69 paras 2.76-2.87.

" (1) 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.

(2) For the purposes of paragraph (1), the High Court shall have the same power as it has for the purposes of proceedings before that court to make

(a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or

(b) an order securing the amount in dispute; or

(c) an order appointing a receiver; or

(d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

(e) an interim interdict or other interim order.

(3) Where:

(a) a party applies to a court for an interim interdict or other interim order; and

(b) an arbitral tribunal has already ruled on the matter, the court shall treat the ruling or any finding of fact made in the course of the ruling as conclusive for purposes of the application.

(4) Article 16(3) shall not apply to a ruling by the arbitral tribunal on an interim measure.

(5) The court shall have no other powers to grant interim measures other than those contained in this article."

The reasons for the additions appear from the discussion below.

2.141 The purpose of article 9 is to give express recognition to the principle that a request to court for interim measures of protection which may be available under a given legal system and the granting of such measures by the court are not incompatible with an agreement to settle the dispute by arbitration.¹⁷⁸ The concept "interim measures of protection" is however not defined in article 9 as adopted by UNCITRAL: see article 9(1) as quoted in the previous paragraph. The court's power

¹⁷⁸

A/40/17 para 96.

to grant interim measures must be compared to that of the arbitral tribunal in article 17 (see the commentary on this article below).

2.142 Holtzmann & Neuhaus¹⁷⁹ are of the view that article 9 and the court's powers to grant interim measures can be excluded in the arbitration agreement.¹⁸⁰

2.143 Article 9 must be read with article 5 ("Extent of court intervention") and compared to the court's powers under s 21 of the Arbitration Act 42 of 1965 ("General powers of the court"). It has been suggested that the court's powers in s 21 are too wide and that certain of these matters are best left to the arbitral tribunal. However, some powers for the court to grant interim measures of protection are clearly desirable where the matter is urgent and there is a need for effective sanctions to ensure compliance.¹⁸¹

2.144 In South Africa, the subject is further complicated by the fact that the court has certain common-law powers relating to arbitration outside the Arbitration Act.¹⁸² These powers would not be affected by the exclusion of the 1965 Act as recommended in the discussion on s 3 above.¹⁸³ To the extent that these common-law powers overlap with powers conferred on the court by the Model Law, they would be excluded by article 5.

2.145 However, there is one power in particular which could be problematic. This is the power to review a procedural ruling by an arbitral tribunal while the arbitration is still in progress. The existence of this power was recognised in *Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd*,¹⁸⁴ although the court stressed it would only be exercised in exceptional circumstances and did not exercise it in that case.

¹⁷⁹ *Op cit* 333.

¹⁸⁰ They cite as authority para 96 of UNCITRAL's report on its 18th session (A/40/17), which is however ambivalent.

¹⁸¹ Butler 142-3. See too the greatly reduced powers of the English court in respect of interim measures under s 44 of the English Arbitration Act of 1996, compared to those given by s 12(6) of the 1950 Act which served as the model for s 21 of Act 42 of 1965.

¹⁸² Butler & Finsen 61-2; Butler 124.

¹⁸³ See para 2.29 above.

¹⁸⁴ 1978 4 SA 379 (T).

2.146 The Law Commission therefore recommends that South Africa should follow the approach adopted in New Zealand¹⁸⁵ and in Scotland¹⁸⁶ and spell out which powers the court may exercise as interim measures of protection in terms of article 9.¹⁸⁷

2.147 In view of a South African court's common-law powers referred to above, it was considered advisable to add a further provision to the effect that the court has no other powers in relation to the arbitration other than those contained in the South African version of the Model Law. This was done in article 9(5) of the Draft Bill, quoted above.

2.148 Article 9(3), quoted above, is identical to article 9(3) of the Scottish version of the Model Law.¹⁸⁸ The provision was included in the Draft Bill in Discussion Paper 69 because it would serve to expedite court applications on interim measures, in that the arbitral tribunal's factual findings would no longer be open to dispute. It was also intended to prevent article 9 from being used as an avenue for disguised appeals or reviews of the arbitral tribunal's procedural rulings. It could also be used as an indirect method of enforcing certain procedural rulings by the arbitral tribunal (compare the commentary on article 17 below).

¹⁸⁵ See the (New Zealand) Arbitration Act of 1996 sch 1 article 9(2) and (3); the New Zealand Law Commission *Arbitration* NZLC R20 1991 (hereinafter referred to as "NZLC R20") at 168-9. Article 9(2) in sch 1 of the (New Zealand) Arbitration Act of 1996 reads as follows:

"(2) For the purposes of paragraph (1), the ... Court shall have the same power as it has for the purposes of proceedings before that court to make -

- (a) Orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or
- (b) An order securing the amount in dispute; or
- (c) An order appointing a receiver; or
- (d) Any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) An interim injunction or other interim order."

¹⁸⁶ Law Reform (Miscellaneous Provisions (Scotland) Act 1990 sch 7 article 9.

¹⁸⁷ For a discussion of interim measures under the Model Law in Scotland, see Semple W G "The UNCITRAL Model Law and Provisional Measures in International Commercial Arbitration" (1994) 3 *The Arbitration and Dispute Resolution LJ* 269-89.

¹⁸⁸ See article 9(3) in sch 7 of the Scottish legislation. The New Zealand Law Commission (NZLC R20 168-9) recommended a similar addition for New Zealand, which is contained in article 9(3) of sch 1 to the 1996 Arbitration Act.

2.149 It was also thought that problems could arise where the arbitral tribunal's ruling on interim measures had or was alleged to have jurisdictional aspects. The court is empowered to review the tribunal's ruling on jurisdiction as a preliminary question under article 16(3). The Law Commission therefore recommended an additional modification as article 9(4) to the effect that article 16(3) should not apply to the ruling of an arbitral tribunal on interim measures.

2.150 The additions recommended for article 9 by the Law Commission were not free from difficulty and attracted a number of adverse comments.

2.151 One difficulty concerned the question whether or not it was clear from article 9(2) that the power of the court to order interim measures did not include the power to order security for costs. The court has this power under s 21(a) of the Arbitration Act of 1965.

2.152 Recently, in *Coppée-Lavalin SA/NV v Ken-Ren Chemicals and Fertilizers Ltd (in liq)*,¹⁸⁹ the House of Lords, in exercising a similar statutory power, directed the claimant in the arbitration to provide security for costs in an international arbitration held in London under the ICC Rules. The contract was subject to the substantive law of Belgium and the only connection with England was the provision in the arbitration clause that the arbitration should be held in London. The House of Lords' decision was greeted with dismay and the proposition that the court should involve itself in deciding whether the claimant in an arbitration should provide security for costs "has received universal condemnation in the context of international arbitrations".¹⁹⁰ The Law Commission therefore recommends that article 9(2)(b) should be amplified to make it clear that a court cannot order security for costs.¹⁹¹

2.153 Having removed the power to order security for costs from the court, it becomes necessary to consider the circumstances in which the power should be

¹⁸⁹ [1994] 2 All ER 449. The case was decided under s 12(6)(a) of the English Arbitration Act of 1950 which has since been repealed. The case has been discussed by Reymond C "Security for Costs in International Arbitration" (1994) *LQR* 501-6; Davenport B "The Ken-Ren Case: Much Ado About Nothing Very Much" (1994) 10 *Arbitration International* 303-11; Branson D "The Ken-Ren Case: It is an Ado Where More Aid is Less Help" (1994) 10 *Arbitration International* 313-6.

¹⁹⁰ See the 1996 Saville Report para 193. The power to order security for costs is not included among the powers which an English court may exercise in support of arbitral proceedings under s 44 of the Arbitration Act 1996. See also Saville 106-7.

¹⁹¹ This recommendation was supported by Dr Gerold Herrmann during his meeting with the Project Committee on 10 March 1997.

exercised by the arbitral tribunal. This is discussed in the commentary on article 17 below.

2.154 Professor Pieter Sanders expressed the view that article 9(3) in the original Draft Bill could create an opportunity to take the arbitral tribunal's order for interim measures on review.¹⁹² It is clear from the commentary above that article 9(3) was intended to have the opposite effect.¹⁹³ After giving the matter further consideration, the Law Commission recommends that it is preferable to deal with the problem of competing applications for interim measures with one party approaching the arbitral tribunal and the other the court by regulating the circumstances in which the court may exercise its power to grant interim measures in more detail. This is done in a new article 9(3), set out below, which is based on a provision in the Zimbabwe legislation.¹⁹⁴

2.155 A party who has been granted interim measures of protection by the arbitral tribunal will now also be able to enforce that order as if it were an arbitral award, in terms of an amendment to article 17 discussed in the commentary on that article below. It will no longer be necessary to consider using article 9 for this purpose.¹⁹⁵

2.156 Article 9(4) of the previous Draft Bill was criticised on a number of grounds by Dr Gerold Herrmann.¹⁹⁶ First, as it was concerned with interim measures ordered by an arbitral tribunal, it would be more appropriate to place it in article 17. Secondly, orders by the arbitral tribunal in matters regulated by the Model Law are

¹⁹² Oral comment at the International Conference on the Resolution of International Trade and Investment Disputes in Africa, held in Johannesburg on 6-7 March 1997.

¹⁹³ See para 2.148 above and Discussion Paper 69 para 2.86. The criticism was refuted at the conference referred to in the previous footnote by Lord Dervaird, who chaired the committee which recommended the adoption of the Model Law for Scotland. The previous version of article 9(3) was based on the Scottish provision. The criticism was also rejected by Karrer in his response to Discussion Paper 69.

¹⁹⁴ See the (Zimbabwe) Arbitration Act no 6 of 1996 sch 1 article 9(3). Similar restraints are imposed on an English court by s 44(3)-(5) of the (English) Arbitration Act 1996.

¹⁹⁵ Compare Discussion Paper 69 para 2.86 and para 2.148 above.

¹⁹⁶ At his meeting with the Project Committee on 10 March 1997. Paulsson in his response, para 1, also found the proposal somewhat perplexing. He asks whether arbitrators should ever grant interim measures under article 17 before disposing of an objection to their jurisdiction. In principle, they should not. Article 9(4) of the previous Draft Bill was however primarily intended to apply in circumstances where the jurisdictional issue concerned the extent of the arbitrators' powers to grant interim measures rather than the issue of their jurisdiction to determine the merits of the dispute.

only reviewable by a court where the Model Law so provides.¹⁹⁷ An order under article 17 is therefore non-reviewable. The previous article 9(4) could have the effect of undermining this position, although this was not the intention. The Law Commission therefore recommends that the previous version of article 9(4) should be deleted.

2.157 In a late change to the Zimbabwean Arbitration Act as approved by parliament,¹⁹⁸ a further addition (article 9(4)) was made to article 9 by providing that a decision made by the court on an application under article 9 should not be subject to appeal. This is in line with other provisions of the Model Law concerning court involvement prior to the commencement or during the course of an arbitration and prior to the award.¹⁹⁹ Particularly in view of the danger of appeals against court orders being used as a delaying tactic, the Law Commission recommends that a similar provision should be included in article 9 of the South African version of the Model Law.

2.158 The Law Commission therefore recommends that article 9 in the previous Draft Bill should be replaced by a revised version to address the problems referred to above. It is recommended that the revised version of article 9 should read as follows:

"(1) 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.

(2) For the purposes of paragraph (1), the High Court shall have the same power as it has for the purposes of proceedings before that court to make

(a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or

(b) an order securing the amount in dispute but not an order for security for costs; or

(c) an order appointing a receiver; or

¹⁹⁷ See article 5.

¹⁹⁸ The provision was not in the (Zimbabwe) Arbitration Bill of 1995, which was used by the Project Committee in preparing the draft of Discussion Paper 69.

¹⁹⁹ See articles 11(5), 13(3) and 16(3). Decisions by the court after the award regarding the setting aside or enforcement of the award are subject to appeal.

- (d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) an interim interdict or other interim order.

(3) The High Court shall not grant an order in terms of paragraph (1) of this article unless -

- (a) the arbitral tribunal has not yet been appointed and the matter is urgent; or
- (b) the arbitral tribunal is not competent to grant the order; or
- (c) the urgency of the matter makes it impractical to seek such order from the arbitral tribunal;

and the High Court shall not grant any such order where the arbitral tribunal, being competent to grant the order, has already determined the matter.

(4) The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal.

(5) The High Court shall have no powers to grant interim measures other than those contained in this article."

CHAPTER III: COMPOSITION OF ARBITRATION TRIBUNAL

Article 10 Number of arbitrators

2.159 True to the principle of party autonomy, article 10(1) leaves the parties free to determine the number of arbitrators. Where the parties do not determine the number of arbitrators, article 10(2), in keeping with the tradition of international arbitrations, provides that the number shall be three (compare article 5 of the UNCITRAL Arbitration Rules, which also provides for three arbitrators in the absence of an agreement that there shall be a single arbitrator).

2.160 Certain jurisdictions, eg Scotland, have modified article 10(2) to provide for a single arbitrator, unless the parties agree otherwise.²⁰⁰ This reduces expense and is in accordance with the usual South African practice. The Law Commission is of the view that these are sufficient reasons for a departure from the Model Law, notwithstanding the desirability of conforming to the general practice when adopting the Model Law. The majority of respondents to Discussion Paper 69 who referred to this point also favoured a single arbitrator unless the parties agree otherwise.²⁰¹ A modification similar to that adopted in Scotland is therefore recommended.

Article 11 Appointment of arbitrators

2.161 Article 11(1) is aimed at countering restrictions in some jurisdictions which preclude foreigners from acting as arbitrators.²⁰² The parties are free to agree on the procedure for the appointment of arbitrators, subject to the mandatory provisions of

²⁰⁰ See also the (Singapore) International Arbitration Act 23 of 1994 s 9 and Sanders 12-13. The Zimbabwean Arbitration Act of 1996 sch 1 article 10 follows the New Zealand approach by having one arbitrator for domestic arbitrations and three for international arbitrations, unless the parties agree otherwise. This change was necessitated by the decision in both jurisdictions to apply the Model Law to domestic and international arbitrations. However, the Kenyan Arbitration Act 4 of 1995, which also applies to both international and domestic arbitrations, stipulates in s 11 that there shall be a single arbitrator in both instances unless the parties agree otherwise.

²⁰¹ Paulsson para 2 and the British Consul-General, Johannesburg para 5 (influenced by the fact that both Scotland and England - in s 15(3) of the Arbitration Act 1996 - provide for a single arbitrator) supported the recommendation for a sole arbitrator. Findlay (see paras 2.1-2.6 of his response to Discussion Paper 69) was opposed to a single arbitrator in complex international arbitrations where a large amount of money is involved. The answer to this objection is that in such cases the parties are free to agree to a tribunal of three arbitrators.

²⁰² A/CN.9/264 commentary on article 11 para 1.

article 11(4) and (5) regarding the powers of the court or other appointing authority. The qualifications for an arbitrator are not set out. However, the parties in practice should have regard to the factors to be taken into account by the court or other appointing authority in making an appointment in article 11(5) as well as the grounds in article 12 on which an appointment may be challenged.²⁰³

2.162 As article 11 is not one of those articles which has extra-territorial application (see article 1(2)), the powers of the court or other appointing authority under article 11 to appoint an arbitrator will only be available once it has been determined to hold the arbitration in South Africa, even if the precise venue in South Africa has yet to be decided (see article 6(b)).

2.163 Article 11 differs in at least two respects from the comparable provisions of the 1965 Act. First, where there are three arbitrators, the third to be appointed by the other two, the third, in accordance with the internationally accepted practice, will be an arbitrator and not an umpire.²⁰⁴ Secondly, the power vested in the court or other appointing authority to appoint an arbitrator where the mechanism agreed to by the parties has failed is wider. It covers the situation where the power to make the appointment was conferred on a third party who has failed to make the appointment.²⁰⁵ Both these differences are an improvement on the present position.

2.164 Article 11, as adopted by UNCITRAL, allows states implementing the Model Law to choose between the court and another body when deciding who should have the power of appointment when the parties are unable to agree or when the default mechanism for appointments provided by the parties has failed to function. For reasons referred to in the commentary on article 6 above, the Law Commission recommends in this instance that the power should be vested in the appointing authority specified in article 6, rather than the court.

²⁰³ Broches (1990) 57-8.

²⁰⁴ Compare s 11(1)(b) of the Arbitration Act 42 of 1965 and Butler 144. The difference between a third arbitrator and an umpire is that the third arbitrator is an active member of the arbitral tribunal. An umpire remains in reserve until there is a disagreement between the two arbitrators, whereupon the matter is decided by the umpire to the exclusion of the two arbitrators.

²⁰⁵ Compare s 12 of the Arbitration Act 42 of 1965 and Butler 145; Butler & Finsen 84 n 66.

Article 12 Grounds for challenge

2.165 Article 12(1) imposes a duty on a prospective arbitrator to disclose circumstances which are likely to affect that arbitrator's independence and impartiality.²⁰⁶ This is an ongoing duty which continues to exist once an arbitrator has been appointed, should a subsequent development affect the arbitrator's independence or impartiality.²⁰⁷

2.166 It is clear from the word "only" in article 12(2) that it sets out the only grounds on which a challenge may be made, namely justifiable doubts as to the arbitrator's impartiality or independence or if the arbitrator does not possess the qualifications agreed to by the parties. A party who has appointed an arbitrator, including an appointment made jointly with the other party, may only challenge the appointment for reasons which were unknown to the party at the time the appointment was made.

2.167 No changes to the substance of this article are recommended.

Article 13 Challenge procedure

2.168 This article deals with the procedure for a challenge to an arbitrator's appointment on the grounds contained in article 12. The scope of court intervention in deciding challenges proved a controversial subject for the drafters of the Model Law. At one extreme, was a proposal for an immediate right to resort to the court if a challenge referred to the arbitral tribunal or other body was unsuccessful, with the arbitration being held in abeyance, pending the outcome of the court proceedings. At the other extreme, were those who argued that there should be no right to resort to the

²⁰⁶ The British Consul-General in Johannesburg, in his response to Discussion Paper 69 para 6, points out that in the English Arbitration Act 1996 s 24(1)(a) an arbitrator is only required to be impartial and not independent and impartial. (The reasons for the omission of independence as a criterion appear from the 1996 Saville report paras 101-4: in brief lack of independence is only considered important where it gives rise to justified doubts regarding impartiality.) The Commission recommends the retention of the wording of the Model Law for two reasons. First, it is the Commission's declared policy to keep changes to the Model Law to a minimum. Secondly, the wording of the Model Law on this point is in line with s 34 of the Constitution of the Republic of South Africa, 1996. S 34 entitles disputants to have their disputes which can be resolved by application of law decided before a court, "or where appropriate, another independent and impartial tribunal".

²⁰⁷ A/CN.9/264 commentary on article 12 paras 1-3.

court during the arbitral proceedings, but only by way of an application to set aside the award.²⁰⁸

2.169 The mechanism provided by article 13 for challenging an arbitrator's appointment endeavours to strike a balance between (a) the need for preventing obstruction or dilatory tactics by a party needlessly challenging an arbitrator's appointment in court at an early stage of the proceedings and (b) avoiding the waste of time and money which would be caused if the arbitration continues notwithstanding a challenge and the challenge is later upheld by the court.²⁰⁹ The parties are therefore free to agree on a challenge procedure in a bid to avoid court proceedings, but this procedure is still subject to a party's right to take an unsuccessful challenge to court (article 13 (1) and (2)). Article 13(2) contains a default procedure where the parties have not agreed on a challenge mechanism.²¹⁰

2.170 Where a challenge using the parties' agreed mechanism or the default mechanism in article 13(2) is unsuccessful, article 13(3) provides for an immediate court review of the unsuccessful challenge, but with three safeguards to reduce the risk of delay. First, there is short time period of 30 days for initiating a court review. Secondly, there is no appeal against the court's decision. Thirdly, and most important, the arbitral tribunal has the *discretion* to continue with the arbitration during the court proceedings and to make an award, where the tribunal is of the view that the challenge is unjustified.²¹¹

2.171 The lack of a right to take the court's decision on appeal is similar to the position regarding other instances of court intervention during the arbitration (see articles 11(5) and 16(3)). The lack of a right of appeal is not unreasonable as the party has by this stage had two challenges (one under article 13(1) or (2) and one under article 13(3)) rejected. This limitation on the right of appeal is a desirable safeguard against the challenge procedure being used as a delaying tactic.²¹²

²⁰⁸ See Holtzmann & Neuhaus 407.

²⁰⁹ A/40/17 para 124.

²¹⁰ The concern expressed by SAICE (in Paper 1 para 3.8 of their response to Discussion Paper 69) that the last sentence of article 13(2) could be used by one party to prevent the appointment of an expert by the tribunal, appears to be misconceived. Article 13(2) is concerned only with challenging an arbitrator's appointment and has no relevance to the appointment of an expert, which is regulated by article 26.

²¹¹ See Holtzmann & Neuhaus 407.

²¹² See however the contrary view of Adv A Findlay SC in para 20 of his 1995 submissions in response to Working Paper 59.

Article 14 Failure or impossibility to act

2.172 Article 14 contains two alternative grounds on which the mandate of an arbitrator may be terminated, namely (a) if the arbitrator becomes *de jure* or *de facto* unable to perform the functions of that office, or (b) if the arbitrator for other reasons fails to act without undue delay. The first ground, the *de jure* or *de facto* inability to act was derived from article 13(2) of the UNCITRAL Arbitration Rules of 1976 and retained for the sake of consistency.²¹³ The drafters of the Model Law were of the view that court assistance for termination of an arbitrator's mandate on this ground would rarely be required.²¹⁴ It has, however, been said that it is a moot point whether *de jure* inability to act is wide enough to include apparent bias.²¹⁵ Apparent bias logically gives rise to "justifiable doubts as to [the arbitrator's] impartiality or independence", and is therefore a ground on which the arbitrator may be challenged under article 13 (read with article 12(2)), rather than an instance of *de jure* inability to act. The point is of practical importance. Unlike article 13(3), article 14 gives the arbitral tribunal no discretion to continue with the arbitration while an application for the termination of an arbitrator's mandate is being decided by the court.

2.173 Regarding the second ground for termination, the words "without undue delay" express the time element inherent in the term "failure to act". It is not intended that the efficiency with which the arbitral proceedings are conducted should be a factor because this could open the door to a review of the substantive work of the arbitral tribunal.²¹⁶

2.174 The termination of the arbitrator's mandate does not occur automatically by the presence of the specified factors: the termination of the mandate occurs through the arbitrator's withdrawal from office or the agreement of the parties. If a

²¹³ A/40/17 para 137.

²¹⁴ A/CN.9/264, commentary on article 14 para 2.

²¹⁵ See Davidson F P *International Commercial Arbitration – Scotland and the UNCITRAL Model Law* 75. He cites A/CN.9/263ADD.1, article 14 para 1, where the Canadian delegation pointed out that the relationship between articles 14 and 13 was not entirely clear: "For instance, one may ask whether the apparent bias of an arbitrator might be regarded as a *de jure* impossibility to act."

²¹⁶ A/40/17 para 138.

controversy remains as to the presence of the grounds referred to in article 14 it will have to be resolved by the court.²¹⁷

Article 15 Appointment of substitute arbitrator

2.175 Article 15 provides for the appointment of a substitute arbitrator in the following circumstances:

- (a) where the mandate of an arbitrator has been terminated under articles 13 or 14; or
- (b) where an arbitrator withdraws from office for any other reason; or
- (c) where an arbitrator's mandate has been terminated by an agreement between the parties; or
- (d) any other case of the termination of the mandate.

2.176 Article 15 thereby endeavours to embrace all possible cases where the need to appoint a substitute arbitrator may arise.²¹⁸ Case (b) referred to above also covers the instance where the arbitrator resigns. Although an arbitrator should not be allowed to resign for capricious reasons after accepting appointment, it was not considered practical to list all the instances where resignation would be regarded as justifiable. Regarding case (c), the unrestricted freedom of the parties in principle to agree on the termination of the arbitrator's mandate follows from the consensual nature of arbitration. However, neither case (b) nor case (c) deals with legal liability (for example a damages claim for breach of contract) arising from the termination of the mandate, which will be regulated by the ordinary principles of the law of contract.²¹⁹

2.177 The New Zealand Arbitration Act of 1996 makes an addition to article 15 to provide for the effect of the substitution on the arbitral proceedings held prior to the substitution. Unless the parties agree otherwise, in the case of the replacement of a sole or presiding arbitrator any previous hearings must be repeated. In other cases, the decision to repeat hearings is in the discretion of the tribunal. An order or ruling

²¹⁷ Broches (1990) 67.

²¹⁸ A/CN.9/264 commentary on article 15 para 1.

²¹⁹ A/CN.9/264 commentary on article 15 paras 2 and 3.

made prior to the replacement, is not invalid solely because there has been a change in the composition of the tribunal.²²⁰ The position in the case of the substitution of a sole arbitrator differs from the present position in South Africa. The decision whether or not to make use of evidence recorded in the proceedings prior to the arbitrator's appointment is in the discretion of the arbitrator.²²¹

2.178 It appears that the New Zealand addition is unnecessary. The question as to whether the hearing should commence afresh is adequately dealt with by the general provisions of the Model Law. The parties are free to agree on the procedure to be followed (article 19(1)) and failing such an agreement, the matter is in the discretion of the reconstituted tribunal (article 19(2)). It is also self-evident that unless the circumstances giving rise to the termination of the arbitrator's mandate were such to render a procedural ruling invalid, the mere fact that an arbitrator has been substituted does not result in the invalidity of previous procedural rulings.

CHAPTER IV: JURISDICTION OF ARBITRAL TRIBUNAL

Article 16 Competence of arbitral tribunal to rule on its own jurisdiction

2.179 This very important article merits special attention because it is at odds with a recent South African decision. Article 16(1) deals not only with the competence of a tribunal to rule on its own jurisdiction, but also with the severability of the arbitration clause from the main contract. The provision on severability is clearly inconsistent with *Wayland v Everite Group Ltd*.²²² To the extent that the *Wayland* case apparently fails to recognise severability at all, the decision is contrary to *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk*.²²³ The *Wayland* case is completely contrary to trends in other jurisdictions²²⁴ and both Butler²²⁵ and Christie²²⁶

²²⁰ Sch 1 article 15(2) and (3). The Zimbabwean Arbitration Act 6 of 1996 sch 1 article 15(2) and (3) and the Kenyan Arbitration Act 1995 s 16(2) and (3) contain similar provisions.

²²¹ Arbitration Act 42 of 1965 s 12(6); Butler & Finsen 83.

²²² 1993 3 SA 946 (W).

²²³ 1973 1 SA 17 (A).

²²⁴ Redfern & Hunter 278. Even in England the severability of the arbitration clause is now beyond doubt: see *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* [1992] 1 Lloyd's Rep 81 (Com Ct); [1993] 3 All ER 897 (CA); and the Arbitration Act 1996 s 7.

²²⁵ *Op cit* 147-8.

²²⁶ Christie (1993) 158; Christie (1994) 367.

support the modification of South African law by legislation to bring it into line with international standards. Following the example in England, this could even be achieved by the courts.²²⁷ Article 16(1) and (2) should therefore be adopted unchanged.

2.180 The competence of an arbitral tribunal to rule on its own jurisdiction does not mean that its decision should not be subjected to court control. However, there are different opinions on what the extent of court control should be. One view is that any court interference should have to await the tribunal's award on the merits. To allow an earlier review creates the opportunity for delaying tactics.

2.181 The main argument in favour of an immediate right to apply to the court for review is that if the objection to jurisdiction is upheld, the continuation of the arbitration proceedings after the tribunal held that it had jurisdiction will represent wasted expenditure of time, effort and costs.²²⁸

2.182 Article 16(3), which regulates court control, and which was adopted in its present form after lengthy discussions, has been described as 'an innovative and sensible compromise' between the opposing points of view.²²⁹ In our view it achieves the desired degree of court control, while enabling the tribunal to prevent a review of its ruling on jurisdiction being abused as a blatant delaying tactic. The Law Commission therefore recommends that article 16, including article 16(3), should be adopted without amendment. This recommendation was supported by the majority of respondents to Discussion Paper 69 who referred to the issue.²³⁰

²²⁷ See the cases in footnote 192, which progress logically from the position accepted in *Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk* 1973 1 SA 17 (A). The New English Arbitration Act provides for the separability of the arbitration agreement in s 7, which endeavours to extend the principle even further than the decision of the Court of Appeal in the *Harbour Assurance Co (UK) Ltd v Kansa General International Insurance Co Ltd* case above. S 30, subject to the agreement of the parties, gives the arbitral tribunal wide powers to rule on its own jurisdiction.

²²⁸ A/40/17 paras 157-163.

²²⁹ Holtzmann & Neuhaus 486. The innovation consists of allowing the tribunal at its discretion to continue and make an award while the decision by the court is pending (compare the UNCITRAL Arbitration Rules of 1976 article 21(4)).

²³⁰ Paulsson para 1, Scholtz para 5 and BIFSA para 4.10 strongly supported the recommendation, particularly because article 16(3) will discourage delaying tactics. Findlay (1995 submissions para 21 and his response to Discussion Paper 69, para 3) made some reservations on how the doctrine of severability should be applied, and is opposed to article 16(3) excluding the right of appeal to a higher court and to the tribunal being allowed to continue while the court decision is pending, because of possible wasted expense (1995 submissions para 22 read with

Article 17 Power of arbitral tribunal to order interim measures

2.183 In terms of article 17 the arbitral tribunal has the power to order a party to take interim measures of protection "in respect of the subject-matter of the dispute", unless this power is excluded in the arbitration agreement. The tribunal's power is therefore considerably narrower than that envisaged for the court under article 9.²³¹ The Model Law does not provide measures for enforcing such orders. Some jurisdictions have therefore included an additional provision to enable such orders to be enforced as an award.²³²

2.184 Although the Law Commission in Discussion Paper 69 did not recommend the inclusion of such a provision in the Draft Bill,²³³ at least two respondents to the Discussion Paper favoured its inclusion.²³⁴

2.185 In the light of these responses and the difficulties experienced with the original version of article 9, discussed above, the Law Commission recommends the addition of the following provision to article 17:

"(3) The provisions of articles 31, 35 and 36 shall apply to an order under paragraphs (1) and (2) of this article as if such order were an award."

2.186 The wording differs from the corresponding provision in the Australian legislation (s 23), which only applies Chapter VIII (ie articles 35 and 36) to orders for

his response to Discussion Paper 69, para 4). Of all the jurisdictions which have implemented the Model Law for international arbitrations and which have been extensively relied on by the Commission, Singapore is the only one to allow a right of appeal from the court of first instance by way of a modification to article 16(3). The international norm is clearly in favour of excluding the right of further appeal.

²³¹ A/40/17 par 168 and compare the commentary on article 9 above.

²³² See eg s 23 of the (Australian) International Arbitration Act of 1974 (which is an optional or "opt-in" provision); sch 7 of the Scottish legislation article 17(2), which applies automatically, unless the parties contract out of article 17; and s 26 of the Bermuda International Conciliation and Arbitration Act 1993 s 26. The New Zealand Law Commission (NZLC R20 179-80) recommended a similar provision, but on a contract-out basis (see the Arbitration Act 1996 sch 1 article 17(2)).

²³³ See Discussion Paper 69 para 2.108.

²³⁴ See the Association of Arbitrators para 3 and BIFSA para 4.11.

interim measures. We recommend that article 31 should apply as well,²³⁵ with the result that the order will have to comply with the formal requirements for an award and contain reasons. The proposed wording does not however attempt to turn an order for interim measures by an arbitral tribunal into an award: the effect of article 17(3) is that such order will be recognised and enforced in South Africa as if it were an award, subject to the defences contained in article 36.

2.187 Having recommended that a court should not have the power to order security for costs in connection with arbitration proceedings,²³⁶ the Law Commission found it necessary to decide whether or not to give this power to the arbitral tribunal. At present, the tribunal has no such power under South African law, unless it is conferred on the tribunal by the parties in the arbitration agreement.²³⁷

2.188 The English legislature eventually decided to give the arbitral tribunal the power to order security for costs, unless the parties otherwise agree (ie on a contract-out basis). It was also decided that it was not desirable that the tribunal should necessarily be required to exercise this discretionary power on the same basis as a court. No specific guidance is however provided by the legislature as to how the power should be exercised beyond requiring that the power shall not be exercised on the sole basis that the claimant is a foreigner.²³⁸ However, the Arbitration Practice Sub-Committee of the Chartered Institute of Arbitrators has published guidelines on how arbitrators should approach an application for security for costs in practice.²³⁹

2.189 Concern has been expressed as to how arbitrators in England will exercise their new statutory discretion to order security for costs. It has been said of the power

²³⁵ This is also the position under article 17(2) of the Scottish version of the Model Law. S 26 of the Bermudan statute adopts the Australian approach.

²³⁶ See sch 1 article 9(2)(b) and para 2.152 above.

²³⁷ See *Petz Products (Pty) Ltd v Commercial Electrical Contractors (Pty) Ltd* 1990 4 SA 196 (C) 203H-I; Butler & Finsen 129.

²³⁸ See the Arbitration Act 1996 s 38(2) and (3). The power is nevertheless subject to the tribunal's general duty under s 33 to act fairly and impartially as between the parties and to adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense. On the legislative history of s 38 regarding security for costs and the thinking behind it see the 1996 Saville Report paras 189-199 and 364-70; the 1997 Saville Report paras 28-29; Saville 106-7; Needham M J "Orders for Security for a Party's Costs" (1997) 63 *JCI Arb* 122 (hereinafter "Needham") at 127-9.

²³⁹ See Lew J D M "Introduction to the Work of the Arbitration Practice Sub-Committee" (1997) 63 *JCI Arb* 166-7 for the text of the guidelines.

that it 'will be regarded by arbitrators as a delightful new instrument, a wonderful new toy. ... It may be quite some time before the position [as to how the discretion is likely to be exercised] is stabilised'.²⁴⁰ Moreover, if the power to order security for costs is automatically available (ie on a contract-out basis), there is also the danger of respondents routinely applying to the tribunal for an order for security for costs as a delaying tactic.

2.190 In the light of these considerations the Project Committee initially proposed that the power to order security for costs should be given to arbitral tribunals on a contract-in basis only. At the regional workshop in Cape Town, concern was however expressed that unless the parties agreed to arbitrate under institutional rules, which confer this power on the arbitral tribunal,²⁴¹ the situation could easily arise that no one has the power to order security for costs in a situation where it is highly desirable that the defendant should be able to obtain such security. It was therefore agreed that unless the arbitration agreement provides otherwise, the tribunal should have the power to order appropriate security where the tribunal considers such relief to be fair in the circumstances.²⁴² The appointing authority specified in article 6²⁴³ could issue guidelines on how the discretion should be exercised. It is not proposed to limit the discretion, as in England, by preventing security being ordered solely on the ground that the claimant is a foreigner.

2.191 The Law Commission therefore recommends that the power to order security for costs should be given to arbitral tribunals on a contract-out basis by adding the following provision as article 17(2):

"(2) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order appropriate security for costs if the arbitral tribunal considers such relief to be fair in the circumstances."

²⁴⁰ See Needham 128 quoting Lord Wilberforce in the House of Lords debate on the provision. See also Bowsher P "Security for Costs" (1997) 63 *JCI Arb* 36 at 38-9 who refers to the possibility of users of arbitration services wishing to know prospective arbitrators' proposed practice in relation to security for costs before agreeing to their appointment.

²⁴¹ See eg the LCIA International Arbitration Rules (1998 edition) article 25.2 and 25.3.

²⁴² These curbs on the tribunal's discretion to order security are similar to those proposed for the tribunal's power to award interest. See article 31(5) discussed in para 2.246 below.

²⁴³ See paras 2.127-2.128 above for the primary function of this authority.

CHAPTER V: CONDUCT OF ARBITRAL PROCEEDINGS

Article 18 *Equal treatment of parties*

2.192 In terms of this article, the parties 'shall be treated with equality and each party shall be given a full opportunity' of presenting that party's case. It has been described as a key element of the "Magna Carta of Arbitral Procedure".²⁴⁴ It has been said that article 18 "might well be called the 'due process' clause of arbitration, akin to similar provisions in national constitutions that establish the element of procedural fairness as the indispensable foundation of a system of justice."²⁴⁵ The article is a compulsory provision which qualifies both the parties' and the tribunal's powers to determine the arbitral procedure. A failure to observe this principle would render the award liable to be set aside as being in violation of public policy.²⁴⁶

Article 19 *Determination of rules of procedure*

2.193 True to the principle of party autonomy, article 19(1) gives the parties the freedom to determine the procedure to be followed in the arbitration, subject to the compulsory provisions of the Model Law²⁴⁷ which are aimed at ensuring procedural fairness.

2.194 Subject to the same restraints, the tribunal is given the power by article 19(2) to determine the procedure to the extent that the agreement is silent. This power extends to the power to determine the admissibility, relevance, materiality and weight of any evidence. The tribunal will therefore still be subject to the agreement of the parties and to the compulsory provisions of the Model Law in evidentiary matters, particularly articles 18, 24(2) and (3) and 27. The tribunal is also in a position to conduct the reference effectively if the parties cannot agree on the procedure to be followed.

2.195 No changes to this article are recommended.

²⁴⁴ See Holtzmann & Neuhaus 550, citing A/CN.9/264 article 19 para 1.

²⁴⁵ See Holtzmann & Neuhaus 550.

²⁴⁶ Compare article 34(2)(b)(ii) and see UNCITRAL Secretariat para 42, as well as the proposed addition of article 34(5), discussed in the commentary on article 34 below.

²⁴⁷ Namely articles 18, 23(1), 24(2) and (3), 27, 30(2), 31(1), (3) and (4), 32, 33(1)(a), (2), (4) and (5) (see Holtzmann & Neuhaus 583).

Article 20 Place of arbitration

2.196 The parties' right to determine the place of arbitration must be read with article 2(d). If the parties do not determine the place of arbitration, it must be determined by the arbitral tribunal, who are obliged to have regard to the circumstances of the case, including the convenience of the parties.

2.197 The place or seat of the arbitration is of great importance. Apart from matters of convenience, it will determine the procedural law applicable to the arbitration (the law applicable to the merits of the dispute is regulated by article 28), the court from which assistance may be sought, the extent of the court's powers of assistance and the court to which application for the setting aside of the award may be made. The award is deemed to be made at the place of the arbitration, even if it is signed elsewhere (article 31(3)). Nevertheless, unless the parties agree otherwise, article 20(2) empowers the tribunal to meet at other places if this is desirable for the efficient conduct of the arbitration.

2.198 No changes to this article are recommended.

Article 21 Commencement of arbitral proceedings

2.199 This article provides that unless the parties otherwise agree, 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.²⁴⁸ The main purpose of this article is to provide a way of determining when a claim may be said to be the subject of arbitration proceedings for purposes of national legislation on prescription or limitation of actions.²⁴⁹ Article 21 also gives the parties the freedom to make their own arrangement in this respect.

²⁴⁸ The British Consul-General in Johannesburg in para 7 of his response to Discussion Paper 69 expressed concern about the commencement of arbitration proceedings hinging on *receipt* by the respondent of the relevant communication. There could be doubt as to whether the communication was actually received or non-receipt could be alleged by the respondent as a delaying tactic. Therefore s 14 of the English Arbitration Act 1996 places the emphasis on the *service* of the notice (as defined in s 76) rather than its receipt. In the Commission's view, this problem is adequately dealt with by article 3 of the Model Law which deals with when a communication is deemed to have been received for purposes of the Model Law.

²⁴⁹ Report of the Working Group on International Contract Practices on the work of the third session A/CN.9/216 of 23 March 1982 (hereinafter referred to as "A/CN.9/216") par 72; A/CN.9/264-49; Broches (1990) 108; Holtzmann & Neuhaus 610, who point out that determination of the commencement of arbitral proceedings is also relevant for the application

2.200 For purposes of the Prescription Act 68 of 1969 s 13(1)(f), the completion of prescription is delayed "if ... the debt is the object of a dispute subjected to arbitration". Article 21 identifies when the arbitration commences and thus when the debt may be regarded as having been subjected to arbitration.

2.201 Given the pragmatic attitude of our courts when applying s 13(1)(f),²⁵⁰ and with the added benefit of the *travaux préparatoires*, we foresee no difficulties in applying article 21 of the Model Law to s 13(1)(f) of the Prescription Act. The Law Commission therefore recommends that the wording of article 21 should be adopted without alteration.²⁵¹

Article 22 Language

2.202 The issue of language is of great practical importance in an international arbitration. Therefore article 22 gives the parties the right to agree on the language(s) to be used. This is the best solution and promotes certainty and the appointment of suitable arbitrators. In the absence of such an agreement, the tribunal will have to determine the language(s) to be used, subject to the fundamental principle contained in article 18 regarding equal treatment and procedural fairness. The new English Arbitration Act of 1996 contains a similar arrangement (see s 34(1) and (2)(b) read with s 33). We recommend that this provision should be adopted without modification.

Article 23 Statements of claim and defence

2.203 "The required contents of the initial statement of claim and of the respondent's reply may be regarded as so basic and necessary as to conform with all established arbitration systems and rules."²⁵² The provision is however non-mandatory in its detail leaving the parties free to make use of particular arbitral rules. Article 23(1)

of eg articles 8(2) ("arbitral proceedings may nevertheless be commenced") and 30(1) of the Model Law ("If, during arbitral proceedings, the parties settle the dispute").

²⁵⁰ See *Murray and Roberts Construction (Cape) (Pty) Ltd v Upington Municipality* 1984 1 SA 571 (A).

²⁵¹ Compare the commentary on s 14 of the Draft Bill in paras 2.93-2.94 above. S 14 is intended to prevent problems with prescription arising in relation to conciliation attempts taking place in terms of an arbitration agreement.

²⁵² A/CN.9/264 51.

leaves it to a party to decide whether or not that party's statement should be accompanied by all relevant documents. The tribunal could use its general power under article 19(2) to ensure that a summary of evidence is presented in advance of the hearing to prevent "trial by ambush". Article 24(3) moreover makes it clear that any information communicated by one party to the tribunal must also be communicated to the other party. The tribunal is also given a discretion to control amendments of statements of claim and defence, for example to prevent serious prejudice to one party through a late amendment by the other, without adequate excuse to explain the delay. We recommend that this provision should be adopted unaltered.

Article 24 Hearings and written proceedings

2.204 Article 24(1) gives the arbitral tribunal the power to determine if, when and where oral hearings are to be held, unless the parties agree otherwise. However, unless the parties agree otherwise, the tribunal must hold an oral hearing if so requested by a party. This is in line with s 15(1) of the Arbitration Act of 1965.

2.205 Article 24(3) ensures procedural fairness by requiring all information furnished to the tribunal by one party to be communicated to the other. The tribunal may also not rely on any document or expert report (compare article 26) in making its decision unless the document has first been furnished to the parties, which by implication means that they have the opportunity to respond to the document before it is used by the tribunal.

2.206 No changes to this article are recommended.

Article 25 Default of a party

2.207 This article gives the tribunal certain powers in the event of a party's default, unless those powers are excluded or modified in the arbitration agreement. Article 25(a) requires the tribunal to terminate the proceedings if the claimant requests that a dispute be referred to arbitration, but then fails to communicate the statement of claim. In terms of article 25(b) however, if the respondent fails to communicate a statement of defence, the tribunal may proceed to make an award without treating the failure as an admission of the claimant's allegations. Article 25(c) enables the tribunal to proceed and make an award if either party fails to appear at a hearing or to produce documentary evidence. It must be read with article 24(2), which requires the parties to be given sufficient notice to attend the hearing or to produce the documents. Article 25 is more specific in some respects than, but fulfills a similar function to s 15(2) of the Arbitration Act of 1965. Article 25 is a necessary provision to counter deliberate delaying tactics or dilatory conduct by a party and is subject to adequate procedural safeguards. The Law Commission recommends that it should be adopted without amendment.

Article 26 Expert appointed by arbitral tribunal

2.208 This provision empowers the tribunal to appoint an expert to report to it on specific issues, unless the parties otherwise agree. It is an important power which enables the tribunal to reduce costs and the length of the hearing, bearing in mind that the cross-examination of experts can add substantially to the duration of the traditional adversarial hearing. This power is recognised in several sets of international arbitral rules, eg those of the LCIA (1998 edition, article 21) and UNCITRAL (article 27).

2.209 The power is subject to safeguards to prevent abuse: first it may be excluded in the arbitration agreement and secondly, a party is entitled to require the tribunal appointed expert, after receiving the expert's report (compare article 24(3)), to participate in a hearing where that party can question the expert in the presence of the party's own experts. (This condition builds on the basic principle of procedural fairness enshrined in article 18.)

2.210 A similar power is conferred on arbitrators in England by s 37 of the Arbitration Act of 1996. The Law Commission recommends that article 26 should be adopted without amendment.

Article 27 Court assistance in taking evidence

2.211 This article provides that the arbitral tribunal or a party with the approval of the arbitral tribunal may request assistance in taking evidence "from a competent court of this State".

2.212 Article 27 does not have extra-territorial operation (see article 1(2)). It therefore only applies when the place of arbitration (as determined by article 20) is within the territory of the state adopting the Model Law. As Holtzmann & Neuhaus state:

"Questions of international assistance in the taking of evidence in arbitral proceedings are not governed by the Model Law, so that any other applicable provisions of law on the question will presumably continue to apply."²⁵³

2.213 Article 27 is also not one of the articles referred to in article 6: therefore the court identified in article 6 is not necessarily the court with jurisdiction under article 27. The possible effect of article 27 can only be understood against the background of the existing South African law regarding court assistance in procuring evidence in arbitration proceedings.

2.214 The normal procedure for summoning a witness to give evidence or to produce documents in arbitration proceedings in South Africa is contained in s 16 of the Arbitration Act 42 of 1965. S 16 enables a party to have a subpoena issued by the clerk of the magistrate's court with jurisdiction in the area where the arbitration is held. S 16 is consistent with the principle of party control over the presentation of evidence: it would appear that the arbitrator cannot call a witness in arbitration proceedings in South Africa unless authorised to do so by the arbitration agreement.²⁵⁴

2.215 S 21(1)(c) of the Arbitration Act 42 of 1965 gives the high court the same power to order "the examination of any witness before a commissioner in the

²⁵³ *Op cit* 738. See also A/140/17 para 223-5.

²⁵⁴ Butler & Finsen 241.

Republic ... or abroad and the issue of a commission or a request for such examination" as it has for purposes of a court action.²⁵⁵

2.216 The Law Commission has recommended that the Arbitration Act 42 of 1965 should not apply to arbitrations held under the Model Law (see the commentary to s 3 above). If this recommendation is accepted, it will be necessary to include provisions on court assistance for the procurement of evidence in the legislation enacting the Model Law, conferring the same types of assistance as are presently available under the Arbitration Act.

2.217 However, although the use of the clerk of the magistrate's court to issue subpoenas is a cost-effective and convenient procedure, it appears from what we have said above that there is an important difference between article 27 and s 16 of the Arbitration Act as to who can request court assistance.

2.218 We recommend that pursuant to the international practice of giving the arbitral tribunal greater control over what evidence is presented,²⁵⁶ and in line with article 27, it should be the *arbitral tribunal* or a party with *the approval of the arbitral tribunal* who can request the clerk of the magistrate's court to issue a subpoena. The same requirement should apply regarding the identity of the applicant to the high court for the appointment of a commissioner.

2.219 The recommended addition to article 27 to implement these recommendations is loosely based on the New Zealand Arbitration Act of 1996 sch 1 article 27(2) and the English Arbitration Act of 1996 s 44.

2.220 None of the respondents to Discussion Paper 69 raised any difficulties regarding this recommendation.

²⁵⁵ S 21(1)(b) contains a similar provision regarding discovery of documents and interrogatories, although there is no reference to the extent of its territorial application.

²⁵⁶ See the ICC Arbitration Rules (1998) article 20.3; *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration* (1983), contained in Redfern & Hunter 704-7, especially article 5(9), (10) and (14) and article 7(c).

CHAPTER VI: MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28 Rules applicable to substance of dispute

2.221 Article 28 deals with the rules of substantive law applicable to the issues in dispute. Article 28(1) requires the tribunal to decide the dispute in accordance with "such rules of law as are chosen by the parties". The parties are therefore given the freedom to choose the system of law.

2.222 By referring to "rules of law" instead of a designated system of national law, the Model Law gives the parties the option to choose rules of law which have been elaborated on by an international forum (eg the ICC or UNCITRAL) but which have not yet been incorporated into any national legal system. The tribunal is also required, unless the parties otherwise agree, to apply a designated system of national law directly and not its conflict of laws rules.

2.223 Failing a designation by the parties, the powers of the tribunal are more circumscribed. The tribunal must then apply the system of national law determined with reference to the conflict of laws rules which the tribunal considers applicable. It may not proceed directly to a system of national law, but must go via the appropriate conflict of laws rules. It must also apply a particular system of national law under article 28(2).²⁵⁷

2.224 In this respect, the Model Law is more conservative than some systems of national law regarding the tribunal's power to choose the substantive law in the absence of a choice by the parties.²⁵⁸ The English Arbitration Act of 1996 however follows article 28(2) of the Model Law.²⁵⁹

2.225 We therefore cannot agree with the views of one respondent to Working Paper 59 that Article 28(1) and (2) "deal cryptically and obscurely with difficult questions

²⁵⁷ UNCITRAL Secretariat para 35.

²⁵⁸ See Redfern & Hunter 127, with reference to the position under French, Dutch and Swiss law.

²⁵⁹ See s 46(3) and the 1996 Saville Report 50 para 225.

of conflict of laws"²⁶⁰ and recommend that the provisions should be adopted unchanged.

2.226 Article 28(3) authorises an arbitral tribunal to decide *ex aequo et bono* or as *amiable compositeur*, but only if the parties have expressly authorised it to do so. A further safeguard against the abuse of this provision is provided by article 28(4), which obliges the tribunal to decide in accordance with the terms of the contract and to take any applicable trade usages into account. The provision in article 28(3) is therefore by no means a licence to apply "some home-made law of the particular arbitrator".²⁶¹

2.227 There is some uncertainty as to whether such clauses will be accepted by our courts in the absence of legislation, and if they are, how they should be interpreted.²⁶² Nevertheless, the existence of a provision whereby "[t]he arbitrator shall have the power to make an appropriate award with due regard to fairness and reasonableness" in an arbitration agreement pertaining to a labour dispute was recently quoted without comment by the former Appellate Division.²⁶³ Although the validity under English law of a provision authorising an arbitrator to act as *amiable compositeur* has been the subject of debate, the 1996 Arbitration Act permits this, if the parties so agree.²⁶⁴

2.228 We recommend that article 28(3) should be adopted without alteration. Such provisions are recognised in several national systems, and in the context of a statute on international commercial arbitration, further the general policy of reducing the importance of the place of the arbitration.²⁶⁵

2.229 It is also possible to give a practical interpretation to a clause authorising the arbitrator to act as *amiable compositeur* in a South African context²⁶⁶ and the

²⁶⁰ Comments prepared by Adv S A Cilliers SC on behalf of the Witwatersrand Division of the Society of Advocates para 2.3.

²⁶¹ Compare *Czarnikow v Roth, Schmidt and Company* [1922] 2 KB 478 at 484.

²⁶² Butler & Finsen 254-5.

²⁶³ See *Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd* 1994 1 SA 162 (A) 167H.

²⁶⁴ See s 46(1)(b) and the 1996 Saville Report 49 para 223. Such agreement would in effect exclude the right which exists in certain circumstances under English law to take a question of law on appeal to the courts, "there being no 'question of law' to appeal".

²⁶⁵ A/CN.9/264 63 para 8; Holtzmann & Neuhaus 770.

²⁶⁶ Butler & Finsen 254-5.

inclusion of a provision on the lines of article 28(3) and (4) in our domestic legislation has also been recommended.²⁶⁷

2.230 The precise meaning of the terms "*amiable compositeur*" and "*ex aequo et bono*" is unclear.²⁶⁸ Nevertheless, we believe that South Africa should follow the example of other Commonwealth jurisdictions²⁶⁹ by adopting these terms in the Model Law as they are and not attempting to paraphrase them. A paraphrase would deprive South African users of the benefit of a growing international literature and jurisprudence on the subject and the assistance of the *travaux préparatoires*.²⁷⁰

2.231 The Law Commission's recommendation that article 28 should be adopted unchanged was supported by the only two respondents to Discussion Paper 69 who specifically referred to this article.²⁷¹

Article 29 Decision-making by panel of arbitrators

2.232 This article basically provides for majority decisions by multiple member tribunals, where unanimity cannot be achieved, unless the parties otherwise agree. We recommend no change to this provision.

Article 30 Settlement

2.233 This provision deals with the situation where the parties settle the dispute during the course of the arbitration proceedings. The parties may then request the tribunal to make an award in terms of the settlement. If this is done, the settlement will be enforceable as an arbitral award, entitling the enforcing party to the benefits of the New York Convention. The tribunal is entitled however to refuse the request if it is of the view that the provision is being abused, eg to obtain an award in respect of a matter which is not arbitrable or where the settlement is an attempt to deceive the

²⁶⁷ Butler 153.

²⁶⁸ Holtzmann & Neuhaus 770.

²⁶⁹ For example Australia, Bermuda, British Columbia, Scotland and Zimbabwe. See further Sanders 18.

²⁷⁰ A/CN.9/264 63 para 9.

²⁷¹ See BIFSA para 4.13 and Paulsson para 1, who applauds the Commission's decision and comments that the provisions of article 28 are rarely a source of difficulty in practice.

fiscus. A similar provision has been included in the English Arbitration Act of 1996.²⁷² We recommend that this provision should be adopted unchanged.

2.234 By implication, a settlement covered by article 30 is one reached by the parties after the arbitral tribunal has been appointed. S 13 of the Draft Bill therefore contains a provision for a settlement agreement in writing entered into by parties to an arbitration agreement, who have settled their dispute before the appointment of the arbitral tribunal, to be enforced in South Africa as if it were an award on agreed terms. See further the commentary on s 13 above.

Article 31 Form and contents of award

2.235 Article 31(1) requires the award to be in writing and signed by the arbitrators. Like s 24 of the Act of 1965, it provides that the failure by a minority to sign the award will not invalidate it, if the reason for the omission is stated.

2.236 Article 31(2) of the Model Law requires an award to state the reasons on which it is based, unless the parties, whether expressly or by implication,²⁷³ agree that no reasons are to be given. This follows the pattern of the UNCITRAL Arbitration Rules, article 32(3). Although many national laws require reasoned awards, this is not presently the position in South Africa.²⁷⁴ Requiring reasons improves the quality of arbitral decisions.²⁷⁵ However, reasons could result in the award being rendered less speedily, increase costs and render the award more susceptible to challenge.²⁷⁶ Notwithstanding these problems, we are firmly of the view that article 31(2) should be adopted unchanged, as it reflects the position which is achieving general acceptance

²⁷² See s 51 and the 1996 Saville Report 52-3, paras 240-4.

²⁷³ A/CN9/216 para 80; Holtzmann & Neuhaus 838.

²⁷⁴ See Butler & Finsen 269; *Schoch NO v Bhettay* 1974 4 SA 860 (A) 865D-E.

²⁷⁵ See Butler & Finsen 269-70; A/CN9/216 para 80.

²⁷⁶ See A/CN9/216 para 80. Butler & Finsen 270 n 101 refer to a number of recently reported cases where challenges to reasoned awards amounted to disguised appeals. To these cases one can add another example: the unreported judgment in *Victor E Gillian Trust v Sessions* (CPD case no 10801/1994, 2 August 1995) where an unsuccessful challenge to an interim award was mounted on extremely flimsy grounds. One solution to this problem rests with the courts who could discourage attacks on awards based on patently inadequate grounds by making punitive awards of costs against the unsuccessful challenger.

in national statutes and institutional rules pertaining to international arbitration.²⁷⁷ It is also in line with a modification to South Africa's domestic legislation proposed by the Association of Arbitrators.²⁷⁸

2.237 Article 31(3) requires the award to state its date and that it is made at the seat of the arbitration, whether it was actually signed there or not. This avoids the problem which arose in *Hiscox v Outhwaite (No 1)*,²⁷⁹ discussed in Chapter 3 par (b)(ii) below, in the context of awards subject to the New York Convention.

2.238 Article 31(4) requires a signed copy of the award to be delivered to each party. There is therefore no requirement equivalent to s 25(1) of the Arbitration Act 42 of 1965 that the award be "published" by the arbitrators in the presence of the parties. A provision for publication on these lines would be inappropriate in international arbitration on the grounds of inconvenience and expense. The publication requirement in s 25(1) has been criticised²⁸⁰ and is not necessarily observed in practice. For example, in *Van Zyl v Von Haebler*,²⁸¹ the parties agreed that the arbitrator could publish his award by transmitting it to them by telefax. The Law Commission therefore recommends that article 31(4) should be adopted unchanged.

Interest

2.239 The UNCITRAL Model Law contains no provision on interest. There are two possible reasons for this. First, in many jurisdictions interest is regarded as a matter of substantive law. Secondly, because of the divergent approach on interest in national systems, it would have been difficult to achieve consensus on what the Model Law should provide on the subject of interest.²⁸² Several states with a common-law tradition have deemed it necessary to include a provision on interest when enacting

²⁷⁷ Redfern & Hunter 389-90; LCIA Rules (1998) article 26.1. S 52(4) of the English Arbitration Act of 1996 is modelled on article 31(2) of the Model Law and now also requires reasons except in the case of an agreed award, unless the parties agree to dispense with reasons.

²⁷⁸ Association of Arbitrators *Amendments to Arbitration Act 42 of 1965 Commentary on Proposed Amendments* (20 July 1994) (hereinafter referred to as "Association of Arbitrators") 18-19 and s 27(3) of the Draft Bill.

²⁷⁹ [1991] 3 All ER 641 (HL).

²⁸⁰ Butler 158-60.

²⁸¹ 1993 3 SA 654 (SE) 663I-J.

²⁸² Butler D W "The Recovery of Interest in Arbitration Proceedings: an Agenda for Lawmakers" (1995) 6 *Stel LR* 291 at 308 (hereinafter referred to as "Butler (1995)").

the Model Law.²⁸³ Butler²⁸⁴ examined the South African common law and legislation regarding interest prior to the Prescribed Rate of Interest Amendment Act 7 of 1997 and concluded that, particularly in the context of international arbitration, the existing rules are inadequate in the light of commercial realities.

2.240 The Commission²⁸⁵ had also recommended certain changes to the law on interest, particularly in the context of unliquidated claims for damages and regarding the prohibition on interest *in duplum*. The proposals regarding interest on unliquidated claims for damages have been implemented by the Prescribed Rate of Interest Amendment Act of 1997.²⁸⁶ This change does not however deal with all the problems which could presently arise in relation to interest in the context of an international arbitration.²⁸⁷

2.241 The new statutory provision for interest on unliquidated claims for damages removes or reduces one reason for a defendant in arbitration proceedings to indulge in delaying tactics, but the problem of the prohibition on interest in duplum remains. Furthermore, with one exception, the institutional rules used in international arbitrations fail to deal with interest.²⁸⁸

2.242 We therefore recommend²⁸⁹ that the Model Law should be amplified along the lines of the approach adopted in British Columbia²⁹⁰ to confer a broad discretion on

²⁸³ Sanders 33; Butler (1995) 306-12.

²⁸⁴ Butler (1995) 294-307.

²⁸⁵ S A Law Commission *Report on Interest on Damages* Project 78 1994.

²⁸⁶ The Act inserted s 2A ("Interest on unliquidated debts") in the Prescribed Rate of Interest Act 55 of 1975. S 2A applies expressly to arbitration proceedings.

²⁸⁷ See Butler (1995) 312-20. An arbitration may be held in one jurisdiction, in circumstances where the arbitral tribunal is required to apply the substantive law of another. The tribunal will then have to give particular attention to the question as to what extent the award of interest is a matter of substantive law and the extent to which it is procedural. Additional considerations regarding interest may arise where the tribunal is asked to make an award in a foreign currency.

²⁸⁸ Butler (1995) 311 n 155. The exception is the rules of the LCIA (1998) article 26.6. A major consideration behind the provision was the avoidance of delay.

²⁸⁹ See also Butler (1995) 320-2.

²⁹⁰ See the International Commercial Arbitration Act of 1986 s 31(7), read with s 1(2). The provision applies unless the parties otherwise agree. In its final version, the Zimbabwean Arbitration Act 6 of 1996 contains a similar provision in schedule 1 article 31(6). Bearing in mind the object of the provision, it is submitted that the approach in British Columbia is

the arbitral tribunal to award interest and to determine the basis on and the rate and period for which such interest should be awarded. The period could, in the tribunal's discretion, start to run from the date when the arbitration proceedings commenced, or, in an appropriate case, even from the date on which the cause of action arose,²⁹¹ until the date of payment. The rate would not be restricted to the statutory rate, but the tribunal could have regard to the rate which persons in the position of the claimant would be able to obtain when investing or have to pay when borrowing. The rate would also be determined having regard to the currency in which the award is made. It must nevertheless be stressed that the object of an award of interest "is not to penalise the party ordered to pay it. It is to compensate the successful claimant for being kept out of his money between the date it ought to have been paid, and that date of payment ...".²⁹² The arbitral tribunal must therefore exercise its discretion by applying the relevant legal principles. If South African law applies, the tribunal may not ignore the existing prohibition on the payment of interest in duplum. The tribunal's discretion is therefore subject to its duty to apply the relevant substantive law in terms of article 28.

2.243 The wide discretionary power referred to above would be a strong deterrent against delaying tactics on the part of the defendant. However, there is no good reason why the defendant should have to pay interest for the full period, when some of the delay in obtaining the award has clearly been caused by the claimant's own dilatory conduct. A discretionary power would enable the arbitral tribunal to take this into account. The tribunal's statutory power would be subject to any exclusion or restriction in the parties' agreement or in the terms of the reference.

2.244 A proposed addition to give effect to this recommendation was incorporated in Schedule 1 article 31(5) of the Draft Bill in Discussion Paper 69. It read as follows:

"(5) Unless otherwise agreed by the parties, the arbitral tribunal may award interest at such rate and for such period as the tribunal considers appropriate in

preferable to the optional or "opt-in" provisions on interest in ss 25 and 26 of the International Arbitration Act of 1974 (Australia) - see Butler (1995) 310 n 140.

²⁹¹ In this respect the recommendation goes further than the Prescribed Rate of Interest Amendment Act of 1997, which provides for interest on the amount of an unliquidated debt as determined by a court or arbitrator to run from the date of demand for payment. The Bermuda International Conciliation and Arbitration Act 1993 s 31(1) and the (Indian) Arbitration and Conciliation Act 26 of 1996 s 31(7) also provide that the arbitral tribunal may award interest from the date on which the cause of action arose instead of the date of demand for payment.

²⁹² See Bernstein R, Tackaberry J & Marriott A L *Handbook of Arbitration Practice* 3ed Sweet & Maxwell London 1998 234.

the circumstances, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment."

2.245 The proposal received strong support from those respondents to Discussion Paper 69 who referred to it.²⁹³ Three of them²⁹⁴ stressed the importance of the tribunal being able to award compound interest and queried whether the above wording was sufficiently clear for this purpose.

2.246 The Law Commission agrees that the arbitral tribunal in an international arbitration should be able to award compound interest in appropriate circumstances. It is also advisable that the original proposal should be modified to make it clear that the tribunal's discretion to award interest is subject to its duty to apply the relevant substantive law under article 28. With this qualification, the proposal received strong support at the regional workshops. At the Durban and Cape Town workshops, it was nevertheless suggested that the discretion should be limited further by the express requirement of fairness. The Law Commission therefore recommends that the wording of article 31(5) in the Draft Bill with Discussion Paper 69, quoted above, should be changed as follows to give effect to these proposals:

"(5) Unless otherwise agreed by the parties and subject to article 28, the arbitral tribunal may award interest on such basis and in such terms [~~at such rate and for such period~~] as the tribunal considers appropriate and fair in the circumstances, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment."

Costs

2.247 The UNCITRAL Model Law is silent on the award of costs by the arbitral tribunal (compare the provisions on costs in articles 38-40 of the UNCITRAL Arbitration Rules).²⁹⁵ Some jurisdictions have therefore amplified the Model Law to include a provision on costs.²⁹⁶

²⁹³ See BIFSA para 4, the British Consul-General in Johannesburg para 8, Marriott, Karrer, SAICE Paper 2 para 2.6 and Scholtz para 4.

²⁹⁴ Marriott, Karrer and the British Consul-General.

²⁹⁵ Several countries referred to the question of costs as an additional item for inclusion in the Model Law in their comments on one of the earlier drafts (see A/CN.9/263 in UNCITRAL *Yearbook* vol XVI (1985) 82, 94 (par C 13, Addendum 1 par C 4), but this suggestion was not taken up by the Secretary-General in his analytical commentary on the draft text (A/CN.9/264). This was possibly because it is "impossible to identify any general practice as to the treatment of costs in international commercial arbitrations" (see Redfern & Hunter 407). Although Redfern & Hunter 408 state that the practice in domestic arbitrations in the United States is for each party to bear its own costs and for the administrative costs to be shared

2.248 The position is complicated in South Africa by the fact that our courts will currently interfere with the way in which an arbitral tribunal exercises its statutory discretion on costs under s 35 of the Arbitration Act 42 of 1965 if the tribunal fails to exercise that discretion in the same way as a court.²⁹⁷

2.249 A *bona fide* mistake of law by the arbitral tribunal in making an award of costs will lead to that award being set aside or remitted, whereas a *bona fide* mistake of law is no basis for a court to interfere with an award on the merits of the dispute. This distinction in the case of costs has been strongly criticised.²⁹⁸

2.250 It therefore seems desirable that the Model Law should be amplified to confer a discretion on the arbitral tribunal to award costs. It is also necessary to prevent that award being attacked in the South African courts, except on the grounds referred to in article 34.²⁹⁹

2.251 Article 5 ("Extent of court intervention") must therefore be applied to exclude the *Harlin Properties* and *Kathrada* cases (referred to in a footnote to paragraph 2.248 above). Otherwise the risk exists that the unsuccessful party could attempt to attack the award by relying on these cases and contending that because of them, the enforcement of an award of costs based on a *bona fide* mistake of law would be contrary to public policy (article 34(2)(b)(ii)).

equally, article 32 of the American Association of Arbitrators International Arbitration Rules (1991) does give the arbitral tribunal the discretion to apportion costs.

²⁹⁶ Sanders 31-3; the Zimbabwean Arbitration Act 6 of 1996 sch 1 article 31(5).

²⁹⁷ See *Harlin Properties (Pty) Ltd v Rush and Tomkins* 1963 1 SA 187 (D) 198A-B; *Kathrada v Arbitration Tribunal* 1975 1 SA 673 (A) 680C-681A; *John Sisk and Son (SA) (Pty) Ltd v Urban Foundation* 1985 4 SA 349 (N) and 1987 3 SA 190 (N); *Joubert t/a Wilcon v Beacham* 1996 1 SA 500 (C) 502D; *Benab Properties CC v Sportshoe (Pty) Ltd* 1998 2 SA 1045 (C) 1049A-F. The *Harlin* case, which was followed in later decisions, relied on English authority and ignored earlier South African cases where the court was not prepared to interfere with an arbitrator's award of costs in the absence of one of the usual grounds for interfering with an award (see *Wynberg Municipality v Town Council of Cape Town* (1892) 9 SC 412 414; *Middleton v The Water Chute Co Ltd* (1905) 22 SC 155 157; *Tucker v FB Smith and Co* (1908) 25 SC 12 14; *Austen v Joubert* 1910 TS 1095 1096-7).

²⁹⁸ See especially Christie (1994) 367; Butler 143; Butler & Finsen 278 n 160.

²⁹⁹ Compare the response of Findlay to Working Paper 59, para 28. He favours an addition to the Model Law to provide for costs to be awarded by the arbitral tribunal but appears to support the view that the award of costs should be subject to review where there has been an error of law.

2.252 A proposed addition to give effect to this proposal was incorporated as article 31(6) in Schedule 1 to the Draft Bill in Discussion Paper 69. It included a proviso designed to restrict court interference with awards on costs, for the reason discussed above.

2.253 Those respondents to Discussion Paper 69 who referred to costs supported the Law Commission's proposals.³⁰⁰ Article 31(6) has therefore been retained in the Draft Bill accompanying this report.

Article 32 Termination of proceedings

2.254 This provision has three purposes.³⁰¹ Its first object is to provide guidance in the last phase of the proceedings (see eg article 32(a) regarding the effect of the unilateral withdrawal of a claim). Secondly, it regulates the termination of the mandate of the arbitral tribunal (and its exceptions) as a result of the termination of the proceedings (see article 32(3)). Thirdly, it provides certainty regarding the moment of termination, which may be relevant to the running of extinctive prescription and the institution of court proceedings. The Law Commission recommends that this provision should be adopted unchanged.

Article 33 Correction and interpretation of award; additional award

2.255 Article 33 first gives the arbitral tribunal, on application or on its own initiative, the power to correct errors in the award, which result in the award not correctly reflecting the tribunal's original intention. The power of the tribunal in s 30 of the Arbitration Act 42 of 1965 is slightly narrower, because it is restricted to *patent* errors.³⁰²

2.256 Secondly, and only with the agreement of the parties, the arbitral tribunal may interpret an ambiguity in the award. Although not expressly sanctioned by the 1965 Act, the possibility of the tribunal clarifying an award has recently been sanctioned by our courts³⁰³ and is permitted by the English Arbitration Act of 1996, s 57(3).

³⁰⁰ Karrer, Scholtz para 4, SAICE Paper 2 para 2.7.

³⁰¹ A/CN.9/264 68.

³⁰² Butler 160-1; Butler & Finsen 272.

³⁰³ See *Interciti Property Referrals CC v Sage Computing (Pty) Ltd* 1995 3 SA 723 (W). On the position where the alleged ambiguity is only raised once the award has been made an order of court, see *Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg and Co Inc*

2.257 Thirdly, unless the parties agree otherwise, a party may request the arbitral tribunal to make an additional award in respect of an issue referred to arbitration but omitted from the award. This matter would normally have to be dealt with by remittal, either with the agreement of the parties or in terms of a court order under s 32 of the present Act of 1965.

2.258 The limited powers given to the tribunal by article 33 are subject to appropriate safeguards and compensate for the more limited role of remittal under the Model Law (see article 34(4)) when compared to s 32 of the 1965 Act. There can therefore be no objection to this provision.

CHAPTER VII: RECOURSE AGAINST AWARD

Article 34 Application for setting aside as exclusive recourse against arbitral award

2.259 Article 34 contains an exclusive list of grounds for recourse against an award, ie grounds for actively attacking the award, as opposed to resisting its enforcement under article 36. The list of grounds is essentially the same as those in article 36(1), which is taken from article V of the New York Convention.³⁰⁴ An application for setting aside must be brought within three months of receipt of the award (article 34(3)).

2.260 It was stated in Discussion Paper 69 that the setting aside of an award under article 34 in the country where it was made rendered the award unenforceable in all other countries.³⁰⁵ Two respondents reacted to this statement.³⁰⁶ As appears from our discussion of the New York Convention, although the setting aside of an award in one country will *usually* render it unenforceable in another, the court where enforcement

1996 3 SA 355 (A). See generally on the power of an arbitral tribunal to interpret its award Knutson R D A "The Interpretation of Arbitral Awards - When is a Final Award not Final?" (1994) Vol 11 No 2 *Journal of International Arbitration* 99-109.

³⁰⁴ UNCITRAL Secretariat paras 41-44.

³⁰⁵ Discussion Paper 69 para 2.172. The authority relied on for this statement was UNCITRAL Secretariat para 44 which in turn referred to article V(1)(e) of the New York Convention and article 36(1)(a)(v) of the Model Law.

³⁰⁶ See Paulsson para 4, discussed in ch 3 para (a)(ii) n 12 below and Asouzu paras 33-35, who refers to court decisions, mainly in France and the United States, enforcing awards which had been set aside or annulled by courts in the jurisdictions where the awards were made.

is sought has a discretion³⁰⁷ still to enforce the award. Enforcement *may* still be appropriate where the basis for setting aside was a ground which is not internationally recognised for that purpose.³⁰⁸

2.261 *In effect* the grounds available for setting aside under article 34 do not really differ from those available under s 33 of the Arbitration Act of 1965. To the extent that the specific procedural irregularities referred to in article 34 do not cover forms of "misconduct" or "gross procedural irregularity" under s 33, these would be covered by the public policy ground.³⁰⁹ Nevertheless, in reaction to suggestions in this regard,³¹⁰ the Law Commission recommends that an addition should be made to article 34 to make it clear that the public policy ground does include serious procedural irregularities, as has been done in certain other jurisdictions.³¹¹ The proposed addition reads:

"For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is also in conflict with the public policy of South Africa if –

- (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the applicant; or
- (b) the making of the award was induced or affected by fraud or corruption."

2.262 Regarding the wording of subparagraph (a), the expression "a breach of the rules of natural justice" is used instead of "a breach of the arbitral tribunal's duty to act fairly" in similar additions to the legislation enacting the Model Law in Australia,

³⁰⁷ See the words "enforcement ... may be refused" in the introduction to article V(1) of the New York Convention and article 36(1) of the Model Law.

³⁰⁸ See further ch 3 para (a)(ii) n 12 below.

³⁰⁹ See UNCITRAL Secretariat para 42. In this regard one must bear in mind that misconduct has a narrower meaning under South African law than under English law (as developed by the courts prior to the 1996 Arbitration Act) and is restricted to wrongful or improper conduct involving dishonesty or moral turpitude.

³¹⁰ See Asouzu para 36, Findlay 1995 submissions (in response to Working Paper 59) para 24.3.

³¹¹ See eg the (Australian) International Arbitration Act of 1974 s 19; the (Zimbabwe) Arbitration Act of 1996 sch 1 article 34(5); the Bermuda International Conciliation and Arbitration Act 1993 s 27; the (Singapore) International Arbitration Act 23 of 1994 s 24.

Zimbabwe and Singapore.³¹² It could be argued that following the same language would make the provision more readily understood by foreign users and would also increase the chances of a uniform standard developing as to how the courts in the various jurisdictions apply the provision. Moreover, although "fairly" is used in the Constitution, in the context of the right to a fair hearing,³¹³ it is not used in the comparable provisions of the Model Law,³¹⁴ although it is clearly implied. Nevertheless, even to English lawyers, the arbitrator's duty to comply with the rules of natural justice means no more than "the duty to act fairly".³¹⁵ On balance, in the context of a South African statute, it appears preferable to use the term "fairly" from s 34 of the Constitution.

2.263 There is also the danger that the allegation of procedural unfairness could become a routine ploy to delay the enforcement of an award, in the context of both articles 34 and 36. The Law Commission therefore recommends that a qualification should be added to this ground, following the example of Singapore and England, by requiring that the applicant for setting aside show substantial prejudice as well.³¹⁶

2.264 The Dervaird Committee in Scotland recommended that the three-month period in article 34(3) for the bringing of an application for setting aside should not apply to setting aside on the ground of fraud or corruption, because of the risk that a party who had been damaged by such behaviour only found out about it once the time-limit had expired.³¹⁷ This recommendation was accepted by the legislature.³¹⁸ The Law Commission therefore proposes that article 34(3) be supplemented by the following addition:

³¹² See the relevant legislation referred to in the previous footnote.

³¹³ See Act 108 of 1996 s 34.

³¹⁴ Compare articles 18 and 24.

³¹⁵ Per Lord Diplock in *O'Reilly v Mackman* [1982] 3 All ER 1124 (HL) 1126j-1127a.

³¹⁶ See the (Singapore) International Arbitration Act 23 of 1994 s 24(b) and the English Arbitration Act of 1996 s 68(2).

³¹⁷ See the *Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law* under the chairmanship of Lord Dervaird, published in 1990 (6) *Arbitration International* 63 74 paras 3.30 and 3.32.

³¹⁸ See the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 sch 7 article 34(3).

"unless the party making the application did not know and could not within that period by exercising reasonable care have acquired knowledge by virtue of which an award is liable to set aside under paragraph 5(b), in which event the period shall commence on the date when such knowledge could have been acquired by exercising reasonable care."³¹⁹

2.265 Remittal will have a more limited role under article 34 than under s 32 of the 1965 Act. First, it is not an independent remedy and could only be sought in the context of an action for setting aside (article 34(4)). Secondly, it will only be possible where one of the article 34 grounds for setting aside is present and the defect in the award can be remedied by referring the matter back to the arbitral tribunal.

CHAPTER VIII: RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35 Recognition and enforcement

2.266 Article 35 is available for the enforcement of any award in an international arbitration. It differs from the New York Convention which is available for the enforcement of *foreign* arbitral awards. See further Chapter 3, para (b)(i) below. Recognition and enforcement of an award by a court is obligatory unless one of the grounds for refusing recognition and enforcement referred to in article 36 is established. This is in line with the New York Convention and produces greater certainty than s 31 of the Arbitration Act of 1965 which contains no list of grounds on which an order enforcing an award can be refused. The evidential requirements of article 35 for a party seeking recognition or enforcement of an award are the same as those imposed by article IV of the New York Convention. The Law Commission has recommended that the court should have a discretion to depart from the strict evidential standards imposed by article IV in appropriate circumstances (see the proviso to s 19 of the Draft Bill and Chapter 3 para (b)(iii) below). However, consistent with the goal of keeping departures from the Model Law to a minimum, it is not proposed that a similar qualification should be added to article 35 of the Model Law. A party seeking recognition or enforcement of a foreign arbitral award in a commercial matter in South Africa would be able to use s 19 as an alternative and will therefore not be prejudiced by this omission.

³¹⁹ The wording of the proposed addition is in language similar to that in s 12(3) of the Prescription Act 68 of 1969.

2.267 No changes to this article are recommended. As a result the footnote to the article becomes superfluous.

Article 36 Grounds for refusing recognition or enforcement

2.268 The grounds on which the court has a discretion not to enforce an award under article 36 are identical to those in the New York Convention. Although some further improvements to the wording of the grounds could have been made (apart from article 36(1)(a)(i)), the drafters of the Model Law decided that harmony between the Model Law and the New York Convention was more important.

2.269 As in the case of article 34 above, the public policy defence to an application for enforcement will include situations where the arbitral award is tainted by a serious procedural irregularity. To avoid any doubt on this point the Law Commission recommends the inclusion of a provision similar to article 34(5), discussed above, as article 36(3), as has been done in certain other jurisdictions.³²⁰

(c) *Other possible additions for consideration*

Optional application of Model Law to domestic arbitrations

2.270 The inclusion of "opt-in" or "opt-out" provisions is discussed in Working Paper 59;³²¹ by Sanders³²² and in paras 92-99 of the Mustill Report.³²³ It is first necessary to clarify what is meant by "opt-in" and "opt-out" provisions. On the assumption that South Africa is to adopt the Model Law for international arbitrations only, while retaining a separate statute for domestic arbitrations, then an "opt-in" provision would mean that parties can elect to apply the Model Law to what is essentially a domestic arbitration. An "opt-out" provision means that parties to an international arbitration can agree to opt out of the Model Law and apply domestic law instead. The comments on contracting in and contracting out of the Model Law

³²⁰ See eg the (Zimbabwe) Arbitration Act of 1996 sch 1 article 36(3); the (Australian) International Arbitration Act of 1974 s 19; the Bermuda International Conciliation and Arbitration Act 1993 s 27.

³²¹ Paras 30.4 and 39.

³²² Sanders 5-6.

³²³ Mustill M J *Report of the Departmental Advisory Committee on the UNCITRAL Model Law* London 1989 reproduced in (1990) 6 *Arbitration International* 3-62 (hereinafter referred to as "Mustill Report") at 30-33.

in para 96 of the Mustill Report (which are summarised in para 39 of Working Paper 59) appear to be directed at contracting in and contracting out in the context of international arbitration only, in other words, particularly the term "contract in" is used in a different sense to that in which "opt in" is defined above.

Opting in

2.271 The Law Commission originally recommended the inclusion of an opt-in provision.³²⁴

2.272 This recommendation was mainly justified by a practical consideration.³²⁵ Allowing parties to contract in in relation to what is objectively a domestic arbitration would avoid potential disputes on the application of article 1(3)(c) of the Model Law, which provides that an arbitration is international and therefore subject to the Model Law if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

2.273 If the arbitration does not qualify as international under article 1(3)(a) or (b) but only because of article 1(3)(c), the situation could arise that objectively speaking, although the two parties to the agreement, both being South African, agree that the subject-matter also relates to a different country, it could be clear from the terms of the contract and the surrounding circumstances that this is not the case and the contract is a purely South African affair.

2.274 If the arbitration agreement or the arbitration were to come before the court, the court could then decide to strike down the whole or part of the arbitration clause as being in *fraudem legis*, an impermissible attempt to avoid compulsory provisions of the Arbitration Act relating to domestic arbitrations, by trying to disguise it as an international arbitration.³²⁶ The South African parties would be desirous of escaping the more onerous provisions applying to domestic arbitrations by designedly disguising their contract by giving it an international façade. This situation could not arise if the parties to a domestic arbitration are allowed to contract into the Model

³²⁴ See Discussion Paper 69 paras 2.29-2.37.

³²⁵ See also the submission of Adv A Findlay SC in response to Working Paper 59 para 11.3.

³²⁶ See Sanders 10 and compare Broches (1990) 16: "As long as such a stipulation or agreement [in terms of article 1(3)(c)] does not go beyond the resolution of reasonable doubts and does not represent an egregious attempt to evade the Law, it will in my opinion be respected by a court in a model law state."

Law. Although few respondents to Discussion Paper 69 referred to this matter, the majority of those who did supported the Law Commission's earlier recommendation.³²⁷

2.275 However, there are important policy and practical considerations against an opt-in provision. First, there is the danger that an opt-in clause could be included in the arbitration clause of certain standard-form contracts.³²⁸ Particularly consumers could thereby be denied the greater degree of court supervision provided by the 1965 Act, especially regarding the enforcement of the arbitration agreement.³²⁹ Secondly, the possibility of a dual system of arbitration legislation applying to domestic arbitration, because of the opt-in provision, would make it more difficult for lawyers and other professionals with no previous experience of arbitration to establish themselves in the field. Thirdly, a separate investigation of the revision of domestic arbitration legislation is under way. The Law Commission therefore considers it inappropriate to touch upon an aspect so important to a review of domestic arbitration legislation, namely the extent of the powers of the court, while dealing with international arbitration. Finally, any need in practice for an opt-in provision will be lessened once the revision of the domestic arbitration legislation has been completed.

2.276 The possibility of an opt-in provision and the arguments in favour and against it were discussed at all three regional workshops. In Johannesburg and Durban there

³²⁷ Support came from SAICE (Paper 1 paras 2.8 and 3.4 and Paper 2 paras 2.2 and 3.1) and Asouzu para 02. Scholtz para 6 commented that the inclusion of an opt-in provision is obviously no guarantee that parties to a domestic arbitration will use it. Prof Pieter Sanders (in an oral comment at the International Conference on the Resolution of International Trade and Investment Disputes in Africa held in Johannesburg on March 6-7 1997) commented that the prudent position was to include an opt-in provision to allow parties to a domestic arbitration the benefits of the Model Law, but to have no opt-out provision, thereby preventing parties to an international arbitration otherwise subject to the South African version of the Model Law from contracting out. This view was supported by Dr Gerold Herrmann at his meeting with the Project Committee on 10 March 1997. BIFSA para 4.5 was against the opt-in provision because "it could be abused". BIFSA did not, however, elaborate on the nature of the abuse.

³²⁸ This is possibly the abuse which BIFSA had in mind by their comment referred to in the previous footnote.

³²⁹ Compare the wider discretion of the court not to enforce the arbitration agreement in ss 3(2) and 6 of the Arbitration Act 42 of 1965 to that provided by article 8 of the Model Law. However, it must be questioned whether the financially stronger party would lightly contract out of the 1965 Act, if that party wished to impose a settlement on its weaker opponent through delaying tactics and escalating costs, including court applications under the 1965 Act. Conversely, a consumer would usually not have the financial resources to litigate in the High Court in an attempt to avoid the enforcement of an arbitration agreement under ss 3 and 6 of the 1965 Act.

was no support for including the opt-in clause, whereas in Cape Town a majority appeared to favour its omission. The Project Committee is divided on the matter. The chairperson, Judge J H Steyn, opposes its omission. While understanding the sensitivities on the issue, he believes that an opt-in provision would provide an opportunity for validating the proposals in the Draft Bill in practice, in the context of domestic arbitration, while the probably lengthy task of the revision of the domestic arbitration statute is undertaken. Because of the novelty of being able to contract into the Model Law, the option is likely only to be invoked after due consideration. Moreover, the omission of the opt-in provision runs counter to a fundamental principle of arbitration law, namely party autonomy. Having considered all the arguments, the Law Commission recommends that the inclusion of an opt-in provision is not desirable.

Opting out

2.277 At least four states have provided "opt-out" provisions, as defined above, when adopting the Model Law, for example, Australia by s 21 of the (Federal) International Arbitration Act of 1974, as amended by Act 25 of 1989 and Hong Kong by s 2M of the Arbitration Ordinance as amended in 1989.³³⁰

2.278 One practical argument in favour of such a provision is that the arbitration legislation of South Africa, Namibia and Lesotho is presently virtually identical. Should not the parties and their lawyers from any two of those countries wishing to hold their arbitration in South Africa be allowed to use the legislation with which they are most familiar and opt out of the Model Law? Put in another way, should they not be able to use all the delaying tactics inherent in the present system, which some lawyers have learnt to exploit and abuse so successfully over the years?

2.279 South Africa's chances of becoming a recognised centre for international arbitration depend on more than the adoption of the Model Law and the availability of the necessary physical infrastructure. A pool of practitioners skilled in modern

³³⁰

Sanders 5-6; Working Paper 59 paras 39.5-39.6. See also the Bermuda International Conciliation and Arbitration Act 1993 s 29 and the (Singapore) International Arbitration Act 23 of 1994 s 15. S 2M of the (Hong Kong) Arbitration Ordinance, referred to in the text, was not amended by the Arbitration (Amendment) Ordinance 1996. Its effect, by allowing parties to international arbitration to apply the regime applicable to domestic arbitrations has however been considerably reduced by the extensive additions in 1996 to Part 1A of the Arbitration Ordinance, as Part 1A applies to both domestic and international arbitrations. One of the main effects of the 1996 amendments is to bring the legal regimes in Hong Kong applying to domestic and international arbitrations closer together.

international arbitration practice is also a prerequisite. It will obviously be essential for all arbitration institutions to make strenuous efforts to ensure the availability of properly trained arbitrators representative of South African society. Although the Law Commission concedes that the parties should in principle be given freedom to determine the procedure applicable to their arbitration, institutional rules and modern arbitration legislation are designed to give more power to arbitrators to determine the dispute in a swift and cost-effective manner, while still doing justice between the parties. Modern statutes also lessen court involvement.³³¹

2.280 Therefore, at least until such time as our domestic arbitration statute is revised, a contract-out provision in relation to the Model Law would in our view be counter-productive and cannot be recommended. There was also little support for an opt-out clause among respondents to Discussion Paper 69.³³²

Power to condone time-bar clauses

2.281 S 8 of the Arbitration Act 42 of 1965 gives the court the power to remove or extend a contractual time-bar on the commencement of arbitration proceedings.³³³ There is no comparable provision in the Model Law. In Discussion Paper 69 the Law Commission decided not to recommend the addition of an equivalent provision to the South African version of the Model Law.

2.282 Few respondents to Discussion Paper 69 referred to this matter. Of those who did, one supported the Law Commission's view that no provision equivalent to s 8 should be included.³³⁴ Three others were in favour of the addition of such a provision,³³⁵ but one of these, Dr Amazu Asouzu, raised the matter in the context of a lengthy memorandum which was focussed primarily on what he regards as the desirability of South Africa adopting the Model Law for both domestic and international arbitrations, as has been done in certain other African jurisdictions. The

³³¹ See Butler 121-122; Association of Arbitrators para 1.5.

³³² Asouzu para 02 states that although it is unlikely that they would do so, it is desirable that international parties should have the option of opting into the domestic regime, if this was more suitable for their circumstances and dispute.

³³³ See Butler 137-9 where certain problems with the wording of the present provision are discussed.

³³⁴ The Department of Foreign Affairs para 1.

³³⁵ See Findlay 1995 submission in response to Working Paper 59 para 26, SAICE Paper 1 para 3.9 and Asouzu paras 45-6.

large majority of respondents who did not refer to the matter must be taken either to have assented to the Law Commission's view by their silence, or not to feel strongly enough about the issue to raise it. Apart from Dr Asouzu, none of the foreign respondents supported the addition.

2.283 Whether or not there is merit in including an improved version of s 8 in revised domestic arbitration legislation,³³⁶ the Law Commission remains opposed to including such a provision in a statute intended for international arbitrations for the following reasons. First, it extends the court's powers in relation to arbitration, whereas an object of the Model Law was to limit those powers. Second, s 8 in effect empowers the court to vary the parties' contract by condoning non-compliance with contractual time-limits. The inclusion of such a power could be a trap for a foreign party who regards those contractual time-limits to be binding and enforceable. Moreover, parties can authorise the arbitral tribunal to modify contractual time-limits if they consider this appropriate, also possibly by authorising the tribunal to decide as *amiable compositeur* under article 28(3). Thirdly, neither Kenya nor Zimbabwe thought it necessary to add a provision similar to s 8 when adopting the Model Law. The inclusion of such a provision would undermine the goal of the drafters of the Model Law of promoting uniformity.

Other provisions of the 1965 Act

2.284 SAICE, in its response to Discussion Paper 69, pointed out that no provisions had been included on the effect of the insolvency of a party or to provide for the arbitrator's remuneration and lien on the award,³³⁷ although such matters are regulated by the 1965 Act (ss 5 and 34). The effect of the insolvency of a foreign party in the context of an international arbitration can hardly be regulated by South African law. In the context of an international arbitration, it is up to the arbitrators to make adequate arrangements for their remuneration. In the case of an institutional arbitration, this matter will be regulated by the institution. Statutory provisions on such matters are best restricted to statutes applying to domestic arbitration.

Confidentiality

³³⁶ See Butler 137-9. S 12 of the English Arbitration Act 1996 will provide useful guidance in identifying possible improvements.

³³⁷ Paper 1 paras 2.10 and 2.12.

2.285 One respondent to Discussion Paper 69, SAICE,³³⁸ favoured the inclusion of a provision on confidentiality. It was submitted that the same approach should be followed as in New Zealand, where the Arbitration Act of 1996 (s 14) provides that the confidentiality of arbitration proceedings is an implied term of every arbitration agreement unless disclosure is to a professional or other adviser of any of the parties or is contemplated by the Act. This left further exceptions to the general principle to be worked out by the courts.³³⁹

2.286 In recent years, the confidentiality of arbitration proceedings has received the attention of the English and the Australian courts. Whereas the privacy of the arbitration hearing has been accepted, the basis of any duty of confidentiality and the extent of the exceptions to any such duty have been the subject of conflicting decisions.³⁴⁰

2.287 Where there is a duty of confidentiality in relation to arbitration proceedings under South African law, whether created by an express or tacit term of the arbitration agreement or otherwise, it is clear that the duty is subject to important exceptions.³⁴¹ The development of the law regarding the extent of the exceptions is likely to be influenced by the Bill of Rights in the Constitution³⁴² and it is neither possible nor

³³⁸ Paper 2 para 2.4.

³³⁹ See Richardson (1997) 233.

³⁴⁰ See especially Neill P "Confidentiality in Arbitration" (1996) 62 No 3(S) *JCI Arb* (hereinafter referred to as "Neill") 1-18. The views of some of the judges in the Australian case of *Esso Australia Resources Ltd v Plowman* 128 ALR 391 (1995) are in sharp contrast to the views of some of the English cases discussed by Neill. See also Rogers A & Miller D "Non-confidential Arbitration Proceedings" (1996) 12 *Arbitration International* 319-45.

³⁴¹ Neill 3 suggests the following exceptions: (a) where the parties consent to disclosure; (b) where disclosure of arbitration documents is required by law for purposes of a subsequent court application; (c) where disclosure is with the court's consent and (d) where disclosure is necessary to protect the legitimate interests of the arbitrating party. Another possible exception which has yet to be considered by the English courts is where disclosure is required in the public interest.

³⁴² See s 14 regarding the right to privacy, including the right not to have the privacy of communications infringed and s 32 concerning the right of access to information held by the state and any information held by another person which is required for the protection of any rights. S 16 on freedom of expression, which includes the freedom to receive or impart information or ideas may also be relevant. Moreover, s 34 provides that everyone has the right "to have any dispute that can be resolved by the application of law decided in a fair *public* hearing before a court or where appropriate, another independent and impartial tribunal ..." (our emphasis). Although s 34 may appear to be opposed to the principles of the privacy of the arbitration hearing and the confidentiality of the result, s 34 is subject to s 36 ("Limitation of rights").

desirable to attempt to formulate these exceptions comprehensively in legislation. This consideration is an important additional reason for agreeing with the conclusion of the Saville Reports in England that the further development of the law on confidentiality of arbitration proceedings is at this stage best left to the courts.³⁴³

Court Rules

2.288 Marriott in his response to Discussion Paper 69 pointed out that England has used the opportunity created by the introduction of the 1996 Arbitration Act to overhaul and streamline the court rules governing applications in respect of arbitration.³⁴⁴ He adds that it would be of undoubted benefit to the foreign practitioner to know that there is a simple, straightforward and standard system for applications to court in relation to arbitration proceedings. The need for this matter to be considered in South Africa was raised by one of the judges attending the regional workshop in Cape Town.³⁴⁵ He stressed the need for the rules to make adequate provision for applications to court arising from arbitration proceedings, so that such applications should not cause unnecessary delay. The Law Commission accordingly recommends that a copy of this report and the Draft Bill be referred to the Rules Board to enable it to consider whether changes to the rules are required.³⁴⁶

³⁴³ See the 1996 Saville Report paras 9-17 and 384 and the 1997 Saville Report para 44.

³⁴⁴ The rules are contained in RSC Order 73 in Appendix A to the 1997 Saville Report.

³⁴⁵ The Honourable Mr Justice M J Hlophe.

³⁴⁶ See too para 4.71 n 65 below, regarding the need to consider the provision of appropriate High Court Rules for purposes of enforcement of ICSID awards under s 24 of the Draft Bill.

CHAPTER 3

THE NEW YORK CONVENTION

(a) *Introduction*

(i) Overview of Chapter

3.1 In Discussion Paper 69, the Law Commission identified a number of serious defects in the South African legislation enacted to give effect to South Africa's accession to the New York Convention, namely the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. The Law Commission therefore recommended that this Act should be repealed and replaced by improved legislation which should be incorporated in the same statute as that to give effect to South Africa's adoption of the UNCITRAL Model Law for international arbitrations.³⁴⁷ Those respondents to the Discussion Paper who referred to the matter strongly supported the Law Commission's recommendations,³⁴⁸ subject to minor reservations on points of detail which are referred to in the discussion below.

3.2 This chapter first examines the importance of the New York Convention, sets out the defects in the existing legislation and provides a comparative survey of legislation in certain other jurisdictions. The proposed changes to the existing legislation, as well as further modifications in the light of responses to Discussion Paper 69, are then discussed.³⁴⁹ Thereafter, certain other legislation affecting the enforcement of foreign arbitral awards is examined.³⁵⁰ The chapter concludes with a summary of the Law Commission's recommendations.³⁵¹

³⁴⁷ See Discussion Paper 69 ch 3 and ss 8-12 of the Draft Bill annexed to the Discussion Paper.

³⁴⁸ The Association of Arbitrators, BIFSA para 5, Goodman, the Department of Justice para 2, and SAICE Paper 1 para 3.5. Goodman referred to a recent instance where a South African company had been severely prejudiced by deficiencies in Act 40 of 1977.

³⁴⁹ See paras (b)-(f) below.

³⁵⁰ See para (g) below.

³⁵¹ See para (h) below.

(ii) The importance and scope of the New York Convention

3.3 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 (hereafter "NYC") was adopted at the headquarters of the United Nations on 10 June of that year.³⁵² The Convention has been described as "the most successful international instrument in the field of arbitration" which could also perhaps "lay claim to be the most effective instance of international legislation in the entire history of commercial law".³⁵³

3.4 Although, as of December 1996, 110 states were parties to the Convention,³⁵⁴ six states in southern and central Africa have yet to accede to it.³⁵⁵ The enactment of improved legislation on the NYC by South Africa will hopefully encourage them to rectify this omission.

3.5 The functions of the NYC have been succinctly described as follows:

"It imposes on [contracting states] the obligations (a) to enforce an agreement to arbitrate unless it is found to be void, and (b) to recognize foreign awards under such agreements and enforce them by proceedings not substantially more onerous than those applicable to domestic awards. Exceptions to the award enforcement duty are few: invalidity of the arbitration agreement, inability of a party to present its case, nonconformance of the award or

³⁵² Van den Berg A J *The New York Arbitration Convention of 1958* Kluwer Deventer 1981 (hereinafter referred to as "Van den Berg (1981)") at 6-8 for the history of the Convention.

³⁵³ See Mustill M J "Arbitration: History and Background" (1989) Vol 6 No 2 *Journal of International Arbitration* 43 at 49. See also Graving R J "Status of the New York Arbitration Convention: Some Gaps in Coverage but New Acceptances Confirm its Vitality" (1995) 10 *ICSID Review - Foreign Investment LJ* 1 (hereinafter referred to as "Graving") at 3-4 who describes it as "[t]he mortar in the edifice of international commercial arbitration"; the 1996 Saville Report para 347; Schwebel S M "A Celebration of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1996) 12 *Arbitration International* 83-7.

³⁵⁴ See "Update on New York and ICSID Conventions" *LCIA Arbitration International Newsletter* (May 1997) 8. Recent accessions include that of Mauritius.

³⁵⁵ According to information furnished by Ian Donovan of Zimbabwe at the International Conference on the Resolution of International Trade and Investment Disputes in Africa held in Johannesburg on 6-7 March 1997, these states are Angola, the Democratic Republic of the Congo (formerly Zaire), Malawi, Namibia, Swaziland and Zambia. Mozambique is in the process of drafting legislation for the purpose of ratifying the NYC.

procedure with the agreement, or violation of public order by enforcement of the award."³⁵⁶

3.6 The obligation of contracting states under the NYC to enforce arbitration agreements is discussed in para (d) below. The issue of which awards fall under the Convention is discussed in para (b)(i) below.

3.7 It should however be noted that the Convention deals both with the recognition and enforcement of awards. For a court to enforce an award, it will obviously first have to recognise that award. However, recognition without enforcement is possible. Party X may successfully resist the claim of party Y for the price of goods allegedly sold and delivered in an arbitration held in state A. If Y subsequently institutes court proceedings against X in state B on the basis of the claim rejected in the arbitration, X will want the court in B to recognise the award for purposes of establishing the defence of *res judicata*. Recognition, on its own, without enforcement, will therefore generally be requested by the successful defendant in arbitration proceedings held in another contracting state.³⁵⁷

3.8 Although the NYC is concerned with the recognition and enforcement of awards, for a proper understanding of the operation of the Convention, it is also necessary to appreciate the differing consequences between the setting aside of an arbitral award and the refusal to enforce an award.

3.9 In respect of setting aside, the court of the country in which, or under the law of which, the award is made is exclusively competent to consider an application for setting aside. If the award is set aside, foreign courts will usually respect that decision, with the result that the setting aside normally has extra-territorial effect.³⁵⁸

³⁵⁶ See Graving 4 (footnotes omitted).

³⁵⁷ Redfern & Hunter 448-9; Van den Berg (1981) 243-4.

³⁵⁸ Van den Berg A J "Non-domestic Arbitral Awards under the New York Convention" (1986) 2 *Arbitration International* 191 (hereinafter referred to as "Van den Berg (1986)") at 199-200 states that "foreign courts are in principle bound" by the decision setting aside the award. As Paulsson points out in para 4 of his response to Discussion Paper 69, this overstates the position. Article V(1)(e) of the NYC gives the court where enforcement is sought a discretion to uphold the award (enforcement "may be refused"), notwithstanding the order of another court setting aside the award. (See also Paulsson J "May or Must Under the New York Convention: an Exercise in Syntax and Linguistics" (1998) 14 *Arbitration International* 227-30.) Moreover article VII, which is mandatory, preserves any other right which a party may have to enforce the award. However, Van den Berg A J "The Efficacy of [the] Award in International Commercial Arbitration" (1992) 58 *JCI Arb* 267 at 273 argues that, where the court with jurisdiction to set aside an award has done so, it is not possible, in principle, that courts in another country can consider the same award as still valid. The answer to this

3.10 An application for enforcement can be brought in any country where the respondent has assets. The rejection of the application does not have extra-territorial effect, because the refusal of one national court to recognise or enforce an award does not provide a ground for the refusal of recognition and enforcement of the award by the court in another foreign country.³⁵⁹

3.11 It is also important to note that the NYC can only apply to the recognition and enforcement of awards governed by a specific system of national arbitration law and cannot be used to enforce "stateless awards".³⁶⁰ The NYC differs in this respect from the Washington Convention (see Chapter 4) which provides a complete, self-contained arbitration system operating under public international law. Moreover, the NYC differs from the Washington Convention in that the former regulates only two aspects of international arbitration, the enforcement of the arbitration agreement and the enforcement of the award.³⁶¹

3.12 Before considering certain aspects of the NYC in more detail, it is first necessary to refer briefly to the existing South African legislation giving effect to the Convention and to the legislation in certain other jurisdictions which will be used as a basis for comparison.

(iii) The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977

argument is that the court where enforcement is sought, is still entitled to investigate whether the court which purported to set aside the award had jurisdiction to do so and did so on an internationally recognised ground (compare Van den Berg's discussion at 270-1 of his 1992 article of the position under French law and the European Convention on International Commercial Arbitration of 1961). The court of NYC country A where enforcement is sought is not obliged to respect a political decision by a court in NYC country B to set aside an award on internationally unacceptable grounds in a blatant attempt to protect one of its own nationals (possibly a state corporation) against whom the award was made. See also Schwartz E A "A Comment on *Chromalloy – Hilmarton, à l'américaine*" (1997) Vol 14 No 2 *Journal of International Arbitration* 125-35.

³⁵⁹ Van den Berg (1986) 199.

³⁶⁰ See Van den Berg (1986) 212 but compare Paulsson's response to Discussion Paper 69 para 4.

³⁶¹ Van den Berg (1986) 213-4.

3.13 Although South Africa acceded to the NYC with effect from 1 August 1976 without reservation,³⁶² the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, which was enacted to give effect to this accession, contains certain defects, which are discussed below. (Because of its cumbersome short title, the Act will usually be referred to below as "Act 40 of 1977".) It is important that these defects should be rectified as part of the legislation to reform South African law regarding international commercial arbitration, because knowledgeable arbitration practitioners are aware of the potential danger posed by such defects: "It is obviously prudent for one contemplating the possibility of arbitration to ascertain local conditions before relying on the bare fact of officially recorded Convention acceptance."³⁶³

3.14 The 1977 Act has been subjected to four main criticisms.³⁶⁴ These relate to (a) the definition of "foreign arbitral award", (b) the failure to include an equivalent to article II of the Convention regarding the enforcement of arbitration agreements, (c) problems with the wording of s 4 regarding the grounds on which enforcement of a foreign arbitral award may be refused and (d) the enforcement of an award in a foreign currency because of the provisions of s 2(2).

3.15 A fifth criticism is the failure to make express provision for the recognition of foreign arbitral awards as opposed to their enforcement.³⁶⁵ A final criticism is that the wording of the legislation could create the impression that the grounds on which enforcement of an award may be refused in the legislation are not exhaustive and that the court therefore has a general discretion to refuse enforcement.³⁶⁶ These criticisms will be dealt with in more detail in the context of the Law Commission's proposals for improvements to the legislation below.

3.16 Because of the substantial degree of overlap between the NYC and the UNCITRAL Model Law, it is possible to argue that detailed separate legislation

³⁶² *Hansard* 18 March 1977 col 3834; Butler & Finsen 311-2.

³⁶³ Graving 45.

³⁶⁴ See the submissions by Butler & Christie on behalf of the Association of Arbitrators in response to Working Paper 59 para 4.1

³⁶⁵ See para (a)(i) above for this distinction and para (e)(ii) for criticism of the existing South African legislation.

³⁶⁶ See para (e)(i) below.

implementing the NYC will become superfluous if South Africa adopts the UNCITRAL Model Law.³⁶⁷

3.17 Notwithstanding this overlap, we nevertheless submit that specific legislation implementing South Africa's accession to the NYC legislation should be retained for the following reasons.³⁶⁸ First, the 1977 Act was enacted pursuant to South Africa's obligations under an international treaty. Retention of separate statutory provisions equivalent to those of the 1977 Act makes it clear that these treaty obligations have been fulfilled. Secondly, some countries ratified the NYC subject to the reservation of reciprocity. A South African award may therefore possibly be treated as unenforceable in these countries if the 1977 Act is repealed and not replaced by separate legislation.³⁶⁹ Moreover, certain foreign arbitral awards qualify as NYC awards, without qualifying for enforcement under the UNCITRAL Model Law.³⁷⁰ Thirdly, several other countries when adopting the UNCITRAL Model Law have nevertheless retained their legislation giving effect to the NYC.³⁷¹

3.18 However, because of the defects in the 1977 legislation, discussed below, the Law Commission recommends that the 1977 Act should be repealed and replaced by legislation forming a separate part of a single statute which also enacts the Model Law. A consolidated Act has the advantage for foreign users that the relevant legislation is readily accessible in a single statute.

(iv) Comparative survey of certain other legislation implementing the NYC

³⁶⁷ Compare the approach of the drafters of the New Zealand Arbitration Act of 1996 discussed in para (a)(iv) below.

³⁶⁸ This approach was specifically supported by the response to Discussion Paper 69 furnished by the British Consul-General, Johannesburg, para 9.

³⁶⁹ This may occur through a superficial approach, based on a misconception of the intended effect of the South African legislation, on the part of the court in the country in which enforcement is sought. In most instances (compare the text below), the correct approach would be that specific legislation was unnecessary, because the matter is provided for by the corresponding provision of the Model Law.

³⁷⁰ See para (a)(iv) below at n 30 and para (e)(iv) below at n 74.

³⁷¹ See eg the (Australian) International Arbitration Act of 1974, as amended, Part II and sch 1, the Bermuda International Conciliation and Arbitration Act 1993 Part IV and sch 3 and the (Singapore) International Arbitration Act 1994 Part III and sch 2.

3.19 This survey considers the new legislation of 1996 in New Zealand, the new legislation in England of 1996 and the Australian International Arbitration Act 1974 (as amended). The legislation in these jurisdictions shows a divergent approach.

3.20 The following factors should be taken into account when considering these differences: whether the jurisdiction has adopted the Model Law, whether the jurisdiction has a basically monistic or dualistic approach to arbitration legislation and the drafting history of the statute.

3.21 A monistic system has been implemented in New Zealand with the UNCITRAL Model Law being applied to both domestic and international arbitrations. The drafters of the new English Arbitration Act decided not to adopt the Model Law but instead drew up their own comprehensive monistic statute, which largely repeals the existing legislation.³⁷² Australia has a dualistic system, with domestic arbitration being regulated by state statutes. The (federal) International Act of 1974 was originally implemented when Australia acceded to the NYC with effect from 26 March 1975. The Act was subsequently amended in 1989 when Australia adopted the UNCITRAL Model Law for international commercial arbitrations.³⁷³

3.22 The approach recommended by the Law Commission for South Africa differs to a greater or lesser extent from all three of the above. As in Australia, it is proposed that the Model Law should be adopted for international arbitrations only. However, it is also proposed that the existing legislation on the NYC should be repealed and replaced by improved legislation forming part of a single consolidated statute applying to international commercial arbitrations.

3.23 While adopting a basically monistic approach, the New Zealand legislation of 1996 nevertheless recognises the distinction between domestic and international arbitrations in that the provisions of the Second Schedule (containing certain provisions not found in the Model Law) apply to international arbitrations only on a contract-in basis, whereas they apply automatically to domestic arbitrations unless the parties contract out (see s 6).

³⁷² See s 107(2) and sch 4. The exceptions are not relevant for present purposes.

³⁷³ The Act was again amended in 1990 to give effect to Australia's accession to the Washington Convention on ICSID.

3.24 The New Zealand Act of 1996 includes in s 5(f) as one of the purposes of the Act 'to give effect to the obligations of New Zealand under ... the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958)' and sets out the English text of the NYC in the Third Schedule to the Act. The New Zealand Law Commission carefully considered the grounds in article 8 of the Model Law on which a court could decline to stay court proceedings to allow a dispute to be referred to arbitration, the provisions of article 35 regarding the recognition and enforcement of arbitral awards and the grounds in article 36 on which recognition and enforcement of an international arbitration award could be refused. The New Zealand Law Commission concluded that article 8 of the Model Law would give effect in New Zealand law to the NYC provisions for enforcing arbitration agreements by requiring the stay of court proceedings and by imposing the same limitations on that requirement.³⁷⁴ Similarly, the New Zealand Law Commission concluded that articles 35 and 36 would give full effect in New Zealand law to the provisions of the NYC regarding the recognition and enforcement of awards and the exclusive grounds on which recognition and enforcement may be refused.³⁷⁵

3.25 It is however necessary to consider whether article 35 of the UNCITRAL Model Law on the recognition and enforcement of arbitral awards covers all the awards to which the NYC applies if the Model Law is adopted without amendment. Article 35 concerns international arbitral awards, irrespective of the country in which they are made (article 35(1) read with article 1(1)).

3.26 However, the NYC also applies to the recognition and enforcement of an award made in a foreign country in a domestic arbitration.³⁷⁶ For example, the enforcement of an arbitral award made in England in an arbitration between two British citizens and residents where the arbitration had no international connection may subsequently be enforced against the losing party in South Africa if that party has assets there. This award might also be an award for damages in a non-commercial matter, whereas the Model Law only applies to commercial matters (see article 1(1)). This award would still be enforceable in South Africa under the NYC because South Africa did not make the commercial reservation on acceding to the Convention.

³⁷⁴ NZLC R20 paras 127 and 146.

³⁷⁵ NZLC R20 paras 143 and 146.

³⁷⁶ See Van den Berg (1981) 17-18.

3.27 The New Zealand Act does not only apply to commercial matters.³⁷⁷ Moreover, the Act applies articles 8, 35 and 36 of the Model Law to any arbitration held outside New Zealand, without apparently requiring that the arbitration be an international arbitration (see s 7). As a result, an award made in a domestic arbitration in a foreign country could still be enforced in New Zealand.

3.28 However, the same result would not be achieved in South Africa, if the Law Commission's proposal to adopt the Model Law for international commercial arbitrations only is accepted. Consequently, the provisions proposed below to replace ss 2 to 4 of Act 40 of 1977 do not merely duplicate articles 35 and 36 of the Model Law, but also apply to certain foreign awards falling outside the Model Law.

3.29 A further criticism of the New Zealand approach which can also perhaps be made, is that it is not necessarily user friendly: a party wishing to enforce a NYC award in New Zealand will find that the NYC is only referred to in s 5 ("Purposes of the Act") and then set out in a schedule. The statutory provisions required for its implementation must be sought in the general provisions of the statute.

3.30 The original portion of the Australian International Arbitration Act of 1974, enacted to implement the NYC, was amended in 1989 when the UNCITRAL Model Law was introduced,³⁷⁸ but s 7 concerning the enforcement of foreign arbitration agreements, s 8 on the recognition of foreign arbitral awards and s 9 on evidence of awards and arbitration agreements were left unaltered.

3.31 The Australian approach therefore differs from that in New Zealand in two important respects: (a) as stated above, the Model Law was adopted in Australia for international arbitrations only and (b) separate provisions for implementing Australia's obligations under the NYC were retained instead of regarding them as being unnecessary in the light of the availability of articles 8, 35 and 36 of the Model Law for this purpose.

3.32 Moreover, although articles 8, 35 and 36 of the Model Law are based on the corresponding provisions of the NYC, they contain certain minor improvements. The Australian legislature did not think it necessary to incorporate these improvements

³⁷⁷ See sch 1 article 1 which modifies article 1(1) of the Model Law by omitting "commercial" and applying the Model Law to arbitrations in general subject to ss 6, 7, 8 and 9 of the Act.

³⁷⁸ See the International Arbitration Amendment Act 1989 ss 3, 4 and 6.

into its legislation implementing the NYC. The text of the NYC is readily accessible to Australian users as it is set out in Schedule 1 to the 1974 Act.

3.33 When the United Kingdom acceded to the New York Convention in 1975, separate legislation was introduced for this purpose, namely the Arbitration Act 1975. The 1975 Act was repealed and replaced by the 1996 Act. The 1996 Act has a separate part III dealing with the recognition and enforcement of certain foreign awards and ss 100-104 deal with the enforcement of NYC awards. The equivalent to article II of the NYC and s 1 of the 1975 Act regarding the staying of court proceedings where the dispute is subject to an arbitration agreement is contained in s 9 in Part I. The grounds on which the court may refuse a stay are restricted to those contained in the NYC article II(3) (see s 9(4)). Notwithstanding the basically monistic structure of the Act, with one statute applying to both international and domestic arbitrations, the 1996 Act, as originally drafted, contained an exception in s 86, which would have given the court a wider discretion not to stay court proceedings in relation to a dispute covered by a domestic arbitration agreement, as defined in s 85, than that conferred by s 9 concerning other arbitration agreements. These provisions were not however brought into operation with the rest of the Act with the result that s 9, referred to above, applies to all arbitration agreements for purposes of court proceedings in England.³⁷⁹ Unlike the position in Australia and New Zealand, the text of the NYC is not set out in a schedule to the Act.

(b) Definitions

3.34 This section considers the definition of "award" for purposes of legislation implementing the New York Convention, with reference to the existing South African legislation and the approach in England and Australia. It also considers which court should have jurisdiction in matters relating to the NYC.

(i) Awards subject to the NYC

³⁷⁹ See Arbitration Act 1996 (Commencement No 1) Order 1996 (No 3146 of 16 December 1996) para 3. There were two reasons for this. First, the majority of respondents to the 1996 Saville Report were in favour of the same standard for a mandatory stay of court proceedings in an international arbitration applying to a domestic arbitration instead of the wider discretionary power to refuse a stay contained in s 86. Secondly, the distinction between international and domestic arbitration was incompatible with European Community law as a result of articles 6 and 59 of the Treaty of Rome. (See the 1997 Saville Report paras 47-49. See further Saville 111-2 on the policy reasons for and against applying the international standard to domestic arbitrations, which will be relevant in any debate on the revision of ss 3 and 6 of the South African Arbitration Act 42 of 1965 for domestic arbitrations.)

3.35 Article I(1) defines the awards to which the Convention should apply:

"This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought."

3.36 The Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, in endeavouring to give effect to this definition in South Africa, defines a "foreign arbitral award" as follows:

"'foreign arbitral award' means an arbitral award -

- (a) made outside the Republic; or
- (b) the enforcement of which is not permissible in terms of the Arbitration Act, 1965 ... but is not in conflict with the provisions of this Act."

3.37 Para (a) of this definition is clearly related to the first definition in article I(1) and in line with the title of the Convention which is concerned with "foreign arbitral awards". It is wider than the comparable legislation in England which refers to an award made in the territory of a state (other than the United Kingdom) which is a party to the NYC.³⁸⁰ This difference is understandable, in so far as the United Kingdom in ratifying the Convention made the reservation that it would only be applied in respect of an award made in another contracting state.³⁸¹ South Africa made no such reservation.

3.38 However, the first definition in article I(1) of the NYC is nevertheless restricted to awards made *in the territory of another state* and does not extend to "stateless" awards (also referred to as "a-national", "transnational", "de-nationalised"

³⁸⁰ See the definition "New York Convention award" in s 100(1) of the 1996 Act. "Convention award" was defined in similar terms in s 7 of the Arbitration Act 1975.

³⁸¹ Van den Berg (1981) 410, 416.

or "floating" awards). These arbitral awards are not governed by any arbitration law at all, but solely by the agreement between the parties.³⁸²

3.39 Van den Berg, after also considering the second definition in article I(1), discussed below, concludes that the NYC does not apply to stateless awards.³⁸³

3.40 The NYC only regulates two aspects of international arbitration: the enforcement of the arbitration agreement and the enforcement and recognition of arbitral awards. All other aspects, including the requirements for a valid award, are necessarily governed by some national arbitration law, normally that of the place of the arbitration.³⁸⁴ We therefore recommend that the definition in para (a) of "foreign arbitral award" should be amplified as follows to make it clear that it does not extend to "stateless" awards:

"'foreign arbitral award' means an arbitral award made *in the territory of a state other than South Africa*".

3.41 The purpose and operation of para (b) of the definition of a "foreign arbitral award" in the 1977 Act, quoted above, is unclear.³⁸⁵ Para (b) was presumably enacted to give effect to the portion of article I(1) of the NYC which refers to awards "not considered as domestic awards in the state where their recognition and enforcement are sought".

3.42 Neither England³⁸⁶ nor Australia³⁸⁷ thought it necessary to incorporate the second category referred to in article 1(1) of the Convention in their definitions of a "foreign" or "New York Convention" award. This suggests that para (b) of our

³⁸² Van den Berg (1986) 212. For a more detailed discussion, see *inter alia* Paulsson J "Delocalisation of International Commercial Arbitration: When and Why it Matters" (1983) 32 *ICLQ* 53-61.

³⁸³ Compare however Paulsson's response to Discussion Paper para 4, in addition to his article referred to in the previous footnote.

³⁸⁴ Van den Berg (1986) 213-4, who finds support for his conclusion in the wording of article V(1)(a), (d) and (e) of the NYC.

³⁸⁵ Cf Butler & Finsen 313; Jacobs M S *The Law of Arbitration in South Africa* Juta Cape Town 1977 164.

³⁸⁶ Arbitration Act 1996 s 100(1). The comment is also true of the repealed Arbitration Act 1975 s 7(1).

³⁸⁷ International Arbitration Act of 1974 s 3(1).

existing definition is superfluous. Nevertheless, the adoption of the UNCITRAL Model Law in South Africa for international arbitrations only would give meaning to the phrase "not considered as domestic awards" in the NYC, namely awards in international arbitrations held in South Africa. However, such awards would be covered by article 35 of the Model Law in the first schedule to the proposed draft legislation. Therefore, in the context of a statute which implements the Model Law as well as the NYC, para (b) of the definition is not necessary.

3.43 An examination of the reason for the inclusion of the definition of "arbitral award" in article I(1) of the NYC supports this conclusion. Van den Berg states that the second category was included in the Convention to cover the possibility *where the country in which the arbitration takes place* allows "parties to agree that the award is to be governed by an arbitration law different from the law of the country in which the award is to be made".³⁸⁸ For example, parties could agree to arbitrate in France, but under German arbitration law. If enforcement of the award is sought in France, the French courts would apply the NYC, because the award would not be considered by them to be a domestic award.

3.44 Nevertheless, parties are in practice unlikely to arbitrate in one country under the arbitration law of another because of the complications involved.³⁸⁹ If the Law Commission's recommendation is accepted that parties to an international arbitration to be held in South Africa should not be allowed to contract out of the Model Law,³⁹⁰ this possibility would not exist under South African law. Para (b) of the present legislation should therefore be omitted from the proposed consolidated legislation, as serving no useful purpose.³⁹¹

(ii) The place where an award is made

3.45 In terms of the proposal in para (b)(i) above, the provisions of the NYC will be applied by the South African legislation to awards made outside South Africa. It

³⁸⁸ Van den Berg (1981) 23. See also Van den Berg (1981) 24-5.

³⁸⁹ Van den Berg (1981) 28; Van den Berg (1986) 200-1. Compare however *Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd* 1983 2 SA 630 (W) 639C-D for an instance where the parties agreed to an ICC arbitration in Switzerland under South African procedural law.

³⁹⁰ See Chapter 2 above para 2.280.

³⁹¹ See also Van den Berg (1986) 214 who concludes that the first criterion seems to be the only relevant one in practice.

remains to consider how the place where an award is made is determined for purposes of the Convention.

3.46 This question arose in the English case of *Hiscox v Outhwaite (No 1)*.³⁹² An arbitration took place between two English parties in London pursuant to an arbitration agreement providing for arbitration in London under English law. The arbitrator was an English barrister, resident in France. Although the arbitration took place in London and the award was made available to the parties for collection there, the award was signed by the arbitrator in Paris. The House of Lords held that in the context, the word 'made' should be given its ordinary, natural and common construction. The award is simply a written instrument which is made when and where it is perfected and it is perfected when it is signed. The award was therefore made in Paris, making it a Convention award.³⁹³

3.47 However, in the context of an international arbitration, the place of signature, or the last affixed signature, where the tribunal consists of more than one arbitrator, is a matter of pure convenience. It is unreasonable to put the parties to the expense of the arbitrators having to return to the place where the arbitration was held to sign the award.

3.48 Writers on arbitration distinguish between two concepts. First, there is the place or seat of the arbitration in the legal sense, usually determined by the parties in their arbitration agreement, which determines the law applicable to the arbitration. Secondly, there is the place of arbitration in the physical sense, being the place or places where the hearing is held, evidence received by the arbitrators and where they deliberate on and sign their award. Writers on the NYC therefore reject the view in the *Hiscox* case and are of the opinion that the place where an award is made should be determined with reference to the seat of the arbitration in the legal sense.³⁹⁴

3.49 The distinction between the place of the arbitration in the legal and physical sense is recognised in the UNCITRAL Model Law. Article 20(1) deals with the determination of the place of arbitration in the legal sense, while article 20(2) permits

³⁹² [1991] 3 ALL ER 641 (HL).

³⁹³ At 646e-h.

³⁹⁴ See eg Van den Berg (1986) 202; Mann F A "Where is an Award 'Made'?" (1985) 1 *Arbitration International* 107 at 108; Reymond C "Where is an Arbitral Award Made?" (1992) 108 *LQR* 1 at 2-5.

the tribunal to meet at other convenient places for hearing evidence, inspecting property or holding consultations among its members. The Model Law avoids the problem which arose in the *Hiscox* case by providing that the award shall state the place of arbitration as determined by article 20(1) and that the award shall be deemed to have been made at that place.

3.50 The English legislature has now also taken corrective action to reverse the decision in the *Hiscox* case.³⁹⁵

3.51 We therefore recommend that the definitions section (s 16) in Chapter 3 of the Draft Bill should contain a provision determining where the award is made with reference to the relevant provisions of the Model Law:

"For purposes of this Chapter an award shall be deemed to be made at the place of arbitration determined in accordance with the provisions of articles 20(1) and 31(3) of the Model Law."³⁹⁶

(iii) The court having jurisdiction

3.52 "Court" is defined in s 1 of Act 40 of 1977 as a court of a provincial or local division of the Supreme Court of South Africa. This definition has been amended in line with the description of the courts in the final Constitution.³⁹⁷ Consideration could also possibly be given to giving a magistrate's court jurisdiction to enforce awards for amounts falling within its jurisdiction.

(c) *Application of New York Convention to South Africa*

³⁹⁵ S 100(2)(b) of the Arbitration Act 1996 provides that for purposes of the definition of a "New York Convention award" in s 100(1), an award shall be determined as having been made at the seat of the arbitration, as determined by s 3 (see also the 1996 Saville Report paras 253 and 349-54 and s 53). S 3 goes further than article 20(1) of the Model Law which provides for the seat of the arbitration to be determined by the parties (or by a third party authorised by the parties (article 2(d)) or by the tribunal if the parties fail to do so. Failing such a designation, s 3 allows the seat to be objectively determined with reference to the parties' agreement and all the relevant circumstances.

³⁹⁶ For the sake of uniformity, the wording used here is that of article 31(3) of the Model Law. S 53 of the English Arbitration Act of 1996 uses the wording "any award ... shall be treated as made there".

³⁹⁷ See the Constitution of the Republic of South Africa 1996 ss 166(c) and 169.

3.53 SAICE, in its response to Discussion Paper 69, pointed out that whereas Chapter 2 of the Draft Bill annexed to the Discussion Paper³⁹⁸ "introduced the Model Law and explained its relevance, Chapter 3 [of the Draft Bill] does not appear to introduce and explain the relevance of Schedule 3" containing the NYC.³⁹⁹

3.54 This defect has been remedied by including a new definition, "Convention" in s 16(1) and by adding a new s 17(1), which provides:

"Subject to the provisions of this Chapter, arbitration agreements and foreign arbitral awards shall be recognised and enforced in South Africa as required by the Convention."

3.55 The new provision is comparable to that in s 23(1) of the Draft Bill which gives certain provisions of the Washington Convention the force of law in South Africa.⁴⁰⁰ However, there is a deliberate difference in wording. The provisions of the NYC apply, subject to the provisions of Chapter 3 of the Draft Bill. Therefore, for example, to the extent the definition of "arbitration agreement" in the Draft Bill may be wider than that in the Convention,⁴⁰¹ the definition in the Draft Bill applies in preference to that in the Convention. Also, South Africa made no reservations when acceding to the NYC, so parts of the NYC as contained in Schedule 3 do not apply in South Africa. The purpose of Chapter 3 is to give effect to South Africa's treaty obligations under the NYC by applying the provisions of the Chapter.

(d) *Enforcement of arbitration agreements*

3.56 A strange omission from Act 40 of 1977 is any equivalent of article II of the NYC regarding the enforcement of arbitration agreements.⁴⁰² Although the enactment of article 8 of the Model Law will largely rectify this omission, there is still arguably a need for a provision corresponding to article II of the NYC in the 1977 Act in compliance with South Africa's treaty obligations.

³⁹⁸ See ss 2(1) and 3, equivalent to ss 5(1) and 6 of the Draft Bill in Annexures E and F to this Report.

³⁹⁹ SAICE Paper 1 para 3.5.

⁴⁰⁰ See further ch 4 para 4.72 below.

⁴⁰¹ See para 3.62 below.

⁴⁰² Butler & Finsen 311-312.

3.57 As stated above,⁴⁰³ neither England nor New Zealand considered a separate provision to be necessary. New Zealand relies on article 8 of the Model Law and England on s 9 of the Arbitration Act of 1996, which is in a different part of the Act from that dealing with the enforcement of NYC awards. Australia, in adopting the Model Law, nevertheless retained a separate provision (s 7) dealing with the enforcement of foreign arbitration agreements, as defined in s 7(1). There is therefore no uniform practice in this regard.

3.58 It is stated below (see para (e)(iv)) that separate provisions for the enforcement of NYC awards were justified, because certain foreign arbitral awards covered by the NYC fall outside the UNCITRAL Model Law. In Discussion Paper 69, it was stated that the same argument did not appear to apply in respect of arbitration agreements covered by article II of the NYC and article 8 of the Model Law. It was therefore concluded that a section in Chapter 3 of the draft legislation on the enforcement of the NYC which duplicates article 8 of the Model Law appeared to be unnecessary.

3.59 Paulsson,⁴⁰⁴ however, correctly points out that article 8 of the Model Law will not apply to an arbitration agreement providing for arbitration outside South Africa in respect of (a) a domestic as opposed to an international dispute or (b) a non-commercial matter. It is therefore necessary to include a provision in Chapter 3 of the Draft Bill to deal with these situations.

3.60 This has been done in s 17(2) which provides:

"The provisions of article 8 of the Model Law shall apply *mutatis mutandis* to arbitration agreements referred to in subsection 1."

3.61 S 17(2), quoted above, attempts to deal with the problem raised by Paulsson without repeating the substance of Article II of the NYC.⁴⁰⁵ This approach endeavours to avoid any complications from differences in wording between article 8 of the Model Law and article II of the NYC and different definitions of an "arbitration

⁴⁰³ See Chapter 3 para (a)(iv).

⁴⁰⁴ In his response to Discussion Paper 69 para 5.

⁴⁰⁵ This appears to be a neater method than that adopted in the (Australian) International Arbitration Act 1974 s 7, which retains the provision in the original Act, notwithstanding other revisions necessitated in 1989 when Australia adopted the Model Law. The Australian approach was partly necessitated by the fact that Australia, unlike South Africa, made the "reciprocity" reservation referred to in article I(3) of the NYC when acceding to the treaty.

agreement". S 17(2) is only required for arbitration agreements providing for arbitration outside South Africa in relation to foreign domestic or non-commercial disputes. Where the NYC and the Model Law both apply, it will be unnecessary for a party to make an election before approaching a South African court, because article 8 of the Model Law is applied to both situations.

3.62 Notwithstanding the additions to the definition of "arbitration agreement" in article 7 of the Model Law contained in s 2(1) of the Draft Bill⁴⁰⁶ and the application of the amplified definition by s 2(1) to Chapter 3 (especially s 17 thereof), it is at least arguable that the Law Commission's proposed wider definition of an "arbitration agreement" is in any event not in conflict with article II of the NYC. Unlike article 7 of the Model Law, the definition in the English text of article II(2) of the NYC contains the words "shall include", which appears to indicate that the definition was not intended to be exhaustive.⁴⁰⁷

(e) ***Recognition and enforcement of arbitral awards***

(i) Extent of court's power to refuse recognition or enforcement

3.63 S 2(1) of Act 40 of 1977 provides that "[a]ny foreign arbitral award **may**, subject to the provisions of sections 3 and 4, be made an order of court by any court" (our emphasis). S 3 deals with how the arbitration agreement and award must be proved for purposes of the application for enforcement and s 4 contains the exclusive list of grounds on which enforcement may be refused by a court.

3.64 S 2(1) is apparently intended to give effect to article III of the NYC. Article III provides that each contracting state "shall recognize arbitral awards as binding and enforce them" subject to the conditions in articles IV to VI. It further provides that the procedural requirements and fees for enforcement shall not be substantially more onerous than those pertaining to the enforcement of domestic awards. The quoted portion of article III imposes an obligation on a contracting state to recognise an award.⁴⁰⁸

⁴⁰⁶ See ch 2 paras 2.131-2.135 above for the reasons for these additions.

⁴⁰⁷ Compare Kaplan (1996) 42; *Zambia Steel and Building Supplies Ltd v James Clark & Eaton Ltd* [1986] 2 Lloyd's Rep 225 CA at 234 per Ralph Gibson LJ.

⁴⁰⁸ Van den Berg (1981) 243.

3.65 The portion of s 2(1), quoted above, creates the impression that a South African court has a discretion whether or not to recognise the award, whereas in terms of the Convention, the court is obliged to recognise it as binding, subject to articles IV to VI.

3.66 The use of the word "may" in the equivalent provision of the Australian legislation (s 8(2) of the International Arbitration Act of 1974) recently influenced an Australian court to conclude⁴⁰⁹ that it had a general discretion whether or not to enforce a foreign award.⁴¹⁰

3.67 In Discussion Paper 69, it was stated that this problem could not arise under the English Arbitration Act of 1996.⁴¹¹ This statement was based on s 101(1), which provides that a NYC award shall be recognised as binding on the persons between whom it is made. Moreover, s 103, which contains the article V grounds on which recognition and enforcement may be refused, is introduced by s 103(1), which provides that recognition or enforcement of a NYC award "shall not be refused" except on those grounds. However, s 101(2) of the English Act provides that a NYC award "may, by leave of the court, be enforced in the same manner as a judgment ... to the same effect".

3.68 The Law Commission proposed in Discussion Paper 69 that the wording of the existing South African legislation should be modified to deal with these problems. S 9(1) of the Draft Bill annexed to the Discussion Paper therefore provided that a NYC award "shall be recognised as binding on the persons as between whom it was made". However, s 9(2) stated that a NYC "award, *may*, on application, be made an order of court, and *may* then be enforced in the same manner as any judgment or order to the same effect" (our emphasis). S 9(2) was based on s 101(2) of the English Arbitration Act,⁴¹² referred to above. At the Cape Town workshop on the draft report, it was

⁴⁰⁹ The second ground on which the court relied could also be raised in South Africa. Article V of the NYC provides that recognition and enforcement may be refused *only* on the grounds contained in article V. Both the Australian legislation s 8(5) and the South African legislation s 4(1) enacted to give effect to article V omit the word "only".

⁴¹⁰ See *Resort Condominiums International Inc v Bolwell* (1993) 118 ALR 655 SC (Qld) 675. It has been said that this aspect of the judgment "will meet with near universal disapproval" (see Pryles M "Interlocutory Orders and Convention Awards: the Case of *Resort Condominiums v Bolwell*" (1994) 10 *Arbitration International* 385 at 393).

⁴¹¹ See Discussion Paper 69 para 3.58.

⁴¹² This provision was based on s 66(1) of the English Act of 1996, regarding the enforcement of awards made in England, not on the New York Convention itself.

asked⁴¹³ whether the first "may" should be replaced by "shall", because the word "may" contradicted the rest of the chapter by creating the impression that the court has a discretion whether or not to enforce the award. This concern appears to be well founded. The Commission therefore proposes that s 9(2) of the original Draft Bill should be replaced by s 18(2), reading as follows:

"(2) Subject to the provisions of sections 19, 20 and 21, a foreign arbitral award shall [~~may~~], on application, be made an order of court and may then be enforced as any judgment or order to the same effect."⁴¹⁴

(ii) Need to deal with recognition and enforcement

3.69 The NYC according to its title deals with both the recognition and enforcement of foreign arbitral awards. Although a court granting an order for enforcement of an award must necessarily first recognise the award to do so, there can be instances where recognition is sought without an order for enforcement.⁴¹⁵

3.70 The South African legislation implementing the NYC however only refers to the "recognition" of awards, as opposed to their enforcement, in its short and long titles and the body of the statute deals only with the enforcement of awards.

3.71 The Australian International Arbitration Act of 1974 also deals mainly with the enforcement of awards, but it at least contains a provision declaring a NYC award to be *binding for all purposes* on the persons as between whom it is made.⁴¹⁶ This provision ensures the recognition of an award even in the absence of an application for its enforcement.

⁴¹³ By Adv M S Wandrag of the University of the Western Cape.

⁴¹⁴ The proposed change better reflects our intention to give effect to the NYC: if the applicant for enforcement complies with s 19 of the Draft Bill annexed to this report, then the court must enforce the award unless one of the grounds in s 20 is present, whereupon the court has a discretion to refuse enforcement. S 21 confirms that chapter 3 does not affect any other right which a party may have to enforce the award.

⁴¹⁵ See para (a)(ii) n 11 above.

⁴¹⁶ See the (Australian) International Arbitration Act of 1974 s 8(1). The repealed English Arbitration Act of 1975 s 3(2) contained a similar provision which has been retained, with minor improvements, as s 101(1) of the English Arbitration Act of 1996. Compare too article III of the NYC.

3.72 The English Arbitration Act of 1996 goes still further by also referring to "recognition or enforcement" in the sections dealing with the evidential requirements and the grounds on which recognition or enforcement may be refused.⁴¹⁷ In this respect the 1996 Act promotes clarity and moves closer to the wording of the relevant articles of the NYC.

3.73 We therefore recommend that the wording of the South African legislation implementing the NYC should be amended in this respect along the lines of the English Arbitration Act of 1996.

(iii) Evidential requirements

3.74 S 3 of Act 40 of 1977 deals with the evidential requirements to prove the existence of the foreign arbitral award and the arbitration agreement in terms of which the award was made, and for their translation, if necessary, into one of the country's official languages. This provision corresponds to article IV of the NYC. In Discussion Paper 69 only one change to the substance of this provision was recommended.⁴¹⁸ Pursuant to the recommendations now contained in the previous paragraph, it was recommended that the wording of this provision should be amplified to cover the situation where the recognition of an award is sought, without an application for enforcement.

3.75 However, Karrer, in his response to Discussion Paper 69, pointed out that for purposes of enforcement of the award, difficulties may be experienced in locating the original arbitration agreement. S 19(a)(ii) of the Draft Bill does permit the use of a certified copy. Nevertheless, the certified copy referred to in s 19(a)(ii) obviously requires the original agreement to be exhibited to the certifier. He suggested that, following the practice in Switzerland, there was a need for greater flexibility in this regard.

3.76 To cover this and similar situations, it is therefore recommended that s 19 should be amplified to allow the court where enforcement is sought, in its discretion, to accept other documentary evidence as to the existence of the foreign arbitral award and arbitration agreement as sufficient proof in appropriate circumstances. This would, for example, allow the acceptance of an uncertified photocopy of the

⁴¹⁷ Ss 102(1) and 103.

⁴¹⁸ See Discussion Paper 69 para 3.65.

agreement or award where the authenticity of the copy is not challenged by the respondent in the enforcement proceedings.

(iv) Grounds on which recognition or enforcement may be refused

3.77 The grounds on which recognition and enforcement of an arbitral award can be refused under article 36 of the UNCITRAL Model Law correspond to those on which recognition and enforcement can be refused under article V of the NYC.⁴¹⁹ Article 36 has an even wider application than article V of the NYC and its equivalent in Act 40 of 1977, namely s 4(1), in that article 36 applies not only to foreign arbitral awards but to international awards made in South Africa. It is therefore possible to argue that the provisions of s 4(1) of the 1977 Act are superfluous.

3.78 A similar argument could be made regarding the provisions in the 1977 Act regarding the enforcement of foreign awards, namely ss 2 and 3, in the light of article 35 of the UNCITRAL Model Law.

3.79 However, as has been pointed out above, the NYC applies to certain foreign awards not covered by the Model Law, namely a foreign award in a domestic arbitration and a foreign award in a non-commercial matter. Therefore, in view of the proposal to adopt the Model Law for international commercial arbitrations only, the retention of provisions equivalent to ss 2 to 4 of Act 40 of 1977 is necessary to give effect to South Africa's obligations under the NYC.⁴²⁰

3.80 S 4(1)(b)(i) and s 4(1)(b)(iv) of Act 40 of 1977 should be amended to correspond exactly to the equivalent provisions of art V of the NYC.⁴²¹ For example, s 4(1)(b)(i) empowers the court to refuse enforcement of an award if the arbitration agreement "is invalid under the law to which the parties have subjected it *or* of the country in which the award was made" (our emphasis). The equivalent portion of article V(1)(a) reads "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" (our emphasis). Under the NYC the law of the place where the award was made is only relevant to test the validity of the arbitration

⁴¹⁹ A/CN.9/264 78.

⁴²⁰ See the discussion of the New Zealand legislation in para (a)(iv) above and also para (a)(iii) above at n 24.

⁴²¹ Butler & Finsen 314 n 136 and 315 n 139.

agreement if the parties have not indicated the legal system which will govern its validity. The South African version appears to provide two possible grounds for attacking the validity of the agreement, instead of the single ground in the NYC. The proposed amendment is also desirable to achieve uniformity with the UNCITRAL Model Law.⁴²²

(f) *Other matters*

(i) Preservation of other bases for recognition

3.81 Article VII of the NYC provides *inter alia* that the NYC does not deprive any interested party of "any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon".

3.82 The provision therefore permits the enforcement of the award on another basis even if the conditions for enforcement under the NYC are not met. Furthermore, the party seeking enforcement is not deprived of more favourable recognition or enforcement procedures under the national law of the state where enforcement is sought.⁴²³

3.83 S 104 of the English Arbitration Act of 1996⁴²⁴ accordingly provides that nothing in Part III of the Act (which deals with the enforcement of NYC awards) affects any right to rely on or to enforce a NYC award at common law or under the ordinary provision for enforcement in part I of the Act (ie s 66).

3.84 Although Act 40 of 1977 contains no such provision, the South African courts also have the power to enforce a foreign arbitral award under the common law (ie apart from their statutory powers) as a contractual obligation.⁴²⁵

⁴²² Article 36(1)(a)(i) and (iv).

⁴²³ Van den Berg (1981) 82-3.

⁴²⁴ See also s 6 of the 1975 Act.

⁴²⁵ *Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd* 1977 3 SA 1020 (T) 1038H. In view of this finding it was unnecessary for the court to consider whether the foreign award (made in London) was also enforceable under s 31 of the Arbitration Act 42 of 1965 (at 1040F).

3.85 As the NYC is intended to facilitate the recognition and enforcement of foreign arbitral awards, rather than to exclude other remedies which parties may have to achieve these ends, the Law Commission recommends that the proposed revised South African legislation to implement the NYC should, in the interests of legal certainty, contain an express provision (s 21) in this regard:

"Nothing in this Chapter affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law."

(ii) Enforcement of awards in a foreign currency

3.86 S 2(2) of Act 40 of 1977 provides that where an award expressed in a foreign currency is made an order of court under the Act, the award is to be converted into rands at the exchange rate prevailing *at the date of the award*, not the date of the payment.

3.87 This provision has no equivalent in the Convention itself and should be repealed: it undermines the effect of an arbitral award in a foreign currency, if there is a substantial period between the date of the award and payment. Furthermore, the conversion of the award in a foreign currency into rands at the date of the award instead of the date of payment could indirectly affect the arbitral tribunal's award of interest, to the advantage of one party and the detriment of the other.⁴²⁶

(iii) Inclusion of the text of the Convention in a schedule

3.88 When South Africa acceded to the NYC, its text was published in the *Government Gazette*.⁴²⁷ However, some other countries adopting the Convention have included its English text in a schedule to the legislation.⁴²⁸ It is submitted that this should be done in a new South African statute on international arbitration, as a means of making the text of the Convention readily accessible to interested South African parties.⁴²⁹

⁴²⁶ Butler (1995) 291, 318 and 322.

⁴²⁷ See GN 1028 in *Government Gazette* 5160 of 18 June 1976 at 11-12, together with the corrections in *Government Gazette* 5208 of 9 July 1976 at 9.

⁴²⁸ See eg the (Australian) International Arbitration Act 1974 sch 1; the (New Zealand) Arbitration Act 1996 s 5(f) and sch 3; the Bermuda International Conciliation and Arbitration Act 1993 s 2 and sch 3; the (Singapore) International Arbitration Act 1994 s 27(1) and sch 2.

⁴²⁹ Support for this recommendation was received from SAICE in its response to Discussion Paper 69, Paper 1 para 3.5.

(g) *Other legislation relevant to enforcement of foreign arbitral awards*

3.89 The ability of a party to enforce a foreign arbitral award in South Africa under the New York Convention could presently be excluded by the Protection of Businesses Act 99 of 1978. In terms of s 1 of this Act, no judgment *or arbitral award* made outside South Africa shall be enforced inside South Africa without the consent of the Minister of Trade and Industry, if the judgment or award arose from an act or transaction "connected with the mining, production, importation, exportation, refinement, possession, use or sale of or ownership to any matter or material, of whatever nature,⁴³⁰ whether within, outside, into or from [South Africa]". The provision applies notwithstanding any other law or legal rule to the contrary. It was apparently originally enacted to protect South African businesses "from the far-reaching tentacles of American anti-trust legislation".⁴³¹

3.90 The Act was subsequently amended in 1984 by the insertion of additional provisions to restrict the enforcement of judgments from the United States in product-liability cases, particularly against South African asbestos producers. However these provisions do not apparently apply to foreign arbitral awards.⁴³²

3.91 However, the Act was again amended in 1987 to provide that no judgment or arbitration award arising from a transaction of the type described above can be enforced, with or without the Minister's consent if the judgment or award is connected with any liability arising from any bodily injury to any person resulting from the consumption or use of or exposure to any natural resource of South Africa, unless the same liability would have arisen under South African law.⁴³³ Once again, this provision prevents the recovery of multiple or punitive damages, but compensatory damages would be recoverable with the Minister's consent, under s 1.

⁴³⁰ "Matter or material" has been interpreted as referring to raw materials or substances from which physical things are made. A transaction involving the charter or possession of a ship (as a manufactured item) has therefore been held to fall outside the section (see *Tradex Ocean Transportation SA v MV Silvergate (or Astyanax)* 1994 4 SA 119 (D) 121A).

⁴³¹ See Forsyth C F *Private International Law* 3 ed 1996 402 (hereinafter referred to as "Forsyth"). See generally Forsyth 402-4 regarding the Protection of Businesses Act.

⁴³² See ss 1A-1C.

⁴³³ See s 1D.

3.92 Although the wording of these sections is unnecessarily wide, they may be regarded as a statutory expression of public policy aimed at preventing the enforcement of certain judgments or awards providing for punitive or multiple damages against South African businesses.⁴³⁴ In the two reported cases to date, the provisions have been restrictively interpreted by the courts.⁴³⁵

3.93 In a case dealing with an application for the enforcement of a judgment for punitive damages falling *outside* the ambit of the Protection of Businesses Act, it was held in *Jones v Krok*⁴³⁶ that the mere fact that an award of damages is made on a basis not recognised in South Africa does not necessarily make the award contrary to public policy. Although the principle behind the award of punitive damages is not necessarily unconscionable,⁴³⁷ the court held that the award of double the amount claimed as punitive damages because of the defendant's reprehensible conduct was so excessive and exorbitant as to render it contrary to public policy in South Africa.⁴³⁸

3.94 This decision illustrates that our courts are quite capable of dealing with the enforcement of foreign judgments and arbitral awards for the payment of punitive damages on the basis of public policy, without the need for statutory shields which would probably be perceived by foreign parties trading with South African businesses as providing excessive protection.⁴³⁹ In the context of foreign arbitral awards, the approach of the court in *Jones v Krok*, discussed above, shows that the matter can be dealt with satisfactorily under the public policy defence in the Draft Arbitration Bill.⁴⁴⁰

⁴³⁴ See Forsyth 402.

⁴³⁵ In addition to the *Tradex* case referred to in n 56 above, see also *Jones v Krok* 1996 1 SA 504 (T) at 509I-510G.

⁴³⁶ At 515H.

⁴³⁷ At 516E.

⁴³⁸ At 517G-H. Leave to take the judgment on appeal to the Appellate Division was subsequently granted (see *Jones v Krok* 1996 2 SA 71 (T)).

⁴³⁹ Lawyers in the United States active in the field of international trade law can be expected to be aware of the problem as it is discussed in Williams V C, Hannay W M, Littenberg M R & Robinson L G (eds) *A Lawyer's Guide to Doing Business in South Africa* American Bar Association New York 1996 at 159-60.

⁴⁴⁰ See s 20(2)(a)(ii) (which corresponds to s 4(1)(a)(ii) of the current Act 40 of 1977) and Schedule 1 articles 34(2)(b)(ii) and 36(1)(b)(ii).

3.95 It appears that the necessity for the Protection of Businesses Act 99 of 1978, at least in its present form, needs to be reassessed. Pending this reassessment it was proposed in Discussion Paper 69 that the references to arbitral awards in the Act should be omitted. The Law Commission invited comments on this issue.⁴⁴¹ Only two respondents to the Discussion Paper specifically referred to this matter.⁴⁴² Both supported the Law Commission's recommendation. Draft legislation to give effect to the recommendation is contained in Annexure G.

(h) Summary of recommendations

3.96 The Law Commission recommends that the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 should be repealed and replaced by legislation forming a separate Chapter of comprehensive legislation dealing with international arbitration.

3.97 It will be necessary to define which awards are subject to this Chapter of the legislation. The Chapter will apply to foreign arbitral awards. An award will be deemed to be made for this purpose at the seat of the arbitration, irrespective of where the award is actually signed.

3.98 A separate provision should be included in this Chapter (corresponding to article II of the NYC) to provide for the enforcement of certain arbitration agreements, which are not covered by article 8 of the Model Law.

3.99 This Chapter of the legislation must deal expressly with both the recognition and enforcement of foreign arbitral awards and rectify certain other defects in the wording of the existing legislation regarding the grounds on which recognition and enforcement may be refused.

3.100 It is also recommended that the court should have the discretion to accept other documentary evidence in lieu of that required by the NYC for the enforcement of arbitral awards in appropriate circumstances.

3.101 It must be expressly provided that the machinery for recognising and enforcing awards in this Chapter is in addition to any other right which a party may have to achieve that object.

⁴⁴¹ See Discussion Paper 69 para 3.84.

⁴⁴² The Department of Justice para 4; Paulsson para 6 who regarded the recommendation as most desirable.

3.102 The provision in s 2(2) of Act 40 of 1977 regarding awards in a foreign currency should be repealed.

3.103 The references to arbitral awards in the Protection of Businesses Act 99 of 1978 should be deleted, because the matters to which it refers appear to be adequately provided for by the public policy defence in the NYC.

3.104 The English text of the NYC should be contained in a schedule to the new Act to facilitate access to its wording by South African parties and their lawyers.

CHAPTER 4

THE WASHINGTON CONVENTION OF 1965

(a) Introduction

4.1 This chapter is based on chapter 4 of Discussion Paper 69. It first sets out the purpose and special features of the Washington Convention. It then considers the degree of international acceptance achieved by the Convention and explains the purpose of the so-called Additional Facility. Thereafter, the benefits for South Africa from ratifying the Convention and the financial implications of ratification are discussed.

4.2 The arguments in favour of South Africa ratifying the Convention are strongly persuasive. Although the Law Commission's recommendation to this effect elicited comparatively little comment from respondents to Discussion Paper 69, those who did comment were all in favour of the Law Commission's proposals.⁴⁴³

4.3 Since the Discussion Paper was prepared, the Law Commission has had the benefit of considering the legislation enacted to give effect to Zimbabwe's ratification of the Washington Convention.⁴⁴⁴ Comments on this legislation have been included in the concluding portions of the Chapter dealing with proposed draft legislation to implement South Africa's proposed ratification of the Convention.

(b) Purpose and special features of the Washington Convention

4.4 The purpose of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the Washington Convention) of 1965 largely appears from its title.

4.5 The Convention established a "specialized autonomous and self-contained arbitration system"⁴⁴⁵ to resolve an investment dispute between a Contracting State

⁴⁴³ See the responses of the Association of Arbitrators, the Department of Foreign Affairs para 5, the Department of Justice para 2, Karrer, SAICE Paper 1 para 2.4 and Paper 2 para 4.1.

⁴⁴⁴ The Arbitration (International Investment Disputes) Act 16 of 1995.

⁴⁴⁵ See Broches A "Arbitration under the ICSID Convention" *News from ICSID No 1* (1991) 1 (hereinafter referred to as "Broches (1991)").

(ie a state which is a party to the Convention) or government entity of that state and a natural or juristic person which is a non-government entity and a national of another Contracting State.⁴⁴⁶

4.6 Article 1 of the Convention established the International Centre for Settlement of Investment Disputes ("ICSID"), which has its seat at the principal office of the World Bank (article 2) in Washington DC, to administer this arbitration and conciliation system.

4.7 It has been said that the paramount objective of ICSID, like that of the World Bank, is to promote a climate of mutual confidence between states and investors thereby increasing the flow of resources to developing countries under reasonable conditions.⁴⁴⁷

4.8 In order to evaluate properly the possible benefits for South Africa from ratifying the Washington Convention, it is first necessary to consider the special features of the arbitration system established by the Convention.

4.9 ICSID, being the creation of an international treaty, creates a unique arbitration system operating under public international law and independently of national procedural or arbitration laws.

4.10 In a situation where a private investor, situated in State A, enters into an investment contract with State B, neither party will be keen to resolve any dispute by litigation in the other party's state courts. Ordinary international commercial arbitration, even under the auspices of an organisation like the ICC, still takes place under a national system of arbitration law and is subject to the supervisory powers of the courts in the country where that arbitration takes place. Moreover, the New York Convention, discussed in Chapter 3 above, does not apply to the enforcement of

⁴⁴⁶ See Broches (1991) 1-2.

⁴⁴⁷ See Delaume G R "ICSID Arbitrations" in Lew J D M (ed) *Contemporary Problems in International Arbitration* Centre for Commercial Law Studies Queen Mary College London 1986 (hereinafter referred to as "Delaume") 23; El-Kosheri A S "ICSID Arbitration and Developing Countries" (1993) 8 *ICSID Rev - Foreign Investment LJ* (hereinafter referred to as "El-Kosheri") 104-5. See also the preamble to the Convention: "[c]onsidering the need for international cooperation for economic development and the role of private international investment therein".

stateless awards, but only to awards which are governed by a specific national arbitration law.⁴⁴⁸

4.11 In order for ICSID to achieve the high degree of acceptance among both states and private investors which it has (see further para 4(c) below), it was necessary for the Washington Convention and the arbitration rules made thereunder by ICSID to maintain a careful balance between the interests of investors and those of Contracting States.⁴⁴⁹

4.12 This balance is demonstrated *inter alia* by the special features of ICSID discussed below. These special features are (a) jurisdiction; (b) the self-contained nature of ICSID arbitrations and (c) the procedure for the recognition and enforcement of an ICSID arbitral award.

(i) Jurisdiction

4.13 There are three requirements before ICSID will have jurisdiction to administer the arbitration of a dispute. These requirements relate to consent, the identity of the parties and the nature of the dispute.⁴⁵⁰

4.14 A Contracting State does not agree to submit any dispute falling within the Convention to arbitration by ICSID merely by ratifying the Convention. Article 25 requires the parties to give their specific written consent to the submission of the dispute to arbitration. Consent has been referred to as the "cornerstone of the jurisdiction of the Centre".⁴⁵¹ When the parties have given their consent, no party may withdraw its consent unilaterally (article 25(1)).

⁴⁴⁸ Van den Berg (1986) 213.

⁴⁴⁹ Delaume 24. Osode P C "State Contracts, State Interests and International Commercial Arbitration: a Third World Perspective" (1997) 30 *CILSA* 37 at 55-57 is however of the view that certain features of the Convention still leave the balance tilted in favour of the foreign investor at the expense of a Contracting State from the Third World. Compare Agyemang A A "African States and ICSID Arbitration" (1988) 21 *CILSA* 177 (hereinafter referred to as "Agyemang") at 187-188 for a summary of the factors which account for the strong support for the Convention among African countries.

⁴⁵⁰ Delaume 25. For a detailed discussion of ICSID's jurisdiction, see Lamm C B "Jurisdiction of the International Centre for Settlement of Investment Disputes" (1991) 6 *ICSID Rev - Foreign Investment LJ* 462-83 (hereinafter referred to as "Lamm").

⁴⁵¹ Lamm 463; Hirsch M *The Arbitration Mechanism of the International Center for the (sic) Settlement of Investment Disputes* Martinus Nijhoff Dordrecht 1993 (hereinafter referred to as "Hirsch") 47.

4.15 The consent of the state party may be given in one of three ways: (a) in the internal legislation of that state; (b) in a bilateral investment treaty between that state and the home state of the private investor; or (c) in an agreement between the state party and the private investor.⁴⁵²

4.16 The requirements to qualify as a party to an ICSID arbitration appear from article 25. The state party may not only be the Contracting State, but may also include "any constituent subdivision or agency of a Contracting State designated to the Centre by that State". Consent to ICSID jurisdiction by a constituent subdivision or agency of a Contracting State requires the approval of that State unless the State notifies the Centre that no such approval is required (article 25(1) and (3)).

4.17 The other party must be the national of another Contracting State. In the case of a juristic person, it must have the nationality of another Contracting State on the date on which the parties consented to submit their dispute to arbitration or conciliation. However, State A when negotiating an investment contract with a company incorporated in and controlled by persons resident in State B will often require the company to incorporate a special subsidiary company registered in State A to perform the investment contract. If this subsidiary is subject to foreign control when consent to ICSID arbitration is given, the parties may agree that it should be treated as the national of another Contracting State to enable the Convention to apply (article 25(2)). 'Foreign control' in itself is not sufficient. The foreign control will have to be exercised by nationals of another Contracting State.

4.18 As to the nature of the dispute, the jurisdiction of the Centre extends to "any legal dispute arising directly out of an investment" (article 25(1)). The term "legal dispute" was used to exclude disputes concerning mere conflicts of interests: "The dispute must concern the existence or scope of a legal right or obligation, or the nature or extent of the reparation to be made for breach of a legal obligation".⁴⁵³

⁴⁵² Hirsch 48.

⁴⁵³ *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) (hereinafter referred to as "Report of the Executive Directors") para 26. Compare Nathan V S K "Submissions to the International Centre for Settlement of Investment Disputes in Breach of the Convention" (1995) Vol 12 No 1 *Journal of International Arbitration* 27 (hereinafter referred to as "Nathan (1995)") at 41 for the view that a difference over factual matters arising from a civil engineering contract would be outside ICSID's jurisdiction. In his view only disagreements over questions of law arising from the contract could be subject to ICSID's jurisdiction. This view is clearly incorrect: the factual dispute arising from the contract will have legal consequences in deciding whether the contract has been duly performed or breached. This is a "legal dispute" relating to a conflict of rights as opposed to a mere conflict of interest and is therefore subject to the Convention.

4.19 The Convention does not however attempt to define the term "investment", relying instead on the fact that the parties must consent to the submission of the dispute to ICSID.⁴⁵⁴ The parties thus have a large measure of discretion in deciding what constitutes an investment.⁴⁵⁵ "Investment" may therefore be widely interpreted to include the transfer of services and technology,⁴⁵⁶ but political, economic or purely commercial disputes are excluded.⁴⁵⁷ This wide interpretation of investment allows the Convention to adapt to "innovative patterns of investment" which were not foreseen at the time of the drafting of the Convention.⁴⁵⁸

4.20 Some doubts have been expressed as to the application of the Convention to disputes arising from a major civil engineering construction project executed by the national of one Contracting State in terms of a contract with another Contracting State.⁴⁵⁹ It is contended that a free-standing civil engineering contract does not contain an element of investment because there is no transfer of foreign capital to the state concerned and money can actually flow from the state to the foreign contractor.⁴⁶⁰

4.21 One answer to this is to give a broader definition to "investment" to include a contract, for example for the construction of a dam, which will potentially be of great benefit to the host state's economy.⁴⁶¹ It must also be borne in mind that the construction contract will seldom be free-standing, but will normally be one of a group of inter-related contracts, at least one of which will have an investment component. A good example is a BOT contract.⁴⁶² Certainly, the main contract, the

⁴⁵⁴ *Report of the Executive Directors* para 27.

⁴⁵⁵ Broches (1991) 5.

⁴⁵⁶ Delaume 26.

⁴⁵⁷ Lamm 474.

⁴⁵⁸ Hirsch 59.

⁴⁵⁹ Paulsson J "ICSID Arbitration: the Host State's Point of View" in *Private Investments Abroad - Problems and Solutions in International Business* Matthew Bender New York 1993 (hereinafter referred to as "Paulsson (1993)") 15-17; Nathan (1995) especially 28, 30-31 and 51-2 but cf Nathan's earlier article "ICSID and Dispute Resolution in International Civil Engineering Contracts" (1992) 58 *JCI Arb* 193 at 196-7.

⁴⁶⁰ Nathan (1995) 28.

⁴⁶¹ Nathan (1995) 31 quoting the views of Delaume.

⁴⁶² A BOT contract refers to a Build, Operate and Transfer Contract where a state enters into a contract with a foreign concession holder in terms of which the foreign concession holder will

concession agreement between the concession company and the state concerned will qualify as an investment contract for purposes of ICSID jurisdiction,⁴⁶³ although other forms of arbitration clause will probably have to be considered for the subsidiary contracts, where there is no state party to the contract.

4.22 Although the consent of the parties to ICSID's jurisdiction was intended to make a detailed consideration of whether or not the dispute subject to the ICSID arbitration clause is an investment dispute unnecessary, there will still be cases where consent is insufficient by itself and the issue of jurisdiction must be considered.⁴⁶⁴ For example, the Secretary-General, when considering whether or not to register a request for arbitration in terms of article 36 (see para 4(b)(ii) below) will refuse a request where the dispute concerns the sale of goods.⁴⁶⁵ Moreover, before an arbitral tribunal proceeds to make an award in the absence of a party where that party is in default, the tribunal is expressly required to satisfy itself that it has jurisdiction.⁴⁶⁶ This will include the question whether the dispute arises out of an investment.

4.23 A dispute which falls outside the jurisdictional requirements of article 25 could possibly be dealt with under the ICSID Additional Facility (see para 4(d) below).

build a major project providing infrastructure for the state, operate it for the benefit of the concession holder for a period of say 25 years and at the end of the period transfer the project to the state. A good example is a contract for the provision of a toll road. The concession holder receives no direct payment from the state for building the road or for transferring it at the end of the project. The project has to pay for itself and make a profit for the concession holder during the period when the concession holder is allowed to operate the toll road for its own benefit. This is clearly an investment contract.

⁴⁶³ The main contract for the BOT project is the concession agreement between the state (or state agency) and the concession company. The concession company will enter a construction contract with a contractor who may well be a shareholder and promoter of the concession company. There will usually be a separate company to operate the toll road in terms of an operating contract with the concession holder. There will also be separate agreements between the concession company and various lenders and shareholders who provide the money to finance the project. (See James R Knowles in association with Binnington Copeland & Associates *Seminar on BOT Contracts* held in Cape Town on 12 September 1996, appendix 6.)

⁴⁶⁴ Hirsch 59.

⁴⁶⁵ Hirsch 59-60.

⁴⁶⁶ Arbitration Rule 42(4) and Broches (1991) 9.

(ii) Self-contained nature of ICSID arbitrations

4.24 The exclusivity of ICSID arbitrations appears from article 26: consent to an ICSID arbitration is deemed to exclude any other remedy, whether litigation in state courts or arbitration before another institution.⁴⁶⁷ Although a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition for its consent to ICSID arbitration (article 26), this condition has rarely been imposed in practice.

4.25 There is no need to resort to a local court or a national system of arbitration law at any stage of an ICSID arbitration. Thus, an application by a party for the disqualification of a member of the arbitral tribunal must be decided by the other members of the tribunal or the Chairman of ICSID's Administrative Council (article 58). Even provisional measures are a matter for the ICSID arbitral tribunal, to the exclusion of local courts.⁴⁶⁸

4.26 Moreover, no Contracting State may give diplomatic protection to one of its nationals in relation to a dispute which that national and another Contracting State have agreed to submit to ICSID arbitration, unless and until the other Contracting State fails to comply with or abide by the arbitral award (article 27).

4.27 An ICSID arbitration is initiated by one of the parties to the ICSID arbitration agreement making a request to the Secretary-General of ICSID to institute arbitration proceedings, who must send a copy of the request to the other party (article 36(1)).⁴⁶⁹ The Secretary-General must register the request, unless the Secretary-General finds, on the basis of the information furnished by the party requesting arbitration, that the dispute is manifestly outside the jurisdiction of the Centre.

4.28 Because the Secretary-General is here performing a non-reviewable administrative function, if there is the slightest doubt on the issue of jurisdiction, the request should be registered and it should be left to the arbitral tribunal to decide the

⁴⁶⁷ See Broches (1991) 9-13.

⁴⁶⁸ See article 47 rule 39 and generally Brower C N & Goodman R E M "Provisional Measures and the Protection of ICSID Jurisdictional Exclusivity against Municipal Proceedings" (1991) 6 *ICSID Rev - Foreign Investment LJ* 431-61. Rule 39(5) expressly requires the consent of the parties, before either can approach a court for provisional measures.

⁴⁶⁹ The request must contain the information prescribed by article 36(2).

issue.⁴⁷⁰ Should the tribunal erroneously find that it has jurisdiction, an application for the annulment of the award is possible.⁴⁷¹

4.29 The parties may agree that the tribunal should consist of a sole arbitrator or any uneven number of arbitrators. If there is no agreement, the tribunal must consist of three arbitrators, one appointed by each party, and the third, who shall be the president of the tribunal, to be appointed by the agreement of the parties. A default mechanism is provided if the tribunal is not appointed within the time specified or agreed, with the power to appoint the remaining arbitrators being vested in the Chairman of the Centre's Administrative Council. Unless an arbitrator is appointed with the agreement of the parties, the arbitrator may not be a national of the party appointing such arbitrator. Arbitrators appointed by the Chairman must be of a different nationality from that of the parties.⁴⁷² There is also a procedure for the replacement and disqualification of arbitrators in certain circumstances.⁴⁷³

4.30 The Washington Convention and its Arbitration Rules contain detailed provisions on how the arbitration is to be conducted, while giving the parties the necessary degree of freedom to determine their own procedure in appropriate circumstances. The rules achieve a good balance between the common-law and civil-law procedures and ensure that the proceedings are cost-effective by restricting the length of the hearing, while allowing the parties' representatives adequate opportunity to question witnesses.⁴⁷⁴

(iii) Recognition and enforcement of ICSID awards

4.31 Although ICSID arbitrations are independent of any national arbitration law, the arbitral tribunal is required to decide a dispute in accordance with such rules of

⁴⁷⁰ See article 36(3) and Broches (1991) 6. Article 41(1) makes the tribunal the judge of its own competence.

⁴⁷¹ The procedure for annulment is contained in article 52: see para (b)(iii) below.

⁴⁷² See articles 37-40 read with articles 12-16 and Arbitration Rules 2-6; Broches (1991) 7. Because article 13(2) allows the Centre to nominate a number of potential arbitrators to the panel from which the Chairman makes appointments, ICSID arbitrators have generally been of a high standard. The fact that the Chairman is required by article 38 to consult with the parties before making appointments also helps to ensure that the persons appointed are acceptable to the parties (see Paulsson (1993) 15-11 - 15-12).

⁴⁷³ See articles 56-58 and Arbitration Rules 9-12.

⁴⁷⁴ See articles 41-47 and Arbitration Rules 13-45; Paulsson (1993) 15-14 – 15-15.

substantive law as may be agreed by the parties. If no such rules are agreed, the tribunal must apply the law of the Contracting State party and such rules of international law as may be applicable (article 42(1)). International law will be applied where the law of the Contracting State or action taken under that law violates international law.⁴⁷⁵

4.32 Because of the self-contained nature of ICSID arbitrations, the only remedies against the award are those provided by the Convention (article 53(1)), namely (a) interpretation or revision (articles 50 and 51)⁴⁷⁶ or (b) annulment. The grounds for annulment are concerned with matters of procedure and do not extend to a mistake of law or a review of the award on the merits of the dispute (article 52(1)).⁴⁷⁷ The annulment proceedings are conducted by an *ad hoc* committee, appointed by the Chairman of ICSID's Administrative Council (article 52(3)). If the award is annulled, the dispute shall, at the request of either party, be submitted to a new ICSID arbitral tribunal (article 52(6)).

4.33 The distinguishing feature of an ICSID arbitral award concerns the provisions of the Convention regarding its enforcement.⁴⁷⁸ The award is binding on the parties and, as stated above, the only remedies of a dissatisfied party are those provided by the Convention.

4.34 In terms of article 54(1), each Contracting State must recognise an ICSID award and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that state.

4.35 Execution of the award is governed by the law of the state in which execution is sought (article 54(3)). Moreover, article 55 provides that nothing in article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that state or of any foreign state from execution.

⁴⁷⁵ Broches (1991) 8.

⁴⁷⁶ Revision under article 51 is only possible if a fresh fact, sufficiently important as decisively to affect the award, is discovered after the award was made and if the fact that the information was not discovered sooner was not due to the negligence of the applicant for revision.

⁴⁷⁷ Although the first decisions by *ad hoc* committees gave rise to concern that annulment would be too easily available, thereby undermining the effectiveness of the ICSID process, it would appear that the necessary balance has now been achieved (see Paulsson J "ICSID's Achievements and Prospects" (1991) 6 *ICSID Rev - Foreign Investment LJ* 380 (hereinafter referred to as "Paulsson (1991)") at 386-94.

⁴⁷⁸ See eg Hirsch 22-4.

4.36 The effect of these provisions from the perspective of a party seeking to enforce an ICSID award is that the party is in a stronger position than a party seeking to enforce a foreign arbitral award under the New York Convention or an award relating to an international commercial arbitration under the UNCITRAL Model Law in that the court of the Contracting State where enforcement is sought has no discretion to refuse recognition and enforcement of that award. However, where the party seeking enforcement is the non-state party, enforcement will be subject to the usual restrictions in local law regarding sovereign immunity, which may protect certain assets (particularly non-commercial assets) from attachment.

(c) *International acceptance of the Washington Convention*

4.37 The Washington Convention enjoys a high degree of international acceptance, particularly among African states.⁴⁷⁹ As at 30 June 1995, it had been ratified by 119 states and signed by a further 15 states. It has been ratified by the following states in Southern Africa: Botswana (1970), Lesotho (1969), Malawi (1966), Mozambique (1995), Swaziland (1971), Zambia (1970) and Zimbabwe (1994).⁴⁸⁰ The only states in the region yet to ratify the Convention are therefore South Africa, Namibia and Angola. The Convention has also generally been positively received by developing countries.⁴⁸¹

(d) *The Additional Facility*

4.38 In 1978 ICSID established the Additional Facility for the settlement of disputes falling outside the Centre's jurisdiction in terms of the Convention, because the state party to the dispute or the state of the other party is not a Contracting State or the dispute is not an investment dispute or if the type of proceeding involved concerns fact finding as opposed to the arbitration of a "legal dispute".⁴⁸²

⁴⁷⁹ See eg Agyemang 177-89.

⁴⁸⁰ See ICSID 1995 *Annual Report* 14-16, Annexure 1. According to "Update on New York and ICSID Conventions" *LCIA Arbitration International Newsletter* (May 1997) 8, 139 states had either signed or ratified the Convention by December 1996.

⁴⁸¹ See the article by Agyemang above.

⁴⁸² See Additional Facility Rules article 2; Delaume 38; Hirsch 22.

4.39 It must be stressed that proceedings under the Additional Facility are outside the Convention (see article 3 of the Additional Facility Rules). Therefore, a local court would have its ordinary powers under local law applying to international arbitrations and foreign arbitral awards to refuse recognition and enforcement of the award in appropriate circumstances.

4.40 As a result, a provision in a bilateral treaty between states or between a state and the national of another state for the arbitration of a dispute under the ICSID Additional Facility is not an adequate substitute for a binding agreement to submit a dispute to arbitration under the Washington Convention itself.

(e) Benefits for South Africa from ratifying the Convention

4.41 The Washington Convention was intended by its drafters to encourage foreign private investment in developing countries. It was anticipated that the state party in an ICSID arbitration would usually be a developing country.⁴⁸³

4.42 Although South Africa is a developing country, its relatively strong infrastructure and position as the major economic power in the region place South Africa in a somewhat unique position as a country which could get a dual benefit from ICSID membership.

4.43 On the one hand, the country is anxious to attract more foreign investment and some of the potential projects could benefit from the availability of arbitration or conciliation under the Washington Convention. Ratification of the Convention would therefore be another positive signal which South Africa could send out to indicate that the new government is eager to create the necessary legal framework to encourage foreign investment.⁴⁸⁴ Bilateral investment treaties between states, particularly between a developed and a developing state commonly contain a provision for arbitration under ICSID as a means of encouraging private investment in the developing country.⁴⁸⁵ As appears from the text below, such clauses are already being

⁴⁸³ See El-Kosheri 104-5. The only two developed countries to feature as state parties in the approximately thirty ICSID arbitrations to date are Iceland and New Zealand.

⁴⁸⁴ Compare Agyemang 187.

⁴⁸⁵ Information furnished by Antonia R Parra, legal adviser on the staff of ICSID at an interview in Washington DC on 16 February 1996; Paulsson (1991) 382.

included in bilateral investment treaties recently entered into by the South African government with the governments of certain foreign states.

4.44 On the other hand, South African companies are eagerly looking for investment opportunities in other African countries, virtually all of which are members of ICSID. Ratification of the Convention by South Africa would facilitate such investment and further the economic development of the region.

4.45 Failure to ratify the Convention would leave South Africa as one of the very few African countries which have not done so and a continued failure to do so appears difficult to justify.⁴⁸⁶ Moreover, the inclusion of ICSID arbitration clauses in bilateral investment treaties recently entered into by the South African government with the governments of, for example, Germany, France, Switzerland, Denmark, Korea and Canada have created the expectation among potential investors in those countries that South Africa intends acceding to the Washington Convention.⁴⁸⁷

4.46 It must nevertheless be borne in mind that ICSID arbitration is suitable only for major investment contracts between a foreign investor and a host state. Because of the requisite formalities, it is rare for a state agency or public entity to be nominated as the state party under an ICSID arbitration clause. ICSID arbitration clauses also require more careful drafting than an ordinary arbitration clause, because of jurisdictional complexities.⁴⁸⁸

4.47 It would also be possible to disparage the value of ICSID in the light of its comparatively modest caseload of some 30 arbitrations and two conciliations submitted to the Centre to date, although the current caseload of 5-8 cases a year shows a modest increase.

⁴⁸⁶ Compare Agyemang 181-2. Two of the others, Angola and Libya, either have internal political problems or are alienated from powerful industrialised countries for political reasons.

⁴⁸⁷ This is particularly true of the treaty with Germany. Article 11 provides that unless the parties to the dispute agree otherwise, the dispute will be referred to arbitration under the ICSID Convention, but for the time being, while South Africa is not a party to the Convention, the ICSID Additional Facility may be used. The treaties with Denmark and Korea are to the same effect, except that they provide for *ad hoc* arbitration under the UNCITRAL Arbitration Rules of 1976 as an alternative to an ICSID arbitration. The treaty with France provides for *ad hoc* arbitration as an alternative to the ICSID Convention as long as South Africa is not a party to the Convention. The treaty with Canada provides for ICSID arbitrations if both states are parties to the Convention, with the ICSID Additional Facility and *ad hoc* arbitration under the UNCITRAL Rules as alternatives. The treaty with Switzerland is similar, except that it provides for an ICC arbitration as an additional alternative.

⁴⁸⁸ Paulsson (1991) 382-4; Paulsson (1993) 15-16 - 15-17.

4.48 However ICSID has an in-built bias favouring settlement: its purpose is not to encourage disputes but to improve the climate for international investment, by providing foreign investors and host states with a reliable and fair method for resolving such disputes as they cannot settle through negotiation. The ICSID arbitration mechanism culminating in an award that cannot be attacked in a national court provides a powerful incentive to settle.

4.49 From the perspective of a South African investor wishing to use ICSID in a dispute with a foreign Contracting State, it should also be noted that states have normally complied voluntarily with ICSID awards against them and would be encouraged by the Secretary-General of ICSID (who is also a World Bank official) to do so.⁴⁸⁹ The World Bank is however unlikely to resort to stronger sanctions like refusing further loans, because it seeks to maintain a reputation for even-handed dealings with member states.⁴⁹⁰

4.50 From the State's perspective, states are also perceived to have fared reasonably well in ICSID arbitrations and have certainly received fair treatment.

4.51 Other factors⁴⁹¹ making ICSID attractive from the perspective of the state party are, first, ICSID's unique standing as the only arbitral institution available for state/investor disputes which operates under public international law, although this factor by itself would deserve little weight in the absence of proof that a quality service is provided.

4.52 Secondly, as appears from paragraphs (b)(ii) and (iii) above, the ICSID mechanism reduces the involvement of foreign state courts to an absolute minimum, thereby reducing sensitivity concerning national sovereignty.⁴⁹²

4.53 Thirdly, in the absence of an agreement to the contrary, the arbitral tribunal is usually obliged to apply the law of the state party (article 42(1)).

⁴⁸⁹ Paulsson (1991) 384-6; El-Kosheri 107-8.

⁴⁹⁰ Information furnished by Antonio R Parra, legal adviser on the staff of ICSID at an interview in Washington DC on 16 February 1996.

⁴⁹¹ Paulsson (1993) 15-8 15-16.

⁴⁹² Agyemang 187.

4.54 Fourthly, a qualitative assessment of ICSID's Rules, its procedures for the appointment of arbitral tribunals, the calibre of the arbitrators, the average duration of ICSID proceedings bearing in mind the large amounts at stake and the relative complexity of the disputes, and the quality of the administrative services and support provided by ICSID staff, shows that ICSID provides a quality service which compares very favourably with that of other arbitral institutions.

4.55 Finally, again bearing in mind the amounts in dispute and the complexity of the issues, it is clear that ICSID provides a cost-effective service,⁴⁹³ if it is properly used, compared to other arbitral institutions. The Rules (by seeking to draw on the best features of both common-law and civil-law procedural traditions) avoid an extensive hearing on the Anglo-American Model, thereby reducing the most expensive item of an arbitration, the fees paid by parties to their own lawyers. The fees paid to ICSID arbitrators are controlled, and therefore very modest at US \$ 850 per day (600 SDR's), without as yet affecting the calibre of prospective arbitrators. Because of its modest caseload and the fact that ICSID arbitrations are subsidised to some degree by the World Bank, ICSID is able to provide an extremely good administrative and supportive service at a very modest cost to the parties. Moreover, if the arbitration takes place at the World Bank Headquarters or at a regional office no charge is made for the use of the venue. Large advances (deposits) are not required from the parties and interest at commercial rates is paid to the parties on those advances.

(f) Financial implications of ratification for South Africa

4.56 The cost-effectiveness of using ICSID for the arbitration of a complex investment dispute has been referred to above. Ratification of the Washington Convention by South Africa would therefore give the State (including a designated subdivision or agency) access to the cost-effective ICSID arbitration mechanism.

4.57 It is however necessary to consider what the possible additional costs of membership of ICSID would be, pursuant to ratification of the Convention.

4.58 Article 17 of the Convention provides that if the expenditure of the Centre "cannot be met out of charges for the use of its facilities *or out of other receipts*, the

⁴⁹³ The paragraph on cost-effectiveness is based on Paulsson (1991) 395-8; Paulsson (1993) 15-13 - 15-16 and an interview with Antonio R Parra, legal adviser on the staff of ICSID, in Washington DC on 16 February 1996.

excess shall be borne by Contracting States which are members of the [World] Bank" in proportion to their respective share holding and by Contracting States which are not members of the Bank in accordance with rules adopted by ICSID's Administrative Council.

4.59 Partly because of ICSID's present modest caseload, the costs of running ICSID which are not recovered from users are a tiny amount in relation to the overall budget of the World Bank. These costs are therefore met out of the Bank's ordinary budget. Because most members of the World Bank have very small shareholdings, the administrative effort of making a levy on those members under article 17 of the Convention is just not practical.⁴⁹⁴

4.60 South Africa would therefore incur no costs in joining ICSID, other than the cost of enacting the legislation to give effect to ratification of the Convention.

(g) *Form and contents of legislation for implementing the Convention*

4.61 The following comments are based on a perusal of the legislation in the United Kingdom;⁴⁹⁵ Lesotho;⁴⁹⁶ Australia,⁴⁹⁷ Zimbabwe⁴⁹⁸ and the comments of the New Zealand Law Commission⁴⁹⁹ on the current New Zealand and Australian legislation implementing the Washington Convention in those countries.

4.62 Although the New Zealand Law Commission recommended certain modifications to the legislation implementing the Washington Convention in New

⁴⁹⁴ Information furnished by Antonio R Parra, legal adviser on the staff of ICSID at an interview in Washington DC on 16 February 1996.

⁴⁹⁵ Arbitration (International Investment Disputes) Act 1966.

⁴⁹⁶ Arbitration (International Investment Disputes) Act 23 of 1974.

⁴⁹⁷ The International Arbitration Act of 1974 as amended by the ICSID Implementation Act 107 of 1990.

⁴⁹⁸ Arbitration (International Investment Disputes) Act 16 of 1995.

⁴⁹⁹ NZLC R20.

Zealand,⁵⁰⁰ the Government Administration Committee recommended that these proposed modifications should be deleted from the final Bill.⁵⁰¹

(i) One consolidated statute?

4.63 The first issue is whether legislation to implement a possible South African ratification of the Convention should be included in legislation implementing the UNCITRAL Model Law. Of the jurisdictions referred to above, only Australia followed this approach by inserting legislation enacted in 1990 to implement the Convention into the International Arbitration Act of 1974, as amended in 1989 following the adoption of the Model Law.

4.64 Reasons against a single statute are that the Model Law is concerned with providing national law to regulate the arbitration of ordinary international commercial disputes, whereas ICSID arbitrations relate to a special type of investment dispute between a state party and the national of another Contracting State and take place under public international law.

4.65 Arguments in favour of a single consolidated statute are that all South Africa's legislation pertaining to international arbitration could then be in a single statute and, perhaps more importantly, the possibility of the legislature being able to deal with all legislation relevant to international arbitration in a single bill, instead of two separate pieces of legislation having to compete separately with all other pending legislation for parliamentary time.

4.66 The Law Commission has therefore included legislation to implement the Washington Convention in Chapter 4 of the Draft Bill and provided in section 29 for different parts to come into force on different dates, should this be necessary in the case of Chapter 4.

(ii) Form of legislation

4.67 As to the form of the implementing legislation, it is suggested that following the method used by the United Kingdom, Australia, New Zealand, Zimbabwe and

⁵⁰⁰ See the Draft Bill attached to its report, s 13(2) read with Schedule 4.

⁵⁰¹ See the Fourth Schedule p 45. The Bill was subsequently enacted as the Arbitration Act 99 of 1996 with a commencement date of 1 July 1997 (see s 1(2) and Richardson (1997) 229 n 1, 232.

Lesotho, the Convention itself should be included in a schedule, prefaced by sections dealing with such matters as are considered necessary to give effect to the ratification of the Convention.

(iii) Matters to be dealt with

4.68 Certain definitions applying only to Chapter 4 of the Draft Bill are required, namely "award", "Centre", "Contracting State" and "Convention".⁵⁰² These definitions are in s 22 of the Draft Bill. The definition of "award" is required because of the special status of an ICSID award regarding its recognition and enforcement, compared to the awards subject to Chapters 2 and 3 of the Draft Bill. "Contracting State" was not defined in s 13 of the Draft Bill in Discussion Paper 69. However the term was used in s 16 (corresponding to s 25 of the Draft Bill annexed to this Report). A definition of "Contracting State" has therefore been added to facilitate the interpretation of that section.⁵⁰³

4.69 The legislation must make provision for the enforcement of an ICSID award in the High Court, so that it can be executed as a final judgment of that court. Both the United Kingdom and Zimbabwe statutes⁵⁰⁴ contain a detailed procedure for the registration of awards and the effect of such registration.⁵⁰⁵

4.70 S 24 of the annexed Draft Bill contains a much shorter provision based on the recommendation of the New Zealand Law Commission.⁵⁰⁶

⁵⁰² Compare the New Zealand legislation, Act 39 of 1979 s 1, the Zimbabwean Act 16 of 1995 and the Lesotho Act 23 of 1974 s 2. The Australian Act of 1974 s 31(2) also provides that words or expressions used in the part of the legislation implementing the Convention should have the same meaning as words or expressions used in the Convention itself. As the proposed provisions of the Draft Bill are less elaborate than those of its Australian counterpart (see eg ss 33, 34 and 37 of the Australian legislation), this provision appears unnecessary in the South African Draft Bill.

⁵⁰³ The definition is based on that contained in s 2 of the Zimbabwe statute.

⁵⁰⁴ See ss 1 and 2 of the (United Kingdom) Arbitration (International Investment Disputes) Act 1966 and ss 4-6 of the (Zimbabwean) Arbitration (International Investment Disputes) Act of 1995.

⁵⁰⁵ See also ss 4 and 5 of the (New Zealand) Arbitration (International Investment Disputes) Act 39 of 1979.

⁵⁰⁶ NZLC R20 232 para 448 and compare the (Australian) International Arbitration Act of 1974 s 35(1).

4.71 Article 54(1) of the Convention obliges a Contracting State to recognise and enforce an ICSID award "as if it were a final judgment of a court in that State". The Secretary-General of ICSID must be notified by the Contracting State of the court which that state has designated for this purpose (article 54(2)). Execution should take place in accordance with the usual procedures (article 54(3)). As there is an obligation to recognise the award, a formal application to court for its enforcement seems inappropriate and an administrative procedure for its registration to enable enforcement seems more appropriate. Consideration will have to be given to the provision of suitable High Court Rules to give effect to s 24 of the Draft Bill and article 54 of the Convention.⁵⁰⁷

4.72 The legislation should provide for articles 18 and 20-24 of the Convention (concerning the status, immunities and privileges of ICSID) and chapters II-VII (articles 25-63) of the Convention (articles 25-63 dealing with ICSID's jurisdiction, conciliation procedures, arbitration, the cost and place of proceedings) to have the force of law in South Africa. This has been done in s 23(1) of the Draft Bill.⁵⁰⁸

4.73 The Zimbabwean legislation provides that articles 18 to 24 of the Convention should have the force of law in Zimbabwe.⁵⁰⁹ Instead of giving Chapters II to VII the force of law, Zimbabwe has singled out certain matters and provided for them in its statute. These include the confidentiality of certain aspects of conciliation proceedings,⁵¹⁰ the effect of the legislation on the state (of Zimbabwe) and its effect on the immunity of foreign states.⁵¹¹ The approach recommended by the Law

⁵⁰⁷ See the written comment of Carolyn B Lamm of 28 April 1997, furnished in response to a request by the project committee.

⁵⁰⁸ It is based on the proposed s 4(1) of the New Zealand Law Commission (NZLC R20 232). Cf the Australian International Arbitration Act of 1974 s 32 which only refers to Chapters II to VII of the Convention and the (New Zealand) Arbitration (International Investment Disputes) Act 39 of 1979 s 10(1) which only refers to articles 18 and 20-24. Support for articles 18 and 20 to 24 and Chapters II to VII of the Convention having the force of law in South Africa was received from SAICE in their response to Discussion Paper 69, Paper 2 para 4.2.

⁵⁰⁹ Arbitration (International Investment Disputes) Act of 1995 s 9(1). (S 9(2) contains certain qualifications on the privileges conferred by article 24.) Unlike the New Zealand provisions referred to above and s 23(1) of the annexed Draft Bill, s 9(1) of the Zimbabwean statute also gives the force of law to article 19 of the Convention which provides that the Centre shall have the immunities and privileges set out in the succeeding articles. It appears sufficient to give articles 20-24, which set out the immunities and privileges, the force of law without including article 19.

⁵¹⁰ See s 8 of the Zimbabwean statute and compare article 35 of the Convention.

⁵¹¹ See s 10(1) and (2) of the Zimbabwean statute which can be compared with articles 54(3) and 55 of the Convention.

Commission in s 23(1) and (2) of the Draft Bill renders extra sections like those in the Zimbabwean statute unnecessary.

4.74 The legislation should exclude a dispute within the jurisdiction of the Centre or an award made under an ICSID arbitration from the operation of other statutory provisions applying to arbitration. (Once it is established *prima facie* that ICSID has jurisdiction, a South African court should have nothing to do with the dispute until ICSID accepts jurisdiction and renders an award or declines jurisdiction.⁵¹²) A provision to this effect is included as s 23(2) of the Draft Bill.⁵¹³

4.75 The legislation should bind the State.⁵¹⁴ This is done by s 4 in Chapter 1 of the Draft Bill (General Provisions), rendering a separate provision on this matter in Chapter 4 unnecessary.

4.76 It seems necessary to provide an evidentiary mechanism to establish which states are Contracting States under the Convention to facilitate the application of the implementing legislation in practice.⁵¹⁵ S 25 of the Draft Bill provides for a certificate signed by the Minister of Foreign Affairs for this purpose.

(h) Conclusion

4.77 For the reasons set out in paragraphs (e) and (f) above, it is submitted that South Africa should follow the example of most other African countries and ratify the Washington Convention. Draft legislation to give effect to this recommendation is contained in Chapter 4 of the Draft Bill.

CHAPTER 5

TRANSITIONAL AND OTHER PROVISIONS

⁵¹² Therefore, a provision similar to s 8 of the New Zealand Act 39 of 1979 or s 7 of the Zimbabwe Act 16 of 1995 is not only unnecessary but also inappropriate. The court has no jurisdiction to consider the matter until ICSID declines jurisdiction.

⁵¹³ Compare the New Zealand Law Commission's proposed s 4(2) (NZLC R20 232) and the Australian International Arbitration Act of 1974 s 34.

⁵¹⁴ See the New Zealand Law Commission's proposed s 3 (NZLC R20 232).

⁵¹⁵ Compare the Australian Act of 1974 s 36, the Zimbabwean Act 16 of 1995 s 3 and NZLC R20 232.

5.1 In this section Chapter 5 (Transitional and Other Provisions) of the proposed Draft Bill will be discussed. The headings in this part of the memorandum correspond to those in the Draft Bill. The commentary should be read together with the text of the Draft Bill.

s 26 Transitional provisions

5.2 Legislation implementing the Model Law will need to contain certain transitional provisions. Those contained in s 66(6)-(8) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 provide a useful example. These provisions read:

- "(6) Subject to subsections (7) and (8) below, this section shall apply in relation to an arbitration agreement whether entered into before or after the date when this section comes into force.
- (7) Notwithstanding subsection (6) above, this section shall not apply with respect to any arbitration which has commenced but has not been concluded on the date when this section comes into force.
- (8) The parties to an arbitration agreement entered into before the date when this section comes into force may agree that the foregoing provisions of this section shall not apply to that arbitration agreement."

5.3 The effect of subsection (6) is to apply the Model Law to all agreements for international arbitration, whether these agreements were entered into before or after the commencement of the enacting legislation. The exception contained in subsection (7) is in our view logical: it is clearly inadvisable for an arbitration which has already commenced to be subjected to a fundamental change in the applicable legislation. Problems could possibly arise in practice in determining whether or not a particular arbitration has actually commenced.⁵¹⁶ This question should therefore be determined with reference to the provisions of article 21 of the Model Law.⁵¹⁷

5.4 S 26(1) and (2) of the Draft Bill are based on s 66(6) and (7) of the Scottish legislation. S 26(3), based on the wording of article 21 of the Model Law, spells out

⁵¹⁶ Compare *Bester v Easigas* 1993 1 SA 30 (C) 33F-H and *Van Zijl v Von Haebler* 1993 3 SA 654 (SE) 664E-F on the meaning of "entered on the reference" for purposes of s 23 of the Arbitration Act 42 of 1965.

⁵¹⁷ This is the solution adopted by the Kenyan legislature, which paraphrases the wording of article 21 of the Model Law in s 42(3) of the transitional provision in the Arbitration Act of 1995.

when arbitration proceedings must be taken to have commenced for purposes of s 26(2).

5.5 S 66(8) of the Scottish legislation, quoted above, gives parties to an arbitration agreement existing when the Model Law takes effect, the right to contract out of the Model Law. Such a provision seems hardly necessary in a case where although the agreement exists when the Model Law commences in South Africa, South Africa has not yet been selected as the venue for the arbitration. Parties who enter into an arbitration agreement referring future disputes to arbitration under the arbitration laws of a particular state should also accept the risk that there could be changes in the compulsory provisions of applicable arbitration legislation before the dispute arises and before the arbitration commences. Therefore, the Law Commission is not in favour of a transitional provision equivalent to s 66(8).

5.6 However, the New Zealand Arbitration Act of 1996 s 19(5) contains an additional transitional provision which reads as follows:

"This Act applies to every arbitral award, whether made before or after the commencement of this Act."

The Zimbabwe Arbitration Act of 1996 s 6(4) contains a substantially similar provision.

5.7 From the point of view of the successful party in an arbitration, it is obviously desirable to have the opportunity to enforce the award under the Model Law and the improved legislation contained in Part 3 of the Draft Bill for New York Convention awards, where applicable. The New Zealand Law Commission supported its recommendation regarding the retrospective application of the new legislation to existing awards as follows: "In particular, we are mindful that the draft Act does not impact on accrued rights but is particularly concerned with procedures."⁵¹⁸

5.8 However, it appears that if an international arbitration held in South Africa had just been concluded and an award made before the new legislation took effect, the retrospective application of the new legislation to the award could have the effect of depriving a party of certain remedies for attacking the award. The most obvious example relates to the more restricted role for remittal under article 34 of the Model Law compared to s 32 of the 1965 Act.

⁵¹⁸ NZLC R20 153 para 274.

5.9 On the other hand, as the new legislation will not apply to arbitration proceedings which have already commenced, by virtue of s 26(2) and given the often protracted nature of some international arbitration proceedings, it is possible to argue that the new legislation should at least apply to awards made after the legislation takes effect.

5.10 We therefore recommend an amended version of the New Zealand and Zimbabwean legislation under discussion as s 26(4) of the Draft Bill, reading as follows:

"(4) Chapters 2 and 3 of this Act shall apply to every arbitral award whether made before, on or after the date of commencement of those Chapters, provided that proceedings for the enforcement of an arbitral award under the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 or proceedings for the enforcement, setting aside or remittal of an award under the Arbitration Act 42 of 1965 which have commenced when Chapters 2 and 3 of this Act come into force shall be continued and concluded as if those Chapters had not yet commenced."

5.11 The effect of the proposal is as follows. The legislation will apply retrospectively to existing awards or awards made after the legislation takes effect but in arbitration proceedings still subject to the existing law. However, the new legislation will not apply to proceedings to enforce or attack an award which have already commenced. It is envisaged that the new legislation will take effect after a notice period in the *Government Gazette* (see s 28 of the Draft Bill). Parties will normally wish to attack or enforce an award as soon as possible. A party wishing to attack an award made some days before the Act commences, will still have the opportunity of commencing proceedings to attack the award before the new legislation takes effect.

s 27 Repeal of Laws

5.12 The Law Commission recommends the repeal of the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 and its replacement by the legislation contained in Chapter 3 of the Draft Bill. The reasons for this are discussed in Chapter 3 of this report, "The New York Convention". Chapter 3, para (g) also recommends the amendment of the Protection of Businesses Act 99 of 1978 in so far as it relates to foreign arbitral awards. Separate legislation is envisaged for this purpose. See Annexure G.

s 28 Short title and commencement

5.13 This section provides for the legislation to come into force on a date determined by the President by proclamation in the *Government Gazette*. This will give arbitration users and their advisers an opportunity to become familiar with the provisions of the legislation, as approved by Parliament, before it takes effect. S 28(3) permits different dates to be proclaimed for different parts. This is because Chapter 4, which will implement the Washington Convention (ICSID Convention), may need a different commencement date because of the formalities involved in acceding to the Convention. As some existing bilateral investment treaties signed by the government contain ICSID dispute resolution clauses it is nevertheless desirable that Chapter 4 be implemented as soon as possible.

ANNEXURE A

MEMBERS OF THE PROJECT COMMITTEE ON ARBITRATION

The Honourable Mr Justice J H Steyn (Chairperson)

The Honourable Madam Justice Y S Meer (resigned, March 1998)

Adv J J Gauntlett SC (Member of the Commission)

Prof D W Butler

Prof R H Christie QC

ANNEXURE B**LIST OF RESPONDENTS: WORKING PAPER 59**

1. Anglo American Corporation of South Africa Ltd
2. Association of Arbitrators (Southern Africa)
3. Association of Retired Persons and Pensioners
4. Cox Yeats
5. Damant Bostock Inc
6. Field & Sims
7. General Council of the Bar of South Africa
8. Pretoria Society of Advocates
9. Raad op Finansiële Dienste
10. Society of Advocates of Natal
11. Society of Advocates of South Africa (Witwatersrand Division)
12. The Council of South African Bankers (COSAB)

ANNEXURE C1**LIST OF RESPONDENTS: DISCUSSION PAPER 69**

1. HE Judge Bola A Ajibola
2. Dr Amazu A Asouzu
3. Association of Arbitrators (Southern Africa)
4. Prof Karl-Heinz Böckstiegel
5. British Consulate-General, Johannesburg
6. Building Industries Federation South Africa (BIFSA)
7. Cape Bar Council
8. Council of South African Banks (COSAB)
9. Department of Foreign Affairs
10. Department of Justice
11. Gauteng Provincial Government
12. General Council of the Bar of South Africa (Laws and Administration Committee)
13. Ronald E Goodman (White and Case, Johannesburg)
14. International Chamber of Commerce (ICC)
15. International Council for Commercial Arbitration (ICCA)
16. Pierre A Karrer (Pestalozzi, Gmuer and Patry, Zurich)
17. Arthur L Marriot (Wilmer, Cutler and Pickering, London)
18. Jan Paulsson (Freshfields Avocats a la Cour, Paris)
19. Society of Advocates of Natal
20. South African Chamber of Business (SACOB)
21. South African Institute of Civil Engineering (SAICE)
22. The South African Institute of Architects

ANNEXURE C2**LIST OF PERSONS WHO ACCEPTED INVITATIONS TO THE
CONSULTATIVE MEETINGS**

1. Mr Justice M J Hlope
2. Mr Justice J A M Khumalo
3. Mr T N Aboobaker, NADEL
4. Prof D A Ailola, UNISA
5. Adv G L M Bokaba, Pretoria Bar
6. Ms S Camerer MP, National Party
7. Adv A Doorasamy, Durban Bar
8. Adv V Douman, African Bank
9. Mr E Finsen, Association of Arbitrators
10. Adv N Goso, Cape Bar
11. Mr K Govender, NADEL
12. Adv S M Govender, Durban Bar
13. Mr S Jazbhay, Ismail Omar & Co
14. Mr Hendrik Kotze, Arbitration Forum
15. Adv M Kuper, AFSA
16. Adv A B Mahomed, Durban Bar
17. Adv T W Majake, Durban Bar
18. Adv C W Moabelo, University of the North
19. Adv J J Moses, Cape Bar
20. Adv Sicelo Mthethwa, SA Human Rights Commission
21. Adv Talib Mukadam, Durban Bar
22. Adv H K Naidu, Durban Bar
23. Adv N Pandya, Johannesburg Bar
24. Adv Essop Patel SC, Johannesburg Bar
25. Mr Ras Patel, Rashid, Patel & Co
26. Ms Sungaree Pather, CCMA
27. Mr C M Sardiwalla, NADEL, Ladysmith
28. Adv R Seegobin, Pietermaritzburg Bar
29. Adv G Shakoane, Johannesburg Bar
30. Adv N Singh SC, Durban Bar
31. Ms Frances Turton, AFSA
32. Adv B Vally, Johannesburg Bar
33. Ms M S Wandrag, University of Western Cape

LIST OF PERSONS WHO ATTENDED THE CONSULTATIVE MEETINGS

1. Mr Justice M J Hlope
2. Mr Justice J A M Khumalo
3. Prof D A Ailola, UNISA
4. Adv Leon Bekker, AFSA
5. Adv G L M Bokaba, Pretoria Bar
6. Mr Charles Cohen, SA Law Society
7. Adv V Douman, African Bank
8. Mr E Finsen, Association of Arbitrators
9. Mr S Jazbhay, Ismail Omar & Co
10. Mr Hendrik Kotze, Arbitration Forum
11. Adv Harold Knopp, Johannesburg Bar
12. Adv C W Moabelo, University of the North
13. Andries Nel, representing Chairperson, Justice Portfolio Committee
14. Adv N Pandya, Johannesburg Bar
15. Adv Essop Patel SC, Johannesburg Bar
16. Mr Ras Patel, Rashid, Patel & Co
17. Ms Sungaree Pather, CCMA
18. Mr C M Sardiwalla, NADEL, Ladysmith
19. Adv R Seegobin, Pietermaritzburg Bar
20. Adv N Singh SC, Durban Bar
21. Ms Frances Turton, AFSA
- 22.. Adv B Vally, Johannesburg Bar
23. Ms M S Wandrag, University of Western Cape

ANNEXURE D

**EXCERPTS FROM THE DRAFT BILL ACCOMPANYING DISCUSSION
PAPER 69**

BILL

To amend and consolidate the law relating to international arbitration and the recognition and enforcement of foreign arbitral awards and to provide for the settlement of certain international investment disputes.

To be introduced by the Minister of Justice

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

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CHAPTER 1

Statement of principles

Purposes of the Act

1. The purposes of this Act are:
 - (a) to encourage the use of arbitration as an agreed method of resolving international commercial and investment disputes;
 - (b) to implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 for international commercial arbitrations and to provide for its optional use in domestic arbitrations;
 - (c) to facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards;
 - (d) to provide for the settlement of certain international investment disputes; and
 - (e) by doing so, to give effect to the obligations of the Government of South Africa under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), the English texts of which are set out in Schedules 3 and 4 of this Act.

[Note: compare the New Zealand Arbitration Bill of 1995, s 5.]

CHAPTER 2

International Commercial Arbitration

Definitions

2. (1) In this Chapter, "the Model Law" means the UNCITRAL Model Law on International Commercial Arbitration as adopted by the United Nations Commission on International Trade Law on 21 June 1985.

(2) Unless a contrary intention appears, a word or expression that is used in both this Chapter and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in this Chapter, the same meaning as it has in the Model Law.

[Note: compare Australian Act of 1974, s 15; Zimbabwean Bill 1995 s 2.]

Model Law to have force of law

3. Subject to this Act, the Model Law shall have the force of law in South Africa, in the form set out in Schedule 1 to this Act, which contains the Model Law with certain modifications to adapt it for application in South Africa.

[Note: compare Scottish Act s 66(2), Australian Act 1974 s 16(1).]

Exclusion of Act 42 of 1965

4. The Arbitration Act 42 of 1965 shall not apply to an arbitration agreement, reference to arbitration or arbitral award covered by this Chapter.

Optional application of Model Law to domestic arbitrations

5. The parties to an arbitration agreement may, notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of article 1 of the Model Law as set out in Schedule 1 to this Act, agree that the Model Law as set out shall apply to that arbitration.

[Note: compare Scottish Act s 66(4).]

Matters not subject to arbitration

6.(1) A reference to arbitration shall not be permissible in respect of any matter relating to status.

(2) Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the arbitration agreement is contrary to public policy or, under any other law, such a dispute is not capable of determination by arbitration.

(3) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as preventing the matter from being determined by arbitration.

[Note: compare Arbitration Act 42 of 1965 s 2, New Zealand Bill of 1995 s 8(1) and (2), Zimbabwe Bill of 1995 s 4.]

Interpretation

7. The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law as set out in Schedule 1 includes the documents of the United Nations Commission on International Trade Law and its working group referred to in Schedule 2 to this Act.

[Note: compare the Scottish Act s 66(3), the Australian Act of 1974 s 17(1), the Zimbabwean Bill of 1995 s 2(3), the New Zealand Bill of 1995 s 3.]

CHAPTER 3

Recognition and enforcement of foreign arbitral awards

[Note: For purposes of discussion [~~deletions~~] from and additions to Act 40 of 1977 are indicated in the draft below as in this sentence.]

Definitions

8.(1) In this Chapter, unless the context otherwise indicates -

- (i) "certified copy" means a copy authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court;
- (ii) "court" means a court of a provincial or local division of the [~~Supreme~~] High Court of South Africa;
- (iii) "foreign arbitral award" means an arbitral award made [~~outside the Republic~~] in the territory of a state other than South Africa. [(b) the enforcement of which is not permissible in terms of the Arbitration Act, 1965 ... this Act.]

(2) For purposes of this Chapter an award shall be deemed to be made at the place determined in accordance with the provisions of articles 20(1) and 31(3) of Schedule 1.

[Note: Compare Act 40 of 1977 s 1.]

Recognition and enforcement of foreign arbitral awards ~~[Foreign arbitral award may be made order of court and enforced as such]~~

9.(1) A foreign award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in South Africa. ~~[Any foreign arbitral award may, subject to the provisions of sections 3 and 4, be made an order of court by any court.]~~

~~[(2) — Where any amount payable in terms of such award is expressed in a currency other than the currency of the Republic, the award shall be made an order of court as if it were an award for such amount in the currency of the Republic as, on the basis of the rate of exchange prevailing at the date of the award, is equivalent to the amount so payable.]~~

(2) A foreign arbitral award may, on application, be made an order of court and ~~[Any such award which has under subsection (1) been made an order of court,]~~ may then be enforced in the same manner as any judgment or order to the same effect.

[Note: Compare s 2 of Act 40 of 1977. The changes to subsections (1) and (3) are based on the English Act of 1996 s 101(1) and (2).]

Evidence to be produced by a party seeking recognition or enforcement ~~[Application for award to be made an order of court]~~

10. A party seeking the recognition or enforcement of a foreign arbitral award must produce ~~[Application for an order of court mentioned in section 2(1) shall be made to any court and shall] -~~

- (a) ~~[be accompanied by]~~
 - (i) the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court; or
 - (ii) a certified copy of that award and of that agreement; and
- (b) if that award or agreement is in any language other than one of the official languages of South Africa ~~[the Republic]~~, ~~[be accompanied by]~~ a sworn translation thereof into one of such official languages, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court.

[Note: Compare Act 40 of 1977 s 3.]

Refusal of recognition or enforcement ~~[When order of court may be refused]~~

11.(1) Recognition or enforcement of a foreign arbitral award shall, subject to the provisions of subsection 2, not be refused.

(2) Recognition or enforcement of a foreign arbitral award may be refused if [A court may refuse to grant an application for an order of court in terms of section 3 if] -

- (a) the court finds that -
 - (i) a reference to arbitration is not permissible in South Africa ~~[the Republic]~~ in respect of the subject-matter of the dispute concerned; or
 - (ii) enforcement of the award concerned would be contrary to public policy in South Africa ~~[the Republic]~~; or
- (b) the party against whom the award is invoked ~~[enforcement of the award concerned is sought]~~, proves to the satisfaction of the court that -
 - (i) a party ~~[the parties]~~ to the arbitration agreement concerned had, under the law applicable to that party ~~[them]~~, no capacity to contract, or that the said agreement is invalid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country in which the award was made; or
 - (ii) that party ~~[he]~~ did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present that party's ~~[his]~~ case; or
 - (iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the reference to arbitration: Provided that if the decisions on matters referred to arbitration can be separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be recognised or enforced by a ~~[made an order of]~~ court under section 9: or
 - (iv) the constitution of the arbitration tribunal ~~[concerned was]~~ or the arbitration procedure was ~~[proceedings concerned were]~~ not in accordance with the relevant arbitration agreement or, failing such agreement, with the law of the country in which 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 competent authority of the country in which, or under the law of which, the award was made.

(3) If an application for setting aside or suspension of an award has been made to a competent authority referred to in subsection 2(b)(v), 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.

~~[(2) If, on an application in terms of section 3, the court is satisfied that an application for the setting aside or suspension of the award has been made to a competent authority of the country in which, or under the law of which, the award was made, the court may in its discretion postpone the hearing of the said application in terms of section 3, to such date as it may determine, and may thereupon, on the application of the party seeking to enforce the award, order the party against whom the enforcement is sought, to give suitable and specified security.]~~

[Note: Compare s 4 of Act 40 of 1977. The scope of the section has been broadened to cover recognition of awards as well as enforcement. ... The wording of s 11 has been brought more into line with that of article 36 of the Model Law, as it will appear in Schedule 1 of the Draft Bill, without making substantive changes to the provisions of the NYC in the process. S 11(1) is based on s 103(1) of the English Arbitration Act of 1996.]

Saving of other bases for recognition and enforcement

12. Nothing in this Chapter affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 31 in Schedule 1.

[Note: ... The provision is based on s 104 of the English Arbitration Act of 1996.]

CHAPTER 4

Settlement of International Investment Disputes

Definitions

13. In this Chapter, unless the context otherwise indicates -

- (i) "award" means an award rendered pursuant to the Convention and includes any decision interpreting, revising or annulling any award, being a decision pursuant to the Convention, and any decision as to costs which under the Convention is to form part of the award;
- (ii) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to the Convention;

- (iii) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was opened for signature in Washington on 18 March 1965, a copy of the English text of which is set out in Schedule 4 to this Act.

[Note: compare New Zealand Act 39 of 1979 s 1; Lesotho Act 23 of 1974 s 2; Australian International Arbitration Act of 1974 s 31.]

Application of Convention to South Africa

14.(1) Articles 18 and 20 to 24 and chapters II to VII of the Convention have the force of law in South Africa in accordance with the provisions of this Act.

(2) Nothing in the Arbitration Act 42 of 1965 or in parts 2 and 3 of this Act applies to a dispute within the jurisdiction of the Centre or to an award made under the Convention.

[Note: see NZLC R20 (1991) para 448 on p 232; compare the Australian International Arbitration Act of 1974 ss 32-34.]

Recognition and enforcement of awards

15.(1) An award may be enforced by entry as a final judgment of the High Court in terms of the award.

(2) The High Court is designated for purposes of article 54 of the Convention.

[Note: see NZLC R20 (1991) para 448 on p 232; compare the Australian International Arbitration Act of 1974 s 35.]

Proof of application of Convention

16. A certificate purporting to be signed by the Minister of Foreign Affairs and stating that a state is, or was at the time specified, a Contracting State to the Convention shall be *prima facie* proof of the facts stated.

[Note: compare NZLC R20 (1991) para 448 on p 232; the Australian International Arbitration Act of 1974 s 36.]

CHAPTER 5

General Provisions

This Act binds the State

17. This Act shall apply to any arbitration in terms of an arbitration agreement to which the State is a party.

[Note: compare Arbitration Act 42 of 1965 s 40, New Zealand Bill of 1995 s 4.]

Transitional provisions

18.(1) Subject to subsection (2) below, Chapter 2 of this Act shall apply in relation to an arbitration agreement whether entered into before or after the date when Chapter 2 of this Act comes into force, and to every arbitration under such an agreement.

(2) Notwithstanding subsection (1) above, this section shall not apply with respect to any arbitration proceedings which have commenced but have not been concluded on the date when Chapter 2 of this Act comes into force.

(3) For purposes of this section, arbitration proceedings are to be taken as having commenced on the date the parties have agreed they commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

(4) Chapters 2 and 3 of this Act shall apply to every arbitral award whether made before, on or after the date of commencement of those Chapters, provided that proceedings for the enforcement of an arbitral award under the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 or proceedings for the enforcement, setting aside or remittal of an award under the Arbitration Act 42 of 1965 which have commenced when Chapters 2 and 3 of this Act come into force shall be continued and concluded as if those Chapters had not yet commenced.

[Subsections (1)-(4) based on the Zimbabwean Bill of 1995 s 6(1)-(4), the New Zealand Bill of 1995 s 14(1)-(4) and the Scottish Act s 66(6) and (7) in preference to s 30 of the Australian Act of 1974, with a proviso added.]

Repeal of laws

19. The Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act 40 of 1977) is hereby repealed.

Short title and commencement

20.(1) This Act shall be called the International Arbitration Act, 1997.

(2) This Act will come into force on a date fixed by the President by proclamation in the *Government Gazette*.

(3) Different dates may be proclaimed for different Chapters.

[Note: Subsection (3) may be required, should a different commencement date be necessary for Chapter 4, which deals with the implementation of the Washington Convention.]

SCHEDULE 1

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

**(As adopted by the United Commission on International Trade Law on June 21,
1985)**

CONTENTS

[Note: for comparative purposes, ~~deletions~~ from and additions to the official text of the Model Law proposed by the Commission are indicated as in this sentence. Only those articles of the Model Law which differ from the version proposed in the Final Report are included in this excerpt.]

CHAPTER I. GENERAL PROVISIONS

Article 6--Court ~~[or other authority]~~ for certain functions of arbitration assistance and supervision

The functions referred to in articles 11(3), 11(4) 13(3), 14, 16(3) and 34(2) shall be performed by:

(a) the provincial or local division of the High Court within the area of jurisdiction of which the arbitration is being, is to be, or was held;

(b) if the place within South Africa where the arbitration is to take place has not yet been determined, the Witwatersrand Local Division until such place is determined.

~~[Each State enacting this model law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]~~

CHAPTER II. ARBITRATION AGREEMENT

Article 9--Arbitration agreement and interim measures by court

(1) 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.

(2) For the purposes of paragraph (1), the High Court shall have the same power as it has for the purposes of proceedings before that court to make

(a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or

(b) an order securing the amount in dispute; or

(c) an order appointing a receiver; or

(d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or

(e) an interim interdict or other interim order.

(3) Where:

(a) a party applies to a court for an interim interdict or other interim order;
and

(b) an arbitral tribunal has already ruled on the matter, the court shall treat
the ruling or any finding of fact made in the course of the ruling as
conclusive for purposes of the application.

(4) Article 16(3) shall not apply to a ruling by the arbitral tribunal on an interim
measure.

(5) The court shall have no other powers to grant interim measures other than
those contained in this article.

*[Note: see the Scottish Act sch 7 article 9(2) and (3) and the New Zealand Arbitration
Bill sch 1 article 9(2) and (3).]*

CHAPTER III. COMPOSITION OF ARBITRAL TRIBUNAL

Article 11--Appointment of arbitrators

(1) No person shall be precluded by reason of that person's ~~[his]~~ 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 article.

(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 ~~[or other authority specified in article 6];~~

- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator ~~[he]~~ shall be appointed, upon request of a party, by the court ~~[or other authority specified in article 6]~~.
- (4) Where, under an appointment procedure agreed upon by the parties,
 - (a) a party fails to act as required under such procedure, or
 - (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 ~~[or other authority specified in article 6]~~ 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 article to the court ~~[or other authority specified in article 6]~~ shall be subject to no appeal. The court ~~[or other authority]~~, 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 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.

CHAPTER IV. JURISDICTION OF ARBITRAL TRIBUNAL

Article 17--Power of arbitral tribunal to order interim measures

Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

CHAPTER VI. MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 31--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 article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(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 article shall be delivered to each party.

(5) Unless otherwise agreed by the parties, the arbitral tribunal may award interest at such rate and for such period as the tribunal considers appropriate in the circumstances, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment.

(6) Unless otherwise agreed by the parties, the award of costs in connection with the reference and the award shall be in the discretion of the arbitration tribunal, which may specify the party entitled to costs, the party who shall pay the costs, the amount of costs or the method of determining that amount, and the manner in which the costs shall be paid, provided that the tribunal's award of costs may only be set aside on the grounds referred to in article 34.

[Note: regarding the additions in article 31(5) and (6), compare the British Columbian Act of 1986 s 31(7) and (8); the Zimbabwean Bill of 1995 sch 1 article 31(5) and (6); the Australian International Arbitration Act 1974 ss 25-27 and the Arbitration Act 42 of 1965 s 35(1).]

CHAPTER VII. RECOURSE AGAINST AWARD

Article 34--Application for setting aside as exclusive recourse against arbitral award

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

(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 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 that party's ~~his~~ 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; 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 article 33, 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.

CHAPTER VIII. RECOGNITION AND ENFORCEMENT OF AWARDS

Article 36--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 article 7 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 that party's ~~his~~ case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it 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 recognised 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) if 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 article, 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.

ANNEXURE E

BILL

To amend and consolidate the law relating to international commercial arbitration and the recognition and enforcement of foreign arbitral awards and to provide for the settlement of certain international investment disputes.

To be introduced by the Minister of Justice

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

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SCHEDULE 1

UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

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UNCITRAL CONCILIATION RULES

CHAPTER 1

(Note that in the long title and in Chapters 1 to 5 of the Bill, [~~deletions from~~] and additions to the previous Draft Bill in Discussion Paper 69 are indicated as in this sentence.)

General Provisions [~~Statement of Principles~~]

Purposes of this Act

1. The purposes of this Act are -
 - (a) to encourage the use of arbitration as an agreed method of resolving international commercial and investment disputes;
 - (b) to implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 for international commercial arbitrations [~~and to provide for its optional use in domestic arbitrations~~];
 - (c) to facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards;
 - (d) to provide for the settlement of certain international investment disputes; and
 - (e) by doing so, to give effect to the obligations of the Government of South Africa under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), the English texts of which are set out in Schedules 3 and 4 of this Act.

[Note: compare the New Zealand Arbitration Act of 1996, s 5.]

Interpretation

2. (1) In Chapters 2 and 3 of this Act, the expression "arbitration agreement" means an arbitration agreement referred to in article 7 of the Model Law and includes:

- (a) an arbitration clause contained in or incorporated by reference in a bill of lading; and
- (b) an agreement between the parties otherwise than in writing by referring to terms that are in writing.

(2) In the event of any inconsistency between the English and Afrikaans texts of this Act, the Model Law and the Conventions contained in Schedules 3 and 4, in each instance the English text shall prevail.

[Note: on the origin of s 2(1) compare the Singapore International Arbitration Act 1994 s 2(1) and the English Arbitration Act s 5(3). Regarding s 2(2), compare the Wreck and Salvage Act 94 of 1996 s 2(9) and the Constitution of the Republic of South Africa 1996 s 240.]

Exclusion of Act 42 of 1965

3. (1) Subject to subsection (2), the Arbitration Act 42 of 1965 shall not apply to an arbitration agreement, reference to arbitration or arbitral award covered by this Act [~~Chapter~~].

(2) Section 2 of the Arbitration Act 42 of 1965 ("Matters not subject to arbitration") shall apply for purposes of chapter 3 of this Act.

[Note: formerly s 4 of the previous Draft Bill.]

This Act binds the State

4. This Act shall apply to any arbitration in terms of an arbitration agreement to which the State is a party.

[Note: This provision appeared as s 17 of the previous Draft Bill. Compare Arbitration Act 42 of 1965 s 40, New Zealand Act of 1996 s 4.]

CHAPTER 2

International Commercial Arbitration

Definitions

5. (1) In this Chapter, "the Model Law" means the UNCITRAL Model Law on International Commercial Arbitration [as] adopted by the United Nations Commission on International Trade Law on 21 June 1985, as adapted in Schedule 1 to this Act.

(2) Unless a contrary intention appears, a word or expression that is used in both this Chapter and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in this Chapter, the same meaning as it has in the Model Law.

(3) In this Chapter "conciliation" includes mediation and "conciliator" includes a mediator.

[Note: S 5(1) and (2) appeared as s 2(1) and (2) of the previous Draft Bill. Compare the Australian Act of 1974, s 15; Zimbabwe Arbitration Act 1996 s 2. Regarding s 5(3) see the Bermuda International Conciliation and Arbitration Act 1993 s 2.]

Model Law to have force of law

6. Subject to this Act, the Model Law shall have the force of law in South Africa. ~~[in the form set out in Schedule 1 to this Act, which contains the Model Law with certain modifications to adapt it for application in South Africa.]~~

[Note: S 6 corresponds to s 3 of the previous Draft Bill. Compare the Scottish Act s 66(2); the Australian Act 1974 s 16(1).]

~~[Optional application of Model Law to domestic arbitrations]~~

~~**7.** The parties to an arbitration agreement may, notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of article 1 of the Model Law as set out in Schedule 1 to this Act, agree that the Model Law as set out shall apply to that arbitration.~~

[Note: this provision appeared as s 5 of the previous Draft Bill. Compare the Scottish Act s 66(4).]

Matters~~[not]~~ subject to arbitration

~~**7.** [(1)—A reference to arbitration shall not be permissible in respect of any matter relating to status.]~~

(1) For the purposes of this chapter, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless the arbitration agreement is contrary to the public policy of South Africa or, under any other law of South Africa, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as ~~[preventing the matter from being determined]~~ excluding determination of the matter by arbitration.

[Note: S 7 replaces s 6 of the previous Draft Bill. Compare the Arbitration Act 42 of 1965 s 2, New Zealand Act of 1996 s 10(1) and (2)), Zimbabwe Arbitration Act of 1996 s 4, the Netherlands Arbitration Act of 1986 article 1020(3), the Swiss Private International Law Act of 1987 article 177(1); Draft German Code on Arbitration (1 September 1996) article 1030(1).]

Interpretation of Model Law

8. The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law [~~as set out in Schedule 1~~] includes the documents [~~of the United Nations Commission on International Trade Law and its working group~~] referred to in Schedule 2 to this Act.

[*Note: Compare the Scottish Act s 66(3), the Australian Act of 1974 s 17(1), the Zimbabwe Arbitration Act of 1996 s 2(3), the New Zealand Act of 1996 s 3.*]

Immunity of arbitrators and arbitral institutions

9. (1) An arbitrator is not liable for any act or omission in the discharge or purported discharge of that arbitrator's functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution, authority or person specified in article 6(2) or (3) of the Model Law or designated or requested by the parties, or another arbitral institution to appoint an arbitrator is not liable for any act or omission in the discharge of that function or any other function in relation to an arbitration unless the act or omission is shown to have been in bad faith.

(3) An institution, authority or person referred to in subsection (2) by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated such arbitrator, for any act or omission of such arbitrator in the discharge or purported discharge of that arbitrator's functions.

(4) The provisions of this section apply *mutatis mutandis* to –

- (a) the employees of an arbitrator or person, or
- (b) the officers and employees of an arbitral or other institution, authority or person referred to in subsection (2).

[*Note: compare the English Arbitration Act 1996 ss 29 and 74.*]

Consolidation

10. (1) The parties to an arbitration agreement are free to agree –

- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
- (b) that concurrent hearings shall be held,

on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the arbitral tribunal, it has no power to order consolidation of arbitral proceedings or concurrent hearings.

[Note: see the English Arbitration Act 1996 s 35; compare the Netherlands Arbitration Act 1986 article 1046; the Hong Kong Arbitration Ordinance s 6B and the Australian International Arbitration Act of 1974 s 24.]

Appointment of conciliator

11. (1) In any case where an arbitration agreement provides for the appointment of a conciliator -

- (a) by the parties, and the parties are unable to agree on a conciliator; or
- (b) by a person other than the parties and that person has refused or failed to make the appointment within the time specified in the agreement, or if no time is so specified, within a reasonable time of being requested by any party to the agreement to make the appointment;

the chairperson for the time being of the authority specified in article 6(2) of the Model Law shall, on the application of any party to the agreement, appoint a conciliator who shall have the same powers as if that conciliator had been appointed in terms of the agreement.

(2) Where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as arbitrator if the conciliation proceedings fail to produce a settlement acceptable to the parties -

- (a) no objection shall be taken to the appointment of such person as an arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that that person has previously acted as a conciliator in connection with some or all of the matters referred to arbitration;
- (b) where confidential information has been obtained by a conciliator from a party during conciliation proceedings, the conciliator, before proceeding to act as arbitrator, shall disclose to all other parties to the arbitral proceedings as much of that information as the conciliator considers material to the arbitral proceedings;
- (c) if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required to act as a conciliator unless a contrary intention appears in the arbitration agreement.

(3) Unless a contrary intention appears therein, an arbitration agreement which provides for the appointment of a conciliator shall be deemed to contain a provision that in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties within three months, or such other period to which the parties may agree, of the date of the appointment of the conciliator, or where the conciliator is appointed by name in the agreement, of the receipt by the conciliator of written notification of the existence of the dispute, the conciliation proceedings shall thereupon terminate.

(4) The provisions of section 9 shall apply *mutatis mutandis* to –

- (a) an arbitrator acting as conciliator, or the employees of such arbitrator; and
- (b) the authority referred to in subsection (1) and its officers and employees.

[Note: Regarding s 11(1), (2)(a) and (c) and (3) see the Hong Kong Ordinance s 2A and the Singapore legislation s 16(1) and (3)-(4). S 11(2)(b) is based on s 2B(3) of the Hong Kong Ordinance and s 17(3) of the Singapore legislation.]

Power of arbitral tribunal to act as conciliator

12. (1) If all parties to any arbitration proceedings consent in writing and for so long as no party withdraws that party's consent in writing, an arbitrator may act as conciliator.

(2) An arbitrator acting as conciliator -

- (a) may communicate with the parties to the arbitral proceedings collectively or separately; and
- (b) shall, subject to subsection (3), treat information obtained as conciliator from a party to the arbitration proceedings as confidential unless that party otherwise agrees.

(3) The provisions of section 11(2)(b) shall apply *mutatis mutandis* to an arbitrator resuming arbitration proceedings after acting as conciliator under this section.

(4) No objection shall be taken to the conduct of arbitral proceedings by an arbitrator solely on the ground that that person has previously acted as a conciliator in accordance with this section.

[Note: see the Hong Kong Ordinance s 2B and the Singapore legislation s 17. Regarding s 12(1) compare the Indian legislation s 30(1) and the British Columbia International Commercial Arbitration Act of 1986 s 30(1).]

Settlement agreement

13. If the parties to an arbitration agreement settle their dispute by means of conciliation or otherwise prior to the appointment of the arbitral tribunal and enter into a settlement agreement in writing containing the terms of the settlement, that agreement shall be enforced in South Africa as an arbitral award on agreed terms in accordance with articles 35 and 36 of the Model Law, which shall *mutatis mutandis* apply to the enforcement of the settlement agreement.

[Note: see the *Bermudan International Conciliation and Arbitration Act of 1993 s 20*; compare the *Indian Arbitration and Conciliation Act 26 of 1996 s 74*.]

Resort to arbitral proceedings

14. Notwithstanding any agreement to the contrary, a party to an arbitration agreement who is engaged in conciliation proceedings to settle a dispute covered by the arbitration agreement shall not be precluded from commencing arbitration proceedings if that party is of the opinion that such step is necessary for the preservation of that party's rights.

[Note: compare the *UNCITRAL Conciliation Rules article 16*.]

Application of UNCITRAL Conciliation Rules

15. Subject to the provisions of this Act, the parties to an arbitration agreement desirous of settling their dispute by conciliation may agree to use the UNCITRAL Conciliation Rules, the English text of which is set out in Schedule 5 to this Act.

[Note: compare the *Nigerian Arbitration and Conciliation Act of 1988 s 55*.]

CHAPTER 3

Recognition and enforcement of foreign arbitral awards

Definitions

16. (1) In this Chapter, unless the context otherwise indicates -

- (i) "certified copy" means a copy authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court;
- (ii) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the English text of which is set out in Schedule 3 to this Act;
- (iii) "court" means a court of a provincial or local division of the High Court of South Africa;

- (iv) "foreign arbitral award" means an arbitral award made in the territory of a state other than South Africa.

(2) For purposes of this Chapter an award shall be deemed to be made at the place of arbitration determined in accordance with the provisions of articles 20(1) and 31(3) of the Model Law.

[*Note: Formerly s 8 of the previous Draft Bill. Compare Act 40 of 1977 s 1.*]

Application of Convention to South Africa

17. (1) Subject to the provisions of this Chapter, arbitration agreements and foreign arbitral awards shall be recognised and enforced in South Africa as required by the Convention.

(2) The provisions of article 8 of the Model Law shall apply *mutatis mutandis* to arbitration agreements referred to in subsection 1.

Recognition and enforcement of foreign arbitral awards

18. (1) A foreign arbitral award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in South Africa.

(2) Subject to the provisions of sections 19, 20 and 21, a foreign arbitral award ~~[may]~~ shall, on application, be made an order of court and may then be enforced in the same manner as any judgment or order to the same effect.

[*Note: S 18 was formerly s 9 of the previous Draft Bill. Compare s 2 of Act 40 of 1977. The changes to subsections (1) and (3) are based on the English Act of 1996 s 101(1) and (2).*]

Evidence to be produced by a party seeking recognition or enforcement

19. A party seeking the recognition or enforcement of a foreign arbitral award shall ~~[must]~~ produce -

- (a)
 - (i) the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court; or
 - (ii) a certified copy of that award and of that agreement; and
- (b) if that award or agreement is in any language other than one of the official languages of South Africa, a sworn translation thereof into one of such official languages, authenticated in the manner in which

foreign documents may be authenticated to enable them to be produced in any court;

provided that the court may accept other documentary evidence as to the existence of the foreign arbitral award and arbitration agreement as sufficient proof in appropriate circumstances.

[*Note: S 19 was formerly s 10 of the previous Draft Bill. Compare Act 40 of 1977 s 3.*]

Refusal of recognition or enforcement

20. (1) Recognition or enforcement of a foreign arbitral award shall, subject to the provisions of subsection 2, not be refused.

(2) Recognition or enforcement of a foreign arbitral award may be refused if -

- (a) the court finds that -
 - (i) a reference to arbitration is not permissible in South Africa in respect of the subject-matter of the dispute concerned; or
 - (ii) enforcement of the award concerned would be contrary to public policy in South Africa; or
- (b) the party against whom the award is invoked, proves to the satisfaction of the court that -
 - (i) a party to the arbitration agreement concerned had no capacity to contract under the law applicable to that party, or that the said agreement is invalid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country in which the award was made; or
 - (ii) that party did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present that party's case; or
 - (iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the reference to arbitration: Provided that if the decisions on matters referred to arbitration can be separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be recognised or enforced by a court under section 19; or
 - (iv) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, failing such agreement, with the law of the country in which 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 competent authority of the country in which, or under the law of which, the award was made.

(3) If an application for setting aside or suspension of an award has been made to a competent authority referred to in subsection 2(b)(v), 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.

[Note: S 20 was formerly s 11 of the previous Draft Bill. Compare s 4 of Act 40 of 1977. S 21(1) is based on s 103(1) of the English Arbitration Act of 1996.]

Saving of other bases for recognition and enforcement

21. Nothing in this Chapter affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law.

[Note: S 21 was formerly s 12 of the previous Draft Bill. The provision is based on s 104 of the English Arbitration Act of 1996.]

CHAPTER 4

Settlement of International Investment Disputes

Definitions

22. In this Chapter, unless the context otherwise indicates -

- (i) "award" means an award rendered pursuant to the Convention and includes any decision interpreting, revising or annulling any award, being a decision pursuant to the Convention, and any decision as to costs which under the Convention is to form part of the award;
- (ii) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to the Convention;
- (iii) "Contracting State" means a State which has ratified or acceded to the Convention and includes a territory to which the Convention applies by virtue of article 70 thereof;
- (iv) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was opened for signature in Washington on 18 March 1965, ~~[a copy of]~~ the English text of which is set out in Schedule 4 to this Act.

[Note: S 22 was formerly s 13 of the previous Draft Bill. Compare the New Zealand Act 39 of 1979 s 1; the Lesotho Act 23 of 1974 s 2; the Zimbabwe Act 16 of 1995 s 2; the Australian International Arbitration Act of 1974 s 31.]

Application of Convention to South Africa

23. (1) Articles 18 and 20 to 24 and Chapters II to VII of the Convention have the force of law in South Africa in accordance with the provisions of this Act.

(2) Nothing in the Arbitration Act 42 of 1965 or in Chapters 2 and 3 of this Act applies to a dispute within the jurisdiction of the Centre or to an award made under the Convention.

[Note: S 23 was formerly s 14 of the previous Draft Bill. See also NZLC R20 (1991) para 448 on p 232; compare the Australian International Arbitration Act of 1974 ss 32-34.]

Recognition and enforcement of awards

24. (1) An award may be enforced by entry as a final judgment of the High Court in terms of the award.

(2) The High Court is designated for purposes of article 54 of the Convention.

[Note: S 24 was s 15 of the previous Draft Bill. See also NZLC R20 (1991) para 448 on p 232; compare the Australian International Arbitration Act of 1974 s 35.]

Proof of application of Convention

25. A certificate [~~purporting to be~~] signed by the Minister of Foreign Affairs and stating that a state is, or was at the time specified, a Contracting State to the Convention shall be *prima facie* proof of the facts stated.

[Note: S 25 was formerly s 16 of the previous Draft Bill. Compare NZLC R20 (1991) para 448 on p 232; the Australian International Arbitration Act of 1974 s 36.]

CHAPTER 5

Transitional and Other [General] Provisions

Transitional provisions

26. (1) Subject to subsection (2) below, Chapter 2 of this Act shall apply in relation to an arbitration agreement whether entered into before or after the date when Chapter 2 of this Act comes into force, and to every arbitration under such an agreement.

(2) Notwithstanding subsection (1) above, this section shall not apply with respect to any arbitration proceedings which have commenced but have not been concluded on the date when Chapter 2 of this Act comes into force.

(3) For purposes of this section, arbitration proceedings are to be taken as having commenced on the date the parties have agreed they commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

(4) Chapters 2 and 3 of this Act shall apply to every arbitral award whether made before, on or after the date of commencement of those Chapters, provided that proceedings for the enforcement of an arbitral award under the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 or proceedings for the enforcement, setting aside or remittal of an award under the Arbitration Act 42 of 1965 which have commenced when Chapters 2 and 3 of this Act come into force shall be continued and concluded as if those Chapters had not yet commenced.

[Note: S 26 was formerly s 18 of the previous Draft Bill. Subsections (1)-(4) are based on the Zimbabwe Arbitration Act of 1996 s 6(1)-(4), the New Zealand Act of 1996 s 19(1)-(2) and (4)-(5) and the Scottish Act s 66(6) and (7) in preference to s 30 of the Australian Act of 1974, with a proviso added.]

Repeal of laws

27. The Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act 40 of 1977) is hereby repealed.

[Note: S 27 was formerly s 19 of the previous Draft Bill.]

Short title and commencement

28. (1) This Act shall be called the International Arbitration Act, 1998.

(2) This Act will come into force on a date fixed by the President by proclamation in the *Gazette*.

(3) Different dates may be proclaimed for different Chapters.

[Note: S 28 was formerly s 20 of the previous Draft Bill.]

SCHEDULE 1
UNCITRAL
MODEL LAW ON INTERNATIONAL COMMERCIAL
ARBITRATION

(As adopted by the United Nations Commission on International Trade Law on
June 21, 1985, subject to certain changes and additions.)

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[Note: This table is not part of the Model Law on International Commercial Arbitration and is included for convenience.]

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[Note: For comparative purposes, [~~deletions~~] from and additions to the official text of the Model Law proposed by the Commission are indicated as in this sentence.]

CHAPTER I: GENERAL PROVISIONS

Article 1 -- Scope of application¹

(1) This Law applies to international commercial^[2] arbitration, subject to any agreement in force between South Africa [~~this State~~] and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of South Africa [~~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 article:

- (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 his habitual residence.

¹ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

^[2] ~~The term "commercial" should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business co-operation; carriage of goods or passengers by air, sea, rail or road.]~~

(5) This Law shall not affect any other law of South Africa [~~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 Law.

Article 2 -- Definitions and rules of interpretation

For the purposes of this Law:

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination;
- (e) where a provision of this Law 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;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3--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 his 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;
- (b) the communication is deemed to have been received on the day it is so delivered.

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

Article 4--Waiver of right to object

A party who knows that any provision of this Law 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 that party's ~~his~~ objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived the ~~his~~ right to object.

Article 5--Extent of court intervention

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

Article 6--Court or other authority for certain functions of arbitration assistance and supervision

(1) The functions referred to in articles ~~[11(3), 11(4),]~~ 13(3), 14, 16(3) and 34(2) shall be performed by:

- (a) the provincial or local division of the High Court within the area of jurisdiction of which the arbitration is being, is to be, or was held;
- (b) if the place within South Africa where the arbitration is to take place has not yet been determined, the division with jurisdiction over a South African party, or if there is no South African party, the Witwatersrand Local Division until such place is determined.

(2) Subject to paragraph (4) of this article, the functions referred to in article 11(3) and (4) and section 11(1) of the Act shall be performed by the chairperson for the time being of an appropriate authority specified for this purpose by the Chief Justice by notice in the *Government Gazette*.

(3) If the chairperson referred to in paragraph 2 fails or refuses to perform the functions referred to in article 11(3) and (4) or section 11(1) of the Act and the Chief Justice considers it necessary, the Chief Justice may, by notice in the *Government Gazette*, appoint any other appropriate person to exercise the functions of the chairperson of the authority specified in paragraph (2) of this article.

(4) Pending the designation of an appropriate authority under paragraphs (2) and (3) of this article, the functions referred to in article 11(3) and (4) and section 11(1) of the Act shall be performed by the Chief Justice.

~~[Each State enacting this Model Law specifies the court, courts or, where referred to therein, other authority competent to perform these functions.]~~

CHAPTER II: ARBITRATION AGREEMENT

Article 7--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. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim in defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make the clause part of the contract.

Article 8--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 that party's [his] 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 article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9--Arbitration agreement and interim measures by court

(1) 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.

(2) For the purposes of paragraph (1) of this article, the High Court shall have the same power as it has for the purposes of proceedings before that court to make

- (a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or
- (b) an order securing the amount in dispute but not an order for security for costs; or

- (c) an order appointing a receiver; or
- (d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) an interim interdict or other interim order.

(3) The High Court shall not grant an order in terms of paragraph (1) of this article unless -

- (a) the arbitral tribunal has not yet been appointed and the matter is urgent; or
- (b) the arbitral tribunal is not competent to grant the order; or
- (c) the urgency of the matter makes it impractical to seek such order from the arbitral tribunal;

and the High Court shall not grant any such order where the arbitral tribunal, being competent to grant the order, has already determined the matter.

(4) The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal.

(5) The High Court shall have no powers to grant interim measures other than those contained in this article.

[Note: compare the Scottish Act sch 7 article 9(2) and (3); the Zimbabwe Arbitration Act of 1996 sch 1 article 9(2), (3) and (4) and the New Zealand Arbitration Act sch 1 article 9(2) and (3).]

CHAPTER III: COMPOSITION OF ARBITRAL TRIBUNAL

Article 10--Number of arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be one.~~[three]~~.

Article 11--Appointment of arbitrators

- (1) No person shall be precluded by reason of that person's ~~[his]~~ 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 article.

(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 or other]~~ authority specified in article 6;
- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, ~~that arbitrator~~ ~~[he]~~ shall be appointed, upon request of a party, by the ~~[court or other]~~ authority specified in article 6.

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

- (a) a party fails to act as required under such procedure, or
- (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 or other]~~ authority specified in article 6 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 article to the ~~[court or other]~~ authority specified in article 6 shall be subject to no appeal. The ~~[court or other]~~ authority, 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 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.

Article 12--Grounds for challenge

(1) ~~[When]~~ A person who is approached in connection with that person's ~~[his]~~ possible appointment as an arbitrator ~~[, he]~~ shall disclose any circumstances likely to give rise to justifiable doubts as to that person's ~~[his]~~ impartiality or independence. An arbitrator, from the time of ~~[his]~~ appointment and throughout the arbitral

proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by that arbitrator ~~[him]~~.

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

Article 13--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 article.

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

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

Article 14--Failure or impossibility to act

(1) If an arbitrator become *de jure* or *de facto* unable to perform the ~~[his]~~ functions of that office or for other reasons fails to act without undue delay, that arbitrator's ~~[his]~~ mandate terminates on withdrawal from office ~~[if he withdraws from his office]~~ or if the parties agree on the termination. Otherwise, if a controversy remains concerning any of these grounds, any party may request the court ~~[or other authority]~~ specified in article 6 to decide on the termination of the mandate which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from ~~[his]~~ office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15--Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of ~~[his]~~ withdrawal from office for any other reason or because of the revocation of that arbitrator's ~~[his]~~ mandate by agreement of the parties or in any other case of termination of that ~~[his]~~ mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV: JURISDICTION OF ARBITRAL TRIBUNAL

Article 16--Competence of arbitral tribunal to rule on its 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 defence. A party is not precluded from raising such a plea by the fact that that party ~~[he]~~ has appointed, or participated in 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 article 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 article 6 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.

Article 17--Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties and subject to paragraph (2) of this article, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order appropriate security for costs if the arbitral tribunal considers such relief to be fair in the circumstances.

(3) The provisions of articles 31, 35 and 36 shall apply to an order under paragraphs (1) and (2) of this article as if such order were an award.

[Note: regarding article 17(3) compare the Scottish legislation sch 7 article 17(2) and the Australian International Arbitration Act of 1974 s 23.]

CHAPTER V: CONDUCT OF ARBITRAL PROCEEDINGS

Article 18--Equal treatment of parties

The parties shall be treated with equality and each party shall be given a full opportunity of presenting that party's ~~[his]~~ case.

Article 19--Determination of rules of procedure

(1) Subject to the provisions of this Law, 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 Law, 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.

Article 20--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 article, 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.

Article 21--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.

Article 22--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.

Article 23--Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the [his] claim, the points at issue and the relief or remedy sought, and the respondent shall state the [his] defence 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 the [his] claim or defence 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.

Article 24--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 arbitration 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.

Article 25--Default of a party

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

- (a) the claimant fails to communicate the ~~[his]~~ statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate the ~~[his]~~ statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) 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.

Article 26--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 ~~[his]~~ 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 a a ~~[his]~~ written or oral report, participate in a hearing where the parties have the opportunity to put questions to the expert ~~[him]~~ and to present expert witnesses in order to testify on the points at issue.

Article 27--Court assistance in taking evidence

(1) The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court ~~[of this State]~~ assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

(2) For purposes of paragraph (1) –

- (a) the registrar of the High Court or the clerk of a magistrate's court in whose area of jurisdiction the arbitration takes place may on the application of the arbitral tribunal or a party with the approval of the

arbitral tribunal issue a subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or to produce documents;

- (a) the High Court shall have, for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for-
 - (i) the issue of a commission or request for taking evidence out of the jurisdiction; and
 - (ii) the preservation of evidence.

[Note: compare the New Zealand Arbitration Act of 1996 sch 1 article 27; the English Arbitration Act 1996 s 44.]

CHAPTER VI: MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28--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 authorised 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.

Article 29--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 authorised by the parties or all members of the arbitral tribunal.

Article 30--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 article 31 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.

Article 31--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 article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(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 article shall be delivered to each party.

(5) Unless otherwise agreed by the parties and subject to article 28, the arbitral tribunal may award interest on such basis and in such terms as the tribunal considers appropriate and fair in the circumstances, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment.

(6) Unless otherwise agreed by the parties, the award of costs in connection with the reference and the award shall be in the discretion of the arbitration tribunal, which may specify the party entitled to costs, the party who shall pay the costs, the amount of costs or the method of determining that amount, and the manner in which the costs shall be paid, provided that the tribunal's award of costs may be set aside only on the grounds referred to in article 34.

[Note: regarding the additions in article 31(5) and (6), compare the British Columbian Act of 1986 s 31(7) and (8); the Zimbabwean Act of 1996 sch 1 article 31(5) and (6); the Australian International Arbitration Act 1974 ss 25-27 and the Arbitration Act 42 of 1965 s 35(1).]

Article 32--Termination of proceedings

(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 article.

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

- (a) the claimant withdraws the ~~[his]~~ claim, unless the respondent objects thereto and the arbitral tribunal recognises a legitimate interest on the respondent's ~~[his]~~ 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 articles 33 and 34(4).

Article 33--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 article 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 article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII: RECOURSE AGAINST AWARD

Article 34--Application for setting aside as exclusive recourse against arbitral award

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

(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 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 South Africa [~~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 that party's [~~his~~] 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 Law

from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

- (a) the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa [~~this State~~]; or
 - (ii) the award is in conflict with the public policy of South Africa [~~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 article 33, from the date on which that request had been disposed of by the arbitral tribunal, unless the party making the application did not know and could not within that period by exercising reasonable care have acquired knowledge by virtue of which an award is liable to be set aside under paragraph 5(b), in which event the period shall commence on the date when such knowledge could have been acquired by exercising reasonable care.

(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.

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of South Africa if -

- (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the applicant; or
- (b) the making of the award was induced or affected by fraud or corruption.

[Note: regarding article 34(3), compare the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 sch 7 article 34(3); regarding article 34(5) see the Australian International Arbitration Act of 1974 s 19 and the Zimbabwe Arbitration Act of 1996 sch 1 article 34(5) and the Singapore International Arbitration Act of 1994 s 24.]

CHAPTER VIII: RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35--Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the

award or agreement is not made in an official language of South Africa [~~this State~~], the party shall supply a duly certified translation thereof into such language.^[3]

Article 36--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 article 7 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 that party's [~~his~~] case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it 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 recognised 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
 - (iv) 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
- (a) if the court finds that:
 - (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa [~~this State~~]; or
 - (ii) the recognition or enforcement of the award would be contrary to the public policy of South Africa [~~this State~~].

^[3] ~~The conditions set forth in this paragraph are intended to set maximum standards. It would, thus, not be contrary to the harmonisation to be achieved by the model law if a State retained even less onerous conditions.]~~

(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 article, 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.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award is contrary to the public policy of South Africa if -

- (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the party resisting recognition or enforcement; or
- (b) the making of the award was induced or affected by fraud or corruption.

[Note: see the Australian International Arbitration Act of 1974 s 19 and the Zimbabwe Arbitration Act of 1996 sch 1 article 36(3).]

SCHEDULE 2

DOCUMENTS WHICH MAY BE CONSULTED AS AN INTERPRETATION AID

The documents to which reference may be made in terms of ~~[referred to in]~~ section 8 of this Act are:

1 The documents listed hereunder of the United Nations Commission on International Trade Law and its working group, namely -

- (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN9/207 of 14 May 1981);
- (b) Report of the Working Group on International Contract Practices on the work of its third session (A/CN9/216 of 23 March 1982);
- (c) Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN9/232 of 10 November 1982);
- (d) Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN9/233 of 28 March 1983);
- (e) Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN9/245 of 22 September 1983);
- (f) Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN9/246 of 6 March 1984);
- (g) Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN9/263 of 19 March 1985), including the three addenda dated 15 April 1985, 21 May 1985 and 31 July 1985;
- (h) Analytical Commentary on draft text of a model law on international commercial arbitration (A/CN9/264 of 25 March 1985); and
- (i) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (A/40/17 of 21 August 1985).

2 Report on International Arbitration of the South African Law Commission, Project 94, 1998.

[For Schedules 3-5 see Annexure F]

ANNEXURE F

BILL

To amend and consolidate the law relating to international commercial arbitration and the recognition and enforcement of foreign arbitral awards and to provide for the settlement of certain international investment disputes.

To be introduced by the Minister of Justice

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

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SCHEDULE 5

UNCITRAL CONCILIATION RULES

CHAPTER 1

General Provisions

Purposes of this Act

1. The purposes of this Act are -
 - (a) to encourage the use of arbitration as an agreed method of resolving international commercial and investment disputes;
 - (b) to implement the Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985 for international commercial arbitrations;
 - (c) to facilitate the recognition and enforcement of certain arbitration agreements and arbitral awards;
 - (d) to provide for the settlement of certain international investment disputes; and
 - (e) by doing so, to give effect to the obligations of the Government of South Africa under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958) and the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (1965), the English texts of which are set out in Schedules 3 and 4 of this Act.

Interpretation

2. (1) In Chapters 2 and 3 of this Act, the expression "arbitration agreement" means an arbitration agreement referred to in article 7 of the Model Law and includes:

- (a) an arbitration clause contained in or incorporated by reference in a bill of lading; and
- (b) an agreement between the parties otherwise than in writing by referring to terms that are in writing.

(2) In the event of any inconsistency between the English and Afrikaans texts of this Act, the Model Law and the Conventions contained in Schedules 3 and 4, in each instance the English text shall prevail.

Exclusion of Act 42 of 1965

3. (1) Subject to subsection (2), the Arbitration Act 42 of 1965 shall not apply to an arbitration agreement, reference to arbitration or arbitral award covered by this Act.

(2) Section 2 of the Arbitration Act 42 of 1965 ("Matters not subject to arbitration") shall apply for purposes of chapter 3 of this Act.

This Act binds the State

4. This Act shall apply to any arbitration in terms of an arbitration agreement to which the State is a party.

CHAPTER 2

International Commercial Arbitration

Definitions

5. (1) In this Chapter, "the Model Law" means the UNCITRAL Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on 21 June 1985, as adapted in Schedule 1 to this Act.

(2) Unless a contrary intention appears, a word or expression that is used in both this Chapter and in the Model Law (whether or not a particular meaning is given to it by the Model Law) has, in this Chapter, the same meaning as it has in the Model Law.

(3) In this Chapter "conciliation" includes mediation and "conciliator" includes a mediator.

Model Law to have force of law

6. Subject to this Act, the Model Law shall have the force of law in South Africa.

Matters subject to arbitration

7. (1) For purposes of this chapter, any dispute which the parties have agreed to submit to arbitration under an arbitration agreement and which relates to a matter which the parties are entitled to dispose of by agreement may be determined by arbitration unless the arbitration agreement is contrary to the public policy of South Africa or, under any other law of South Africa, such a dispute is not capable of determination by arbitration.

(2) The fact that an enactment confers jurisdiction on a court or other tribunal to determine any matter shall not, on that ground alone, be construed as excluding determination of the matter by arbitration.

Interpretation of Model Law

8. The material to which an arbitral tribunal or a court may refer in interpreting this Chapter and the Model Law includes the documents referred to in Schedule 2 to this Act.

Immunity of arbitrators and arbitral institutions

9. (1) An arbitrator is not liable for any act or omission in the discharge or purported discharge of that arbitrator's functions as arbitrator unless the act or omission is shown to have been in bad faith.

(2) An arbitral or other institution, authority or person specified in article 6(2) or (3) of the Model Law or designated or requested by the parties, or another arbitral institution to appoint an arbitrator is not liable for any act or omission in the discharge of that function or any other function in relation to an arbitration unless the act or omission is shown to have been in bad faith.

(3) An institution, authority or person referred to in subsection (2) by whom an arbitrator is appointed or nominated is not liable, by reason of having appointed or nominated such arbitrator, for any act or omission of such arbitrator in the discharge or purported discharge of that arbitrator's functions.

(4) The provisions of this section apply *mutatis mutandis* to –

- (a) the employees of an arbitrator or person, or
- (b) the officers and employees of an arbitral or other institution, authority or person referred to in subsection (2).

Consolidation

10. (1) The parties to an arbitration agreement are free to agree -

- (a) that the arbitral proceedings shall be consolidated with other arbitral proceedings, or
- (b) that concurrent hearings shall be held,

on such terms as may be agreed.

(2) Unless the parties agree to confer such power on the arbitral tribunal, it has no power to order consolidation of arbitral proceedings or concurrent hearings.

Appointment of conciliator

11. (1) In any case where an arbitration agreement provides for the appointment of a conciliator -

- (a) by the parties, and the parties are unable to agree on a conciliator; or
- (b) by a person other than the parties and that person has refused or failed to make the appointment within the time specified in the agreement, or if no time is so specified, within a reasonable time of being requested by any party to the agreement to make the appointment;

the chairperson for the time being of the authority specified in article 6(2) of the Model Law shall, on the application of any party to the agreement, appoint a conciliator who shall have the same powers as if that conciliator had been appointed in terms of the agreement.

(2) Where an arbitration agreement provides for the appointment of a conciliator and further provides that the person so appointed shall act as arbitrator if the conciliation proceedings fail to produce a settlement acceptable to the parties -

- (a) no objection shall be taken to the appointment of such person as an arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that that person has previously acted as a conciliator in connection with some or all of the matters referred to arbitration;
- (b) where confidential information has been obtained by a conciliator from a party during conciliation proceedings, the conciliator, before proceeding to act as arbitrator, shall disclose to all other parties to the arbitral proceedings as much of that information as the conciliator considers material to the arbitral proceedings;
- (c) if such person declines to act as an arbitrator, any other person appointed as an arbitrator shall not be required to act as a conciliator unless a contrary intention appears in the arbitration agreement.

(3) Unless a contrary intention appears therein, an arbitration agreement which provides for the appointment of a conciliator shall be deemed to contain a provision that in the event of the conciliation proceedings failing to produce a settlement acceptable to the parties within three months, or such other period to which the parties may agree, of the date of the appointment of the conciliator, or where the conciliator is appointed by name in the agreement, of the receipt by the conciliator of written

notification of the existence of the dispute, the conciliation proceedings shall thereupon terminate.

- (4) The provisions of section 9 shall apply *mutatis mutandis* to –
 - (a) an arbitrator acting as conciliator, or the employees of such arbitrator; and
 - (b) the authority referred to in subsection (1) and its officers and employees.

Power of arbitral tribunal to act as conciliator

12. (1) If all parties to any arbitration proceedings consent in writing and for so long as no party withdraws that party's consent in writing, an arbitrator may act as conciliator.

- (2) An arbitrator acting as conciliator -
 - (a) may communicate with the parties to the arbitral proceedings collectively or separately; and
 - (b) shall, subject to subsection (3), treat information obtained as conciliator from a party to the arbitration proceedings as confidential unless that party otherwise agrees.

(3) The provisions of section 11(2)(b) shall apply *mutatis mutandis* to an arbitrator resuming arbitration proceedings after acting as conciliator under this section.

(4) No objection shall be taken to the conduct of arbitral proceedings by an arbitrator solely on the ground that that person has previously acted as a conciliator in accordance with this section.

Settlement agreement

13. If the parties to an arbitration agreement settle their dispute by means of conciliation or otherwise prior to the appointment of the arbitral tribunal and enter into a settlement agreement in writing containing the terms of the settlement, that agreement shall be enforced in South Africa as an arbitral award on agreed terms in accordance with articles 35 and 36 of the Model Law, which shall *mutatis mutandis* apply to the enforcement of the settlement agreement.

Resort to arbitral proceedings

14. Notwithstanding any agreement to the contrary, a party to an arbitration agreement who is engaged in conciliation proceedings to settle a dispute covered by the arbitration agreement shall not be precluded from commencing arbitration

proceedings if that party is of the opinion that such step is necessary for the preservation of that party's rights.

Application of UNCITRAL Conciliation Rules

15. Subject to the provisions of this Act, the parties to an arbitration agreement desirous of settling their dispute by conciliation may agree to use the UNCITRAL Conciliation Rules, the English text of which is set out in Schedule 5 to this Act.

CHAPTER 3

Recognition and enforcement of foreign arbitral awards

Definitions

16. (1) In this Chapter, unless the context otherwise indicates -

- (i) "certified copy" means a copy authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court;
- (ii) "Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, the English text of which is set out in Schedule 3 to this Act;
- (iii) "court" means a court of a provincial or local division of the High Court of South Africa;
- (iv) "foreign arbitral award" means an arbitral award made in the territory of a state other than South Africa.

(2) For purposes of this Chapter an award shall be deemed to be made at the place of arbitration determined in accordance with the provisions of articles 20(1) and 31(3) of the Model Law.

Application of Convention to South Africa

17. (1) Subject to the provisions of this Chapter, arbitration agreements and foreign arbitral awards shall be recognised and enforced in South Africa as required by the Convention.

(2) The provisions of article 8 of the Model Law shall apply *mutatis mutandis* to arbitration agreements referred to in subsection 1.

Recognition and enforcement of foreign arbitral awards

18. (1) A foreign arbitral award shall be recognised as binding on the persons as between whom it was made, and may accordingly be relied on by those persons by way of defence, set-off or otherwise in any legal proceedings in South Africa.

(2) Subject to the provisions of sections 19, 20 and 21, a foreign arbitral award shall, on application, be made an order of court and may then be enforced in the same manner as any judgment or order to the same effect.

Evidence to be produced by a party seeking recognition or enforcement

19. A party seeking the recognition or enforcement of a foreign arbitral award shall produce -

- (a)
 - (i) the original foreign arbitral award concerned and the original arbitration agreement in terms of which that award was made, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court; or
 - (ii) a certified copy of that award and of that agreement; and
- (b) if that award or agreement is in any language other than one of the official languages of South Africa, a sworn translation thereof into one of such official languages, authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court;

provided that the court may accept other documentary evidence as to the existence of the foreign arbitral award and arbitration agreement as sufficient proof in appropriate circumstances.

Refusal of recognition or enforcement

20. (1) Recognition or enforcement of a foreign arbitral award shall, subject to the provisions of subsection 2, not be refused.

(2) Recognition or enforcement of a foreign arbitral award may be refused if -

- (a) the court finds that -
 - (i) a reference to arbitration is not permissible in South Africa in respect of the subject-matter of the dispute concerned; or
 - (ii) enforcement of the award concerned would be contrary to public policy in South Africa; or

- (b) the party against whom the award is invoked, proves to the satisfaction of the court that -
- (i) a party to the arbitration agreement concerned had no capacity to contract under the law applicable to that party, or that the said agreement is invalid under the law to which the parties have subjected it, or failing any indication thereon, under the law of the country in which the award was made; or
 - (ii) that party did not receive the required notice of the appointment of the arbitrator or of the arbitration proceedings concerned or was otherwise not able to present that party's case; or
 - (iii) the award deals with a dispute not contemplated by or falling within the provisions of the relevant reference to arbitration, or that it contains decisions on matters beyond the scope of the reference to arbitration: Provided that if the decisions on matters referred to arbitration can be separated from those on matters not so referred, that part of the award which contains decisions on matters referred to arbitration may be recognised or enforced by a court under section 19; or
 - (iv) the constitution of the arbitration tribunal or the arbitration procedure was not in accordance with the relevant arbitration agreement or, failing such agreement, with the law of the country in which 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 competent authority of the country in which, or under the law of which, the award was made.

(3) If an application for setting aside or suspension of an award has been made to a competent authority referred to in subsection 2(b)(v), 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.

Saving of other bases for recognition and enforcement

21. Nothing in this Chapter affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 35 of the Model Law.

CHAPTER 4

Settlement of International Investment Disputes

Definitions

22. In this Chapter, unless the context otherwise indicates -

- (i) "award" means an award rendered pursuant to the Convention and includes any decision interpreting, revising or annulling any award, being a decision pursuant to the Convention, and any decision as to costs which under the Convention is to form part of the award;
- (ii) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to the Convention;
- (iii) "Contracting State" means a State which has ratified or acceded to the Convention and includes a territory to which the Convention applies by virtue of article 70 thereof;
- (iv) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which was opened for signature in Washington on 18 March 1965, the English text of which is set out in Schedule 4 to this Act.

Application of Convention to South Africa

23. (1) Articles 18 and 20 to 24 and Chapters II to VII of the Convention have the force of law in South Africa in accordance with the provisions of this Act.

(2) Nothing in the Arbitration Act 42 of 1965 or in Chapters 2 and 3 of this Act applies to a dispute within the jurisdiction of the Centre or to an award made under the Convention.

Recognition and enforcement of awards

24. (1) An award may be enforced by entry as a final judgment of the High Court in terms of the award.

(2) The High Court is designated for purposes of article 54 of the Convention.

Proof of application of Convention

25. A certificate signed by the Minister of Foreign Affairs and stating that a state is, or was at the time specified, a Contracting State to the Convention shall be *prima facie* proof of the facts stated.

CHAPTER 5

Transitional and Other Provisions

Transitional provisions

26. (1) Subject to subsection (2) below, Chapter 2 of this Act shall apply in relation to an arbitration agreement whether entered into before or after the date when Chapter 2 of this Act comes into force, and to every arbitration under such an agreement.

(2) Notwithstanding subsection (1) above, this section shall not apply with respect to any arbitration proceedings which have commenced but have not been concluded on the date when Chapter 2 of this Act comes into force.

(3) For purposes of this section, arbitration proceedings are to be taken as having commenced on the date the parties have agreed they commenced or, failing such agreement, on the date of receipt by the respondent of a request for the dispute to be referred to arbitration.

(4) Chapters 2 and 3 of this Act shall apply to every arbitral award whether made before, on or after the date of commencement of those Chapters, provided that proceedings for the enforcement of an arbitral award under the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977 or proceedings for the enforcement, setting aside or remittal of an award under the Arbitration Act 42 of 1965 which have commenced when Chapters 2 and 3 of this Act come into force shall be continued and concluded as if those Chapters had not yet commenced.

Repeal of laws

27. The Recognition and Enforcement of Foreign Arbitral Awards Act, 1977 (Act 40 of 1977) is hereby repealed.

Short title and commencement

28. (1) This Act shall be called the International Arbitration Act, 1998.

(2) This Act will come into force on a date fixed by the President by proclamation in the *Gazette*.

(3) Different dates may be proclaimed for different Chapters.

SCHEDULE 1
UNCITRAL
MODEL LAW ON INTERNATIONAL COMMERCIAL
ARBITRATION

(As adopted by the United Nations Commission on International Trade Law on
June 21, 1985, subject to certain changes and additions.)

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[Note: This table is not part of the Model Law on International Commercial Arbitration and is included for convenience.]

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CHAPTER I: GENERAL PROVISIONS

Article 1 -- Scope of application¹

(1) This Law applies to international commercial arbitration, subject to any agreement in force between South Africa and any other State or States.

(2) The provisions of this Law, except articles 8, 9, 35 and 36, apply only if the place of arbitration is in the territory of South Africa.

(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 article:

- (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 his habitual residence.

(5) This Law shall not affect any other law of South Africa 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 Law.

Article 2 -- Definitions and rules of interpretation

For the purposes of this Law:

¹ Article headings are for reference purposes only and are not to be used for purposes of interpretation.

- (a) "arbitration" means any arbitration whether or not administered by a permanent arbitral institution;
- (b) "arbitral tribunal" means a sole arbitrator or a panel of arbitrators;
- (c) "court" means a body or organ of the judicial system of a State;
- (d) where a provision of this Law, except article 28, leaves the parties free to determine a certain issue, such freedom includes the right of the parties to authorise a third party, including an institution, to make that determination;
- (e) where a provision of this Law 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;
- (f) where a provision of this Law, other than in articles 25(a) and 32(2)(a), refers to a claim, it also applies to a counter-claim, and where it refers to a defence, it also applies to a defence to such counter-claim.

Article 3--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 his 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;
- (b) the communication is deemed to have been received on the day it is so delivered.

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

Article 4--Waiver of right to object

A party who knows that any provision of this Law 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 that party's objection to such non-compliance without undue delay or, if a time-limit is provided therefor, within such period of time, shall be deemed to have waived the right to object.

Article 5--Extent of court intervention

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

Article 6--Court or other authority for certain functions of arbitration assistance and supervision

(1) The functions referred to in articles 13(3), 14, 16(3) and 34(2) shall be performed by:

- (a) the provincial or local division of the High Court within the area of jurisdiction of which the arbitration is being, is to be, or was held;
- (b) if the place within South Africa where the arbitration is to take place has not yet been determined, the division with jurisdiction over a South African party, or if there is no South African party, the Witwatersrand Local Division until such place is determined.

(2) Subject to paragraph (4) of this article, the functions referred to in article 11(3) and (4) and section 11(1) of the Act shall be performed by the chairperson for the time being of an appropriate authority specified for this purpose by the Chief Justice by notice in the *Government Gazette*.

(3) If the chairperson referred to in paragraph 2 fails or refuses to perform the functions referred to in article 11(3) and (4) or section 11(1) of the Act and the Chief Justice considers it necessary, the Chief Justice may, by notice in the *Government Gazette*, appoint any other appropriate person to exercise the functions of the chairperson of the authority specified in paragraph (2) of this article.

(4) Pending the designation of an appropriate authority under paragraphs (2) and (3) of this article, the functions referred to in article 11(3) and (4) and section 11(1) of the Act shall be performed by the Chief Justice.

CHAPTER II: ARBITRATION AGREEMENT

Article 7--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. An agreement is in writing if it is contained in a document signed by the parties or in an exchange of letters, telex, telegrams or other means of telecommunication which provide a record of the agreement, or in an exchange of statements of claim in defence in which the existence of an agreement is alleged by one party and not denied by another. The reference in a contract to a document containing an arbitration clause constitutes an arbitration agreement provided that the contract is in writing and the reference is such as to make the clause part of the contract.

Article 8--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 that 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 article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

Article 9--Arbitration agreement and interim measures by court

(1) 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.

(2) For the purposes of paragraph (1) of this article, the High Court shall have the same power as it has for the purposes of proceedings before that court to make

- (a) orders for the preservation, interim custody or sale of any goods which are the subject-matter of the dispute; or
- (b) an order securing the amount in dispute but not an order for security for costs; or
- (a) an order appointing a receiver; or
- (d) any other orders to ensure that any award which may be made in the arbitral proceedings is not rendered ineffectual by the dissipation of assets by the other party; or
- (e) an interim interdict or other interim order.

(3) The High Court shall not grant an order in terms of paragraph (1) of this article unless -

- (a) the arbitral tribunal has not yet been appointed and the matter is urgent; or
- (b) the arbitral tribunal is not competent to grant the order; or
- (c) the urgency of the matter makes it impractical to seek such order from the arbitral tribunal;

and the High Court shall not grant any such order where the arbitral tribunal, being competent to grant the order, has already determined the matter.

(4) The decision of the High Court upon any request made in terms of paragraph (1) of this article shall not be subject to appeal.

(5) The High Court shall have no powers to grant interim measures other than those contained in this article.

CHAPTER III: COMPOSITION OF ARBITRAL TRIBUNAL

Article 10--Number of arbitrators

- (1) The parties are free to determine the number of arbitrators.
- (2) Failing such determination, the number of arbitrators shall be one.

Article 11--Appointment of arbitrators

- (1) No person shall be precluded by reason of that 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 article.
- (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 authority specified in article 6;

- (b) in an arbitration with a sole arbitrator, if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed, upon request of a party, by the authority specified in article 6.
- (4) Where, under an appointment procedure agreed upon by the parties,
- (a) a party fails to act as required under such procedure, or
 - (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 authority specified in article 6 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 article to the authority specified in article 6 shall be subject to no appeal. The authority, 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.

Article 12--Grounds for challenge

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

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

Article 13--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 article.

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

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

Article 14--Failure or impossibility to act

(1) If an arbitrator become *de jure* or *de facto* unable to perform the functions of that office or for other reasons fails to act without undue delay, that arbitrator's mandate terminates on withdrawal from 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 article 6 to decide on the termination of the mandate which decision shall be subject to no appeal.

(2) If, under this article or article 13(2), an arbitrator withdraws from office or a party agrees to the termination of the mandate of an arbitrator, this does not imply acceptance of the validity of any ground referred to in this article or article 12(2).

Article 15--Appointment of substitute arbitrator

Where the mandate of an arbitrator terminates under article 13 or 14 or because of withdrawal from office for any other reason or because of the revocation of that arbitrator's mandate by agreement of the parties or in any other case of termination of that mandate, a substitute arbitrator shall be appointed according to the rules that were applicable to the appointment of the arbitrator being replaced.

CHAPTER IV: JURISDICTION OF ARBITRAL TRIBUNAL

Article 16--Competence of arbitral tribunal to rule on its 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 defence. A party is not precluded from raising such a plea by the fact that that party has appointed, or participated in 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 article 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 article 6 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.

Article 17--Power of arbitral tribunal to order interim measures

(1) Unless otherwise agreed by the parties and subject to paragraph (2) of this article, the arbitral tribunal may, at the request of a party, order any party to take such interim measure of protection as the arbitral tribunal may consider necessary in respect of the subject-matter of the dispute. The arbitral tribunal may require any party to provide appropriate security in connection with such measure.

(2) Unless otherwise agreed by the parties, the arbitral tribunal may, at the request of a party, order appropriate security for costs if the arbitral tribunal considers such relief to be fair in the circumstances.

(3) The provisions of articles 31, 35 and 36 shall apply to an order under paragraphs (1) and (2) of this article as if such order were an award.

CHAPTER V: CONDUCT OF ARBITRAL PROCEEDINGS

Article 18--Equal treatment of parties

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

Article 19--Determination of rules of procedure

(1) Subject to the provisions of this Law, 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 Law, 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.

Article 20--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 article, 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.

Article 21--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.

Article 22--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.

Article 23--Statements of claim and defence

(1) Within the period of time agreed by the parties or determined by the arbitral tribunal, the claimant shall state the facts supporting the claim, the points at issue and the relief or remedy sought, and the respondent shall state the defence 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 the claim or defence 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.

Article 24--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 arbitration 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.

Article 25--Default of a party

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

- (a) the claimant fails to communicate the statement of claim in accordance with article 23(1), the arbitral tribunal shall terminate the proceedings;
- (b) the respondent fails to communicate the statement of defence in accordance with article 23(1), the arbitral tribunal shall continue the proceedings without treating such failure in itself as an admission of the claimant's allegations;
- (c) 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.

Article 26--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 a 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.

Article 27--Court assistance in taking evidence

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

- (2) For purposes of paragraph (1) -
 - (a) the registrar of the High Court or the clerk of a magistrate's court in whose area of jurisdiction the arbitration takes place may on the application of the arbitral tribunal or a party with the approval of the arbitral tribunal issue a subpoena to compel the attendance of a witness before an arbitral tribunal to give evidence or to produce documents;
 - (b) the High Court shall have, for the purpose of the arbitral proceedings, the same power as it has for the purpose of proceedings before that court to make an order for-
 - (i) the issue of a commission or request for taking evidence out of the jurisdiction; and
 - (ii) the preservation of evidence.

CHAPTER VI: MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

Article 28--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 authorised 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.

Article 29--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 authorised by the parties or all members of the arbitral tribunal.

Article 30--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 article 31 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.

Article 31--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 article 30.

(3) The award shall state its date and the place of arbitration as determined in accordance with article 20(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 article shall be delivered to each party.

(5) Unless otherwise agreed by the parties and subject to article 28, the arbitral tribunal may award interest on such basis and in such terms as the tribunal considers appropriate and fair in the circumstances, commencing not earlier than the date on which the cause of action arose and ending not later than the date of payment.

(6) Unless otherwise agreed by the parties, the award of costs in connection with the reference and the award shall be in the discretion of the arbitration tribunal, which may specify the party entitled to costs, the party who shall pay the costs, the amount of costs or the method of determining that amount, and the manner in which the costs shall be paid, provided that the tribunal's award of costs may be set aside only on the grounds referred to in article 34.

Article 32--Termination of proceedings

(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 article.

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

- (a) the claimant withdraws the claim, unless the respondent objects thereto and the arbitral tribunal recognises 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 articles 33 and 34(4).

Article 33--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 article 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 article.

(5) The provisions of article 31 shall apply to a correction or interpretation of the award or to an additional award.

CHAPTER VII: RECOURSE AGAINST AWARD

Article 34--Application for setting aside as exclusive recourse against arbitral award

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

(2) An arbitral award may be set aside by the court specified in article 6 only if:

- (a) the party making the application furnishes proof that:
 - (i) a party to the arbitration agreement referred to in article 7 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 South Africa; 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 that party's 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 Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with this Law; or

(b) the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa; or
- (ii) the award is in conflict with the public policy of South Africa.

(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 article 33, from the date on which that request had been disposed of by the arbitral tribunal, unless the party making the application did not know and could not within that period by exercising reasonable care have acquired knowledge by virtue of which an award is liable to be set aside under paragraph 5(b), in which event the period shall commence on the date when such knowledge could have been acquired by exercising reasonable care.

(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.

(5) For the avoidance of doubt, and without limiting the generality of paragraph (2)(b)(ii) of this article, it is declared that an award is in conflict with the public policy of South Africa if -

- (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the applicant; or
- (b) the making of the award was induced or affected by fraud or corruption.

CHAPTER VIII: RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35--Recognition and enforcement

(1) An arbitral award, irrespective of the country in which it was made, shall be recognised as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36.

(2) The party relying on an award or applying for its enforcement shall supply the duly authenticated original award or a duly certified copy thereof, and the original arbitration agreement referred to in article 7 or a duly certified copy thereof. If the award or agreement is not made in an official language of South Africa, the party shall supply a duly certified translation thereof into such language.

Article 36--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 article 7 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 that party's case; or
 - (iii) the award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it 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 recognised 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) if the court finds that:

- (i) the subject-matter of the dispute is not capable of settlement by arbitration under the law of South Africa; or
- (ii) the recognition or enforcement of the award would be contrary to the public policy of South Africa.

(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 article, 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.

(3) For the avoidance of doubt, and without limiting the generality of paragraph (1)(b)(ii) of this article, it is declared that the recognition or enforcement of an award is contrary to the public policy of South Africa if -

- (a) a breach of the arbitral tribunal's duty to act fairly occurred in connection with the making of the award which has caused or will cause substantial injustice to the party resisting recognition or enforcement; or
- (b) the making of the award was induced or affected by fraud or corruption.

SCHEDULE 2

DOCUMENTS WHICH MAY BE CONSULTED AS AN INTERPRETATION AID

The documents to which reference may be made in terms of section 8 of this Act are:

1. The documents listed hereunder of the United Nations Commission on International Trade Law and its working group, namely -

- (a) Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN9/207 of 14 May 1981);
- (b) Report of the Working Group on International Contract Practices on the work of its third session (A/CN9/216 of 23 March 1982);
- (c) Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN9/232 of 10 November 1982);
- (d) Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN9/233 of 28 March 1983);
- (e) Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN9/245 of 22 September 1983);
- (f) Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN9/246 of 6 March 1984);
- (g) Analytical compilation of comments by Governments and international organizations on the draft text of a model law on international commercial arbitration: report of the Secretary-General (A/CN9/263 of 19 March 1985), including the three addenda dated 15 April 1985, 21 May 1985 and 31 July 1985;
- (h) Analytical Commentary on draft text of a model law on international commercial arbitration (A/CN9/264 of 25 March 1985); and
- (i) Report of the United Nations Commission on International Trade Law on the work of its eighteenth session (A/40/17 of 21 August 1985).

2. Report on International Arbitration of the South African Law Commission, Project 94, 1998.

SCHEDULE 3

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS¹

Article 1

1. This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.

2. The term "arbitral awards" shall include not only awards made by arbitrators appointed for each case but also those made by permanent arbitral bodies to which the parties have submitted.

3. When signing, ratifying or acceding to this Convention, or notifying extension under article X hereof, any State may on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another Contracting State. It may also declare that it will apply the Convention only to differences arising out of legal relationships whether contractual or not, which are considered as commercial under the national law of the State making such declaration.

Article II

1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all of any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

¹ Done at New York, June 10, 1958; entry into force June 7, 1959; published in 330 U.N.T.S. 38 (1959), no. 4739.

Article III

Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles. There shall not be imposed substantially more onerous conditions or higher fees or charges on the recognition or enforcement of arbitral awards to which this Convention applies than are imposed on the recognition or enforcement of domestic arbitral awards.

Article IV

1. To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:

- (a) the duly authenticated original award or a duly certified copy thereof;
- (b) the original agreement referred to in article II or a duly certified copy thereof.

2. If the said award or agreement is not made in an official language of the country in which the award is relied upon, the party applying for recognition and enforcement of the award shall produce a translation of these documents into such language. The translation shall be certified by an official or sworn translator or by a diplomatic or consular agent.

Article V

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

- (a) the parties to the agreement referred to in article II were, under the law applicable to them, 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;
- (b) the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or
- (c) the award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it 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 decision on matters submitted to arbitration may be recognized and enforced; or

- (d) the composition of the arbitral authority 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
- (e) the award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

2. Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

- (a) the subject matter of the difference is not capable of settlement by arbitration under the law of that country; or
- (b) the recognition or enforcement of the award would be contrary to the public policy of that country.

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in Article V paragraph (1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

Article VII

1. The provisions of the present Convention shall not affect the validity of multilateral or bilateral agreements concerning the recognition and enforcement of arbitral awards entered into by the Contracting States nor deprive any interested party of any right he may have to avail himself of an arbitral award in the manner and to the extent allowed by the law or the treaties of the country where such award is sought to be relied upon.

2. The Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral Awards of 1927 shall cease to have effect between Contracting States on their becoming bound and to the extent that they become bound, by this Convention.

Article VIII

1. This Convention shall be open until 31 December 1958 for signature on behalf of any Member of the United Nations and also on behalf of any other State which is or hereafter becomes a member of any specialized agency of the United Nations, or which is or hereafter becomes a party to the Statute of the International Court of Justice, or any other State to which an invitation has been addressed by the General Assembly of the United Nations.

2. This Convention shall be ratified and the instrument of ratification shall be deposited with the Secretary-General of the United Nations.

Article IX

1. This Convention shall be open for accession to all States referred to in article VIII.

2. Accession shall be effected by the deposit of an instrument of accession with the Secretary-General of the United Nations.

Article X

1. Any State may, at the time of signature, ratification or accession, declare that this Convention shall extend to all or any of the territories for the international relations of which it is responsible. Such a declaration shall take effect when the Convention enters into force for the State concerned.

2. At any time thereafter any such extension shall be made by notification addressed to the Secretary-General of the United Nations and shall take effect as from the ninetieth day after the day of receipt by the Secretary-General of the United Nations of this notification, or as from the date of entry into force of the Convention for the State concerned, whichever is the later.

3. With respect to those territories to which this Convention is not extended at the time of signature, ratification or accession, each State concerned shall consider the possibility of taking the necessary steps in order to extend the application of this Convention to such territories, subject, where necessary for constitutional reason, to the consent of the Governments of such territories.

Article XI

1. In the case of a federal or non-unitary State, the following provisions shall apply:

- (a) With respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the

federal Government shall to this extent be the same as those of Contracting States which are not federal States;

- (b) With respect to those articles of this Convention that come within the legislative jurisdiction of constituent states or provinces which are not, under the constitutional system of the federation, bound to take legislative action, the federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent states or provinces at the earliest possible moment;
- (c) A federal State party to this Convention shall, at the request of any other Contracting State transmitted through the Secretary-General of the United Nations, supply a statement of law and practice of the federation and its constituent units in regard to any particular provision of this Convention, showing the extent to which effect has been given to that provision by legislative or other action.

Article XII

1. This Convention shall come into force on the ninetieth day following the date of deposit of the third instrument of ratification or accession.

2. For each State ratifying or acceding to this Convention after the deposit of the third instrument of ratification or accession, this Convention shall enter into force on the ninetieth day after deposit by such State of its instrument of ratification or accession.

Article XIII

1. Any Contracting State may denounce this Convention by a written notification to the Secretary-General of the United Nations. Denunciation shall take effect one year after the date of receipt of the notification by the Secretary-General.

2. Any State which has made a declaration or notification under article X may, at any time thereafter, by notification to the Secretary-General of the United Nations, declare that this Convention shall cease to extend to the territory concerned one year after the date of the receipt of the notification by the Secretary-General.

3. This Convention shall continue to be applicable to arbitral awards in respect of which recognition or enforcement proceedings have been instituted before the denunciation takes effect.

Article XIV

A Contracting State shall not be entitled to avail itself of the present Convention against other Contracting States except to the extent that it is itself bound to apply the Convention.

Article XV

The Secretary-General of the United Nations shall notify the States contemplated in article VIII of the following:

- (a) Signature and ratifications in accordance with article VIII;
- (b) Accessions in accordance with article IX;
- (c) Declarations and notifications under articles I, X and XI;
- (d) The date upon which this Convention enters into force in accordance with article XII;
- (e) Denunciations and notifications in accordance with article XIII.

Article XVI

1. This Convention, of which the Chinese, English, French, Russian and Spanish texts shall be equally authentic, shall be deposited in the archives of the United Nations.

2. The Secretary-General of the United Nations shall transmit a certified copy of this Convention to the States contemplated in article VIII.

SCHEDULE 4

**CONVENTION ON THE SETTLEMENT OF INVESTMENT DISPUTES
BETWEEN STATES AND NATIONALS OF OTHER STATES**

PREAMBLE

The Contracting States

Considering the need for international co-operation for economic development, and the role of private international investment therein;

Bearing in mind the possibility that from time to time disputes may arise in connection with such investment between Contracting States and nationals of other Contracting States;

Recognizing that while such disputes would usually be subject to national legal processes, international methods of settlement may be appropriate in certain cases;

Attaching particular importance to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

Desiring to establish such facilities under the auspices of the International Bank for Reconstruction and Development;

Recognizing that mutual consent by the parties to submit such disputes to conciliation or to arbitration through such facilities constitutes a binding agreement which requires in particular that due consideration be given to any recommendation of conciliators, and that any arbitral award be complied with; and

Declaring that no Contracting State shall by the mere fact of its ratification, acceptance or approval of this Convention and without its consent be deemed to be under any obligation to submit any particular dispute to conciliation or arbitration,

Have agreed as follows:

Chapter 1

International Centre for Settlement of Investment Disputes

Section 1

Establishment and Organization

Article 1

(1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).

(2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

Article 2

The seat of the Centre shall be at the principal office of the International Bank for Reconstruction and Development (hereinafter called the Bank). The seat may be moved to another place by decision of the Administrative Council adopted by a majority of two-thirds of its members.

Article 3

The Centre shall have an Administrative Council and a Secretariat and shall maintain a Panel of Conciliators and a Panel of Arbitrators.

Section 2

The Administrative Council

Article 4

(1) The Administrative Council shall be composed of one representative of each Contracting State. An alternate may act as representative in case of his principal's absence from a meeting or inability to act.

(2) In the absence of a contrary designation, each governor and alternate governor of the Bank appointed by a Contracting State shall be *ex officio* its representative and its alternate respectively.

Article 5

The President of the Bank shall be *ex officio* Chairman of the Administrative Council (hereinafter called the Chairman) but shall have no vote. During his absence or inability to act and during any vacancy in the office of President of the Bank, the person for the time being acting as President shall act as Chairman of the Administrative Council.

Article 6

(1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall

- (a) adopt the administrative and financial regulations of the Centre;
- (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
- (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
- (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
- (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
- (f) adopt the annual budget of revenues and expenditures of the Centre;
- (g) approve the annual report on the operation of the Centre;

The decisions referred to in sub-paragraphs (a), (b), (c) and (f) above shall be adopted by a majority of two-thirds of the members of the Administrative Council.

(2) The Administrative Council may appoint such committees as it considers necessary.

(3) The Administrative Council shall also exercise such other powers and perform such other functions as it shall determine to be necessary for the implementation of the provisions of this Convention.

Article 7

(1) The Administrative Council shall hold an annual meeting and such other meetings as may be determined by the Council, or convened by the Chairman, or convened by the Secretary-General at the request of not less than five members of the Council.

(2) Each member of the Administrative Council shall have one vote and, except as otherwise herein provided, all matters before the Council shall be decided by a majority of the votes cast.

(3) A quorum for any meeting of the Administrative Council shall be a majority of its members.

(4) The Administrative Council may establish, by a majority of two-thirds of its members, a procedure whereby the Chairman may seek a vote of the Council without convening a meeting of the Council. The vote shall be considered valid only if the majority of the members of the Council cast their votes within the time limit fixed by the said procedure.

Article 8

Members of the Administrative Council and the Chairman shall serve without remuneration from the Centre.

Section 3

The Secretariat

Article 9

The Secretariat shall consist of a Secretary-General, one or more Deputy Secretaries-General and staff.

Article 10

(1) The Secretary-General and any Deputy Secretary-General shall be elected by the Administrative Council by a majority of two-thirds of its members upon the nomination of the Chairman for a term of service not exceeding six years and shall be eligible for re-election. After consulting the members of the Administrative Council, the Chairman shall propose one or more candidates for each such office.

(2) The offices of Secretary-General and Deputy Secretary-General shall be incompatible with the exercise of any political function. Neither the Secretary-General nor any Deputy Secretary-General may hold any other employment or engage in any other occupation except with the approval of the Administrative Council.

(3) During the Secretary-General's absence or inability to act, and during any vacancy of the office of Secretary-General, the Deputy Secretary-General shall act as Secretary-General. If there shall be more than one Deputy Secretary-General, the Administrative Council shall determine in advance the order in which they shall act as Secretary-General.

Article 11

The Secretary-General shall be the legal representative and the principal officer of the Centre and shall be responsible for its administration, including the appointment of staff, in accordance with the provisions of this Convention and the rules adopted by the Administrative Council. He shall perform the function of registrar and shall have the power to authenticate arbitral awards rendered pursuant to this Convention, and to certify copies thereof.

Section 4

The Panels

Article 12

The Panel of Conciliators and the Panel of Arbitrators shall each consist of qualified persons, designated as hereinafter provided, who are willing to serve thereon.

Article 13

(1) Each Contracting State may designate to each Panel four persons who may but need not be its nationals.

(2) The Chairman may designate ten persons to each Panel. The persons so designated to a Panel shall each have a different nationality.

Article 14

(1) Persons designated to serve on the Panels shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment. Competence

in the field of law shall be of particular importance in the case of persons on the Panel of Arbitrators.

(2) The Chairman, in designating persons to serve on the Panels, shall in addition pay due regard to the importance of assuring representation on the Panels of the principal legal systems of the world and of the main forms of economic activity.

Article 15

(1) Panel members shall serve for renewable periods of six years.

(2) In case of death or resignation of a member of a Panel, the authority which designated the member shall have the right to designate another person to serve for the remainder of that member's term.

(3) Panel members shall continue in office until their successors have been designated.

Article 16

(1) A person may serve on both Panels.

(2) If a person shall have been designated to serve on the same Panel by more than one Contracting State, or by one or more Contracting States and the Chairman, he shall be deemed to have been designated by the authority which first designated him or, if one such authority is the State of which he is a national, by that State.

(3) All designations shall be notified to the Secretary-General and shall take effect from the date on which the notification is received.

Section 5

Financing the Centre

Article 17

If the expenditure of the Centre cannot be met out of charges for the use of its facilities, or out of other receipts, the excess shall be borne by Contracting States which are members of the Bank in proportion to their respective subscriptions to the capital stock of the Bank, and by Contracting States which are not members of the Bank in accordance with rules adopted by the Administrative Council.

Section 6

Status, Immunities and Privileges

Article 18

The Centre shall have full international legal personality. The legal capacity of the Centre shall include the capacity

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

Article 19

To enable the Centre to fulfil its functions, it shall enjoy in the territories of each Contracting State the immunities and privileges set forth in this Section.

Article 20

The Centre, its property and assets shall enjoy immunity from all legal process, except when the Centre waives this immunity.

Article 21

The Chairman, the members of the Administrative Council, persons acting as conciliators or arbitrators or members of a Committee appointed pursuant to paragraph (3) of Article 52, and the officers and employees of the Secretariat

- (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
- (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

Article 22

The provisions of Article 21 shall apply to persons appearing in proceedings under this Convention as parties, agents, counsel, advocates, witnesses or experts; provided, however, that sub-paragraph (b) thereof shall apply only in connection with their travel to and from, and their stay at, the place where the proceedings are held.

Article 23

(1) The archives of the Centre shall be inviolable, wherever they may be.

(2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

Article 24

(1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.

(2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.

(3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or members of a Committee appointed pursuant to paragraph (3) of Article 52, in proceedings under this Convention, if the sole jurisdictional basis for such tax is the location of the Centre or the place where such proceedings are conducted or the place where such fees or allowances are paid.

Chapter II

Jurisdiction of the Centre

Article 25

(1) The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally.

(2) "National of another Contracting State" means:

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.

(3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.

(4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary General shall forthwith transmit such notification to all Contracting States. Such notification shall not constitute the consent required by paragraph (1).

Article 26

Consent of the parties to arbitration under this Convention shall, unless otherwise stated, be deemed consent to such arbitration to the exclusion of any other remedy. A Contracting State may require the exhaustion of local administrative or judicial remedies as a condition of its consent to arbitration under this Convention.

Article 27

(1) No Contracting State shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its national and another Contracting State shall have consented to submit or shall have submitted to arbitration under this Convention, unless such other Contracting State shall have failed to abide by and comply with the award rendered in such dispute.

(2) Diplomatic protection, for the purposes of paragraph (1), shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

Chapter III

Conciliation

Section 1

Request for Conciliation

Article 28

(1) Any Contracting State or any national of a Contracting State wishing to institute conciliation proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to conciliation in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Conciliation Commission

Article 29

(1) The Conciliation Commission (hereinafter called the Commission) shall be constituted as soon as possible after registration of a request pursuant to Article 28.

- (2) (a) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.
- (b) Where the parties do not agree upon the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each

party and the third, who shall be the president of the Commission, appointed by agreement of the parties.

Article 30

If the Commission shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 28, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the conciliator or conciliators not yet appointed.

Article 31

(1) Conciliators may be appointed from outside the Panel of Conciliators, except in the case of appointments by the Chairman pursuant to Article 30.

(2) Conciliators appointed from outside the Panel of Conciliators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3

Conciliation Proceedings

Article 32

(1) The Commission shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Commission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 33

Any conciliation proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Conciliation Rules in effect on the date on which the parties consented to conciliation. If any question of procedure arises which is not covered by this Section or the Conciliation Rules or any rules agreed by the parties, the Commission shall decide the question.

Article 34

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms. To that end, the Commission may at any stage of the proceedings and from time to time recommend terms of settlement to the parties. The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations.

(2) If the parties reach agreement, the Commission shall draw up a report noting the issues in dispute and recording that the parties have reached agreement. If, at any stage of the proceedings, it appears to the Commission that there is no likelihood of agreement between the parties, it shall close the proceedings and shall draw up a report noting the submission of the dispute and recording the failure of the parties to reach agreement. If one party fails to appear or participate in the proceedings, the Commission shall close the proceedings and shall draw up a report noting that party's failure to appear or participate.

Article 35

Except as the parties to the dispute shall otherwise agree, neither party to a conciliation proceeding shall be entitled in any other proceeding, whether before arbitrators or in a court of law or otherwise, to invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceedings, or the report or any recommendations made by the Commission.

Chapter IV

Arbitration

Section 1

Request for Arbitration

Article 36

(1) Any Contracting State or any national of a Contracting State wishing to institute arbitration proceedings shall address a request to that effect in writing to the Secretary-General who shall send a copy of the request to the other party.

(2) The request shall contain information concerning the issues in dispute, the identity of the parties and their consent to arbitration in accordance with the rules of procedure for the institution of conciliation and arbitration proceedings.

(3) The Secretary-General shall register the request unless he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre. He shall forthwith notify the parties of registration or refusal to register.

Section 2

Constitution of the Tribunal

Article 37

(1) The Arbitral Tribunal (hereinafter called the Tribunal) shall be constituted as soon as possible after registration of a request pursuant to article 36.

- (2) (a) The Tribunal shall consist of a sole arbitrator or any uneven number of arbitrators appointed as the parties shall agree.
- (b) Where the parties do not agree upon the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the president of the Tribunal, appointed by agreement of the parties.

Article 38

If the Tribunal shall not have been constituted within 90 days after notice of registration of the request has been dispatched by the Secretary-General in accordance with paragraph (3) of Article 36, or such other period as the parties may agree, the Chairman shall, at the request of either party and after consulting both parties as far as possible, appoint the arbitrator or arbitrators not yet appointed. Arbitrators appointed by the Chairman pursuant to this Article shall not be nationals of the Contracting State party to the dispute or of the Contracting State whose national is a party to the dispute.

Article 39

The majority of the arbitrators shall be nationals of States other than the Contracting State party to the dispute and the Contracting State whose national is a party to the dispute; provided, however, that the foregoing provisions of this Article shall not apply if the sole arbitrator or each individual member of the Tribunal has been appointed by agreement of the parties.

Article 40

(1) Arbitrators may be appointed from outside the Panel of Arbitrators, except in the case of appointments by the Chairman pursuant to Article 38.

(2) Arbitrators appointed from outside the Panel of Arbitrators shall possess the qualities stated in paragraph (1) of Article 14.

Section 3

Powers and Functions of the Tribunal

Article 41

(1) The Tribunal shall be the judge of its own competence.

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Tribunal, shall be considered by the Tribunal which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

Article 42

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.

(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.

(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

Article 43

Except as the parties otherwise agree, the Tribunal may, if it deems it necessary at any stage of the proceedings,

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

Article 44

Any arbitration proceeding shall be conducted in accordance with the provisions of this Section and, except as the parties otherwise agree, in accordance with the Arbitration Rules in effect on the date on which the parties consented to arbitration. If any question of procedure arises which is not covered by this Section or the Arbitration Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Article 45

(1) Failure of a party to appear or to present his case shall not be deemed an admission of the other party's assertions.

(2) If a party fails to appear or to present his case at any stage of the proceedings the other party may request the Tribunal to deal with the questions submitted to it and to render an award. Before rendering an award, the Tribunal shall notify, and grant a period of grace to, the party failing to appear or to present its case, unless it is satisfied that that party does not intend to do so.

Article 46

Except as the parties otherwise agree, the Tribunal shall, if requested by a party, determine any incidental or additional claims or counter-claims arising directly out of the subject-matter of the dispute provided that they are within the scope of the consent of the parties and are otherwise within the jurisdiction of the Centre.

Article 47

Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.

Section 4

The Award

Article 48

(1) The Tribunal shall decide questions by a majority of the votes of all its members.

(2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.

(3) The award shall deal with every question submitted to the Tribunal, and

shall state the reasons upon which it is based.

(4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.

(5) The Centre shall not publish the award without the consent of the parties.

Article 49

(1) The Secretary-General shall promptly dispatch certified copies of the award to the parties. The award shall be deemed to have been rendered on the date on which the certified copies were dispatched.

(2) The Tribunal upon the request of a party made within 45 days after the date on which the award was rendered may after notice to the other party decide any question which it had omitted to decide in the award, and shall rectify any clerical, arithmetical or similar error in the award. Its decision shall become part of the award and shall be notified to the parties in the same manner as the award. The periods of time provided for under paragraph (2) of Article 51 and paragraph (2) of Article 52 shall run from the date on which the decision was rendered.

Section 5

Interpretation, Revision and Annulment of the Award

Article 50

(1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.

(2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision.

Article 51

(1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.

(2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was

rendered.

(3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.

(4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

Article 52

(1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:

- (a) that the Tribunal was not properly constituted;
- (b) that the Tribunal has manifestly exceeded its powers;
- (c) that there was corruption on the part of a member of the Tribunal;
- (d) that there has been a serious departure from a fundamental rule of procedure; or
- (e) that the award has failed to state the reasons on which it is based.

(2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.

(3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of the Tribunal which rendered the award, shall be of the same nationality as any such member, shall be a national of the State party to the dispute or of the State whose national is a party to the dispute, shall have been designated to the Panel of Arbitrators by either of those States, or shall have acted as a conciliator in the same dispute. The Committee shall have the authority to annul the award or any part thereof on any of the grounds set forth in paragraph (1).

(4) The provisions of Articles 41-45, 48, 49, 53 and 54, and of Chapters VI and VII shall apply *mutatis mutandis* to proceedings before the Committee.

(5) The Committee may, if it considers that the circumstances so require, stay

enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Committee rules on such request.

(6) If the award is annulled the dispute shall, at the request of either party, be submitted to a new Tribunal constituted in accordance with Section 2 of this Chapter.

Section 6

Recognition and Enforcement of the Award

Article 53

(1) The award shall be binding on the parties and shall not be subject to any appeal or to any other remedy except those provided for in this Convention. Each party shall abide by and comply with the terms of the award except to the extent that enforcement shall have been stayed pursuant to the relevant provisions of this Convention.

(2) For the purposes of this Section, "award" shall include any decision interpreting, revising or annulling such award pursuant to Articles 50, 51 or 52.

Article 54

(1) Each Contracting State shall recognize an award rendered pursuant to this Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State. A Contracting State with a federal constitution may enforce such an award in or through its federal courts and may provide that such courts shall treat the award as if it were a final judgment of the courts of a constituent state.

(2) A party seeking recognition or enforcement in the territories of a Contracting State shall furnish to a competent court or other authority which such State shall have designated for this purpose a copy of the award certified by the Secretary-General. Each Contracting State shall notify the Secretary-General of the designation of the competent court or other authority for this purpose and of any subsequent change in such designation.

(3) Execution of the award shall be governed by the laws concerning the execution of judgments in force in the State in whose territories such execution is sought.

Article 55

Nothing in Article 54 shall be construed as derogating from the law in force in any Contracting State relating to immunity of that State or of any foreign State from execution.

Chapter V**Replacement and Disqualification of Conciliators and Arbitrators****Article 56**

(1) After a Commission or a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator or an arbitrator should die, become incapacitated, or resign, the resulting vacancy shall be filled in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

(2) A member of a Commission or Tribunal shall continue to serve in that capacity notwithstanding that he shall have ceased to be a member of the Panel.

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

Article 57

A party may propose to a Commission or Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by paragraph (1) of Article 14. A party to arbitration proceedings may, in addition, propose the disqualification of an arbitrator on the ground that he was ineligible for appointment to the Tribunal under Section 2 of Chapter IV.

Article 58

The decision on any proposal to disqualify a conciliator or arbitrator shall be taken by the other members of the Commission or Tribunal as the case may be, provided that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator or arbitrator, or a majority of the conciliators or arbitrators, the Chairman shall take that decision. If it is decided that the proposal is well-founded the conciliator or arbitrator to whom the decision relates shall be replaced in accordance with the provisions of Section 2 of Chapter III or Section 2 of Chapter IV.

Chapter VI

Cost of Proceedings

Article 59

The charges payable by the parties for the use of the facilities of the Centre shall be determined by the Secretary-General in accordance with the regulations adopted by the Administrative Council.

Article 60

(1) Each Commission and each Tribunal shall determine the fees and expenses of its members within limits established from time to time by the Administrative Council and after consultation with the Secretary-General.

(2) Nothing in paragraph (1) of this Article shall preclude the parties from agreeing in advance with the Commission or Tribunal concerned upon the fees and expenses of its members.

Article 61

(1) In the case of conciliation proceedings the fees and expenses of members of the Commission as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceedings.

(2) In the case of arbitration proceedings the Tribunal shall, except as the parties otherwise agree, assess the expenses incurred by the parties in connection with the proceedings, and shall decide how and by whom those expenses, the fees and expenses of the members of the Tribunal and the charges for the use of the facilities of the Centre shall be paid. Such decision shall form part of the award.

Chapter VII

Place of Proceedings

Article 62

Conciliation and arbitration proceedings shall be held at the seat of the Centre except as hereinafter provided.

Article 63

Conciliation and arbitration proceedings may be held, if the parties so agree,

- (a) at the seat of the Permanent Court of Arbitration or of any other appropriate institution, whether private or public, with which the Centre may make arrangements for that purpose; or
- (b) at any other place approved by the Commission or Tribunal after consultation with the Secretary-General.

Chapter VIII**Disputes between Contracting States****Article 64**

Any dispute arising between Contracting States concerning the interpretation or application of this Convention which is not settled by negotiation shall be referred to the International Court of Justice by the application of any party to such dispute, unless the States concerned agree to another method of settlement.

Chapter IX**Amendment****Article 65**

Any Contracting State may propose amendment of this Convention. The text of a proposed amendment shall be communicated to the Secretary-General not less than 90 days prior to the meeting of the Administrative Council at which such amendment is to be considered and shall forthwith be transmitted by him to all the members of the Administrative Council.

Article 66

(1) If the Administrative Council shall so decide by a majority of two-thirds of its members, the proposed amendment shall be circulated to all Contracting States for ratification, acceptance or approval. Each amendment shall enter into force 30 days after dispatch by the depositary of this Convention of a notification to Contracting States that all Contracting States have ratified, accepted or approved the amendment.

(2) No amendment shall affect the rights and obligations under this Convention of any Contracting State or of any of its constituent subdivisions or agencies, or of any national of such State arising out of consent to the jurisdiction of the Centre given before the date of entry into force of the amendment.

Chapter X

Final Provisions

Article 67

This Convention shall be open for signature on behalf of States members of the Bank. It shall also be open for signature on behalf of any other State which is a party to the Statute of the International Court of Justice and which the Administrative Council, by a vote of two-thirds of its members, shall have invited to sign the Convention.

Article 68

(1) This Convention shall be subject to ratification, acceptance or approval by the signatory States in accordance with their respective constitutional procedures.

(2) This Convention shall enter into force 30 days after the date of deposit of the twentieth instrument of ratification, acceptance or approval. It shall enter into force for each State which subsequently deposits its instrument of ratification, acceptance or approval 30 days after the date of such deposit.

Article 69

Each Contracting State shall take such legislative or other measures as may be necessary for making the provisions of this Convention effective in its territories.

Article 70

This Convention shall apply to all territories for whose international relations a Contracting State is responsible, except those which are excluded by such State by written notice to the depositary of this Convention either at the time of ratification, acceptance or approval or subsequently.

Article 71

Any Contracting State may denounce this Convention by written notice to the depositary of this Convention. The denunciation shall take effect six months after receipt of such notice.

Article 72

Notice by a Contracting State pursuant to Articles 70 or 71 shall not affect the rights or obligations under this Convention of that State or of any of its constituent subdivisions or agencies or of any national of that State arising out of consent to the jurisdiction of the Centre given by one of them before such notice was received by the depositary.

Article 73

Instruments of ratification, acceptance or approval of this Convention and of amendments thereto shall be deposited with the Bank which shall act as the depositary of this Convention. The depositary shall transmit certified copies of this Convention to States members of the Bank and to any other State invited to sign the Convention.

Article 74

The depositary shall register this Convention with the Secretariat of the United Nations in accordance with Article 102 of the Charter of the United Nations and the Regulations thereunder adopted by the General Assembly.

Article 75

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;
- (e) the date on which any amendment of this Convention enters into force

in accordance with Article 66; and

- (f) denunciations in accordance with Article 71.

DONE at Washington, in the English, French and Spanish languages, all three texts being equally authentic, in a single copy which shall remain deposited in the archives of the International Bank for Reconstruction and Development, which has indicated by its signature below its agreement to fulfil the functions with which it is charged under this Convention.

SCHEDULE 5**UNCITRAL CONCILIATION RULES**

Approved by Resolution 35/52 of the General Assembly on 4 December 1980

APPLICATION OF THE RULES**Article 1**

- (1) These Rules apply to conciliation of disputes arising out of or relating to a contractual or other legal relationship where the parties seeking an amicable settlement of their dispute have agreed that UNCITRAL Conciliation Rules apply.
- (2) The parties may agree to exclude or vary any of these Rules at any time.
- (3) Where any of these Rules is in conflict with a provision of law from which the parties cannot derogate, that provision prevails.

COMMENCEMENT OF CONCILIATION PROCEEDINGS**Article 2**

- (1) The party initiating conciliation sends to the other party a written invitation to conciliate under these Rules, briefly identifying the subject of the dispute.
- (2) Conciliation proceedings commence when the other party accepts the invitation to conciliate. If the acceptance is made orally, it is advisable that it be confirmed in writing.
- (3) If the other party rejects the invitation, there will be no conciliation proceedings.
- (4) If the party initiating conciliation does not receive a reply within thirty days from the date on which he sends the invitation, or within such other period of time as specified in the invitation, he may elect to treat this as a rejection of the invitation to conciliate. If he so elects, he informs the other party accordingly.

NUMBER OF CONCILIATORS

Article 3

There shall be one conciliator unless the parties agree that there shall be two or three conciliators. Where there is more than one conciliator, they ought, as a general rule, to act jointly.

APPOINTMENT OF CONCILIATORS

Article 4

- (1) (a) In conciliation proceedings with one conciliator, the parties shall endeavour to reach agreement on the name of a sole conciliator;
- (b) In conciliation proceedings with two conciliators, each party appoints one conciliator;
- (c) In conciliation proceedings with three conciliators, each party appoints one conciliator. The parties shall endeavour to reach agreement on the name of the third conciliator.
- (2) Parties may enlist the assistance of an appropriate institution or person in connection with the appointment of conciliators. In particular,
 - (a) a party may request such an institution or person to recommend the names of suitable individuals to act as conciliator;
or
 - (b) the parties may agree that the appointment of one or more conciliators be made directly by such an institution or person.

In recommending or appointing individuals to act as conciliator, the institution or person shall have regard to such considerations as are likely to secure the appointment of an independent and impartial conciliator and, with respect to a sole or third conciliator, shall take into account the advisability of appointing a conciliator of a nationality other than the nationalities of the parties.

SUBMISSION OF STATEMENTS TO CONCILIATOR

Article 5

(1) The conciliator,* upon his appointment, requests each party to submit to him a brief written statement describing the general nature of the dispute and the points at issue. Each party sends a copy of his statement to the other party.

(2) The conciliator may request each party to submit to him a further written statement of his position and the facts and grounds in support thereof, supplemented by any documents and other evidence that such party deems appropriate. The party sends a copy of his statement to the other party.

(3) At any stage of the conciliation proceedings the conciliator may request a party to submit to him such additional information as he deems appropriate.

REPRESENTATION AND ASSISTANCE

Article 6

The parties may be represented or assisted by persons of their choice. The names and addresses of such persons are to be communicated in writing to the other party and to the conciliator; such communication is to specify whether the appointment is made for purposes of representation or of assistance.

ROLE OF CONCILIATOR

Article 7

(1) The conciliator assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute.

(2) The conciliator will be guided by principles of objectivity, fairness and justice, giving consideration to, among other things, the rights and obligations of the parties, the usages of the trade concerned and the circumstances surrounding the dispute, including any previous business practices between the parties.

(3) The conciliator may conduct the conciliation proceedings in such a manner as he considers appropriate, taking into account the circumstances of the case, the wishes

* In this and all following articles, the term “conciliator” applies to a sole conciliator, two or three conciliators, as the case may be.

the parties may express, including any request by a party that the conciliator hear oral statements, and the need for a speedy settlement of the dispute.

(4) The conciliator may, at any stage of the conciliation proceedings, make proposals for a settlement of the dispute. Such proposals need not be in writing and need not be accompanied by a statement of the reasons therefor.

ADMINISTRATIVE ASSISTANCE

Article 8

In order to facilitate the conduct of the conciliation proceedings, the parties, or the conciliator with the consent of the parties, may arrange for administrative assistance by a suitable institution or person.

COMMUNICATION BETWEEN CONCILIATOR AND PARTIES

Article 9

(1) The conciliator may invite the parties to meet with him or may communicate with them orally or in writing. He may meet or communicate with the parties together or with each of them separately.

(2) Unless the parties have agreed upon the place where meetings with the conciliator are to be held, such place will be determined by the conciliator, after consultation with the parties, having regard to the circumstances of the conciliation proceedings.

DISCLOSURE OF INFORMATION

Article 10

When the conciliator receives factual information concerning the dispute from a party, he discloses the substance of that information to the other party in order that the other party may have the opportunity to present any explanation which he considers appropriate. However, when a party gives any information to the conciliator subject to a specific condition that it be kept confidential, the conciliator does not disclose that information to the other party.

CO-OPERATION OF PARTIES WITH CONCILIATOR

Article 11

The parties will in good faith co-operate with the conciliator and, in particular, will endeavour to comply with requests by the conciliator to submit written materials, provide evidence and attend meetings.

SUGGESTIONS BY PARTIES FOR SETTLEMENT OF DISPUTE

Article 12

Each party may, on his own initiative or at the invitation of the conciliator, submit to the conciliator suggestions for the settlement of the dispute.

SETTLEMENT AGREEMENT

Article 13

(1) When it appears to the conciliator that there exist elements of a settlement which would be acceptable to the parties, he formulates the terms of a possible settlement and submits them to the parties for their observations. After receiving the observations of the parties, the conciliator may reformulate the terms of a possible settlement in the light of such observations.

(2) If the parties reach agreement on a settlement of the dispute, they draw up and sign a written settlement agreement.** If requested by the parties, the conciliator draws up, or assists the parties in drawing up, the settlement agreement.

(3) The parties by signing the settlement agreement put an end to the dispute and are bound by the agreement.

CONFIDENTIALITY

Article 14

** The parties may wish to consider including in the settlement agreement a clause that any dispute arising out of or relating to the settlement agreement shall be submitted to arbitration.

The conciliator and the parties must keep confidential all matters relating to the conciliation proceedings. Confidentiality extends also to the settlement agreement, except where its disclosure is necessary for purposes of implementation and enforcement.

TERMINATION OF CONCILIATION PROCEEDINGS

Article 15

The conciliation proceedings are terminated:

- (a) By the signing of the settlement agreement by the parties, on the date of the agreement; or
- (b) By a written declaration of the conciliator, after consultation with the parties, to the effect that further efforts at conciliation are no longer justified, on the date of the declaration; or
- (c) By a written declaration of the parties addressed to the conciliator to the effect that the conciliation proceedings are terminated, on the date of the declaration; or
- (d) By a written declaration of a party to the other party and the conciliator, if appointed, to the effect that the conciliation proceedings are terminated, on the date of the declaration.

RESORT TO ARBITRAL OR JUDICIAL PROCEEDINGS

Article 16

The parties undertake not to initiate, during the conciliation proceedings, any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings, except that a party may initiate arbitral or judicial proceedings where, in his opinion, such proceedings are necessary for preserving his rights.

COSTS

Article 17

(1) Upon termination of the conciliation proceedings, the conciliator fixes the costs of the conciliation and gives written notice thereof to the parties. The term “costs” includes only:

- (a) The fee of the conciliator which shall be reasonable in amount;
- (b) The travel and other expenses of the conciliator;
- (c) The travel and other expenses of witnesses requested by the conciliator with the consent of the parties;
- (d) The cost of any expert advice requested by the conciliator with the consent of the parties;
- (e) The cost of any assistance provided pursuant to articles 4, paragraph (2)(b), and 8 of these Rules.

(2) The costs, as defined above, are borne equally by the parties unless the settlement agreement provides for a different apportionment. All other expenses incurred by a party are borne by that party.

DEPOSITS

Article 18

(1) The conciliator, upon his appointment, may request each party to deposit an equal amount as an advance for the costs referred to in article 17, paragraph (1) which he expects will be incurred.

(2) During the course of the conciliation proceedings the conciliator may request supplementary deposits in an equal amount from each party.

(3) If the required deposits under paragraphs (1) and (2) of this article are not paid in full by both parties within thirty days, the conciliator may suspend the proceedings or may make a written declaration of termination to the parties, effective on the date of that declaration.

(4) Upon termination of the conciliation proceedings, the conciliator renders an accounting to the parties of the deposits received and returns any unexpended balance to the parties.

ROLE OF CONCILIATOR IN OTHER PROCEEDINGS

Article 19

The parties and the conciliator undertake that the conciliator will not act as an arbitrator or as a representative or counsel of a party in any arbitral or judicial proceedings in respect of a dispute that is the subject of the conciliation proceedings.

The parties also undertake that they will not present the conciliator as a witness in any such proceedings.

ADMISSIBILITY OF EVIDENCE IN OTHER PROCEEDINGS

Article 20

The parties undertake not to rely on or introduce as evidence in arbitral or judicial proceedings, whether or not such proceedings relate to the dispute that is the subject of the conciliation proceedings:

- (a) Views expressed or suggestions made by the other party in respect of a possible settlement of the dispute;
- (b) Admissions made by the other party in the course of the conciliation proceedings;
- (c) Proposals made by the conciliator;
- (d) The fact that the other party had indicated his willingness to accept a proposal for settlement made by the conciliator.

MODEL CONCILIATION CLAUSE

Where, in the event of a dispute arising out of or relating to this contract, the parties wish to seek an amicable settlement of that dispute by conciliation, the conciliation shall take place in accordance with the UNCITRAL Conciliation Rules as at present in force.

(The parties may agree on other conciliation clauses.)