SOUTH AFRICAN LAW COMMISSION

DISCUSSION PAPER 69

PROJECT 94

ARBITRATION: A DRAFT INTERNATIONAL ARBITRATION ACT FOR SOUTH AFRICA

Closing date for comments:
31 March 1997

ISBN: 0-621-17602-8

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 -

The Honourable Mr Justice I Mahomed (Chairperson)
The Honourable Mr Justice P J J Olivier (Vice-Chairperson)
The Honourable Madam Justice J Y Mokgoro
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PREFACE

This Discussion Paper has been prepared, on behalf of the Commission, by Prof David Butler, who is a member of the project committee.

The Discussion Paper (which reflects information accumulated up to the end of October 1996) has been prepared to elicit responses and to serve as a basis for the Commission's deliberations, taking into account any responses received. The views, conclusions and recommendations in this paper should not, at this stage, be regarded as the Commission's final views. The paper is published in full so as to provide persons and bodies wishing to comment or to make suggestions for the reform of this particular branch of the law with sufficient background information to enable them to place focused submissions before the Commission.

For the convenience of the reader a summary of the preliminary recommendations made in this discussion paper, follows immediately hereafter.

The Commission will assume that respondents agree to the Commission's quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the Commission may have to release information contained in representations under the Constitution of the Republic of South Africa, Act 200 of 1993.

Respondents are requested to submit written comments, representations or requests to the Commission by 28 February 1997 at the address appearing on the previous page. Please contact the researcher if you are unable to submit your comments in time. Comment already forwarded to the Commission should not be repeated, but respondents should merely indicate that they abide by their previous comment, if this is the position.

The researcher allocated to this project, who can be contacted for further information, is Mrs A M Louw. The project leader and chairperson of the project committee, responsible for the project, is The Honourable Mr Justice J H Steyn.

SUMMARY OF RECOMMENDATIONS

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

It is however being argued that the present South African law is not suitable for 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 further felt that the court's statutory powers or powers of assistance and supervision during the arbitral process may be excessive. The Commission believes 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 legisla-tion. In this process consideration is given to 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. It provides a framework within which international arbitration 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.

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 principle 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 arbitra-tion with optional application to domestic arbitrations. 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 of the other African countries and ratify the Washington Convention as it 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 will not only ensure that South Africa's arbitration legislation is readily available to foreign contracting parties, but it will 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 re-placing the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977. The legislation should furthermore include legislation implementing the Washington Convention. The International Arbitration Act will only apply to arbitrations pursuant to an agreement between the parties.

TABLE OF CONTENTS **PAGE**

LIST OF SOURCES

Agyemang A A — "African states and ICSID arbitration" (1988) 21 **CILSA** 177

Broches A — **Commentary on the UNCITRAL Model Law on International Commercial Arbitration** Kluwer Deventer 1990

Broches A — "Arbitration under the ICSID Convention" **News from ICSID No. 1** (1991)

Brower and Goodman — "Provisional measures and the protection of ICSID jurisdictional exclusivity against municipal proceedings" (1991) 6 ICSID **Rev - Foreign Investment LJ** 431

Butler D — "South African Arbitration Legislation - the Need for Reform" (1994) 27 **CILSA** 118

Butler D — "The Recovery of Interest in Arbitration Proceedings: an Agenda for Law Makers" (1995) 6 **Stel LR** 291

Butler D & Finsen E — **Arbitration in South Africa - Law and Practice** Juta Cape Town 1993

Christie R H — **The Law of Contract in South Africa** 2 ed Butterworths Durban 1993

Christie R H — "South Africa as a Venue for International Commercial Arbitration" (1993) 9 **Arbitration International** 153

Christie R H — "Arbitration: Party Autonomy or Curial Intervention II:

International Commercial Arbitrations" (1994) 111 **SALJ** 360

Davidson P J — "International Commercial Arbitration Law in Canada" (1991) 12 **Northwestern Journal of International Law and Business** 97

Delaume G R — "ICSID Arbitration" in Lew (ed) **Contemporary Problems in International Arbitrations** (1986) 23

Diamond A — "Multi-Party Arbitrations - A Plea for a Pragmatic Piecemeal Solution" (1991) 7 **Arbitration International** 403

El-Kosheri A S — "ICSID Arbitration and Developing Countries" (1993) 8 ICSID **Rev - Foreign International LJ** 104

Forsyth C F — **Private International Law** 3 ed 1996

Fox H — "Sovereign immunity and arbitration" in Lew (ed) **Contemporary problems** 323

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

Hirsch A — **The Arbitration Mechanism of the International Center for the Settlement of Investment Disputes** Martinus Nijhoff Dordrecht 1993

Holtzmann H M & Neuhaus J E — **A Guide to the UNCITRAL Model Law on International Commercial Arbitration:**

Legislative History and Commentary Kluwer Deventer 1989

Jacobs M S — **The Law of Arbitration in SA** Juta Cape Town 1977

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

Kaplan N — "The Model Law in Hong Kong - Two years on" (1992) 8 **Arbitration International** 223

Kawatra G K and Khwarana S L — "Indian arbitration law existing and proposed" (1995) Vol 12 No. 3 **Journal of International Arbitration** 5

Knutson R D A — "The interpretation of arbitral awards - when is a final award not final?" (1994) Vol 11 No. 2 **International Arbitration** 99

Lamm C B — "Jurisdiction of the International Centre for Settlement of Investment Disputes" (1991) 6 ICSID **Rev - Foreign Investment LJ** 462

Lew J D M (ed) — **Contemporary problems in International Arbitration** Centre for Commercial Law Studies Queen Mary College London 1986

Lörcher G — "Towards a reform of the German rules governing arbitration" (1995) 11 **Arbitration International** 391

Mann F A — "Where is an award made" (1985) 1 **Arbitration International** 107

Mustill M J "Arbitration: history and background" (1989 Vol 6 No. 2 **Journal of International Arbitration** 43

Mustill M J "Multiparite Arbitrations: an Agenda for Law Makers" (1991) 7 **Arbitration International** 393

Mustill M J and Boyd S C **The Law and Practice of Commercial Arbitration in England** 2 ed Butterworths London 1989

Nathan V S K "ICSID and dispute resolution in international civil engineering contracts" (1992) 58 **Arbitration** 193

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

Paterson R K "Implementing the UNCITRAL Model Law - The Canadian Experience" (1993) Vol 10 No. 2 **Journal of International Arbitration** 29

Paulsson J "Delocalisation of international commercial arbitration: when and why it matters" (1983) 53 **ICLQ** 53

Paulsson J "ICSID's Achievement and Prospects" (1991) 6 ICSID **Review - Foreign Investment Law Journal** 380

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

Pryles M — "Interlocutory Orders and Convention Awards: the case of Resort Condominiums v Bolwell" (1994) 10 **Arbitration International** 385

Redfern A & Hunter M — **Law and Practice of International Commercial Arbitration** 2 ed Sweet & Maxwell London 1991

Reymond C — "Where is an arbitral award made?" (1992) 108 **LQR** 1

Sanders P — "Unity and diversity in the adoption of the Model Law" (1995) 11 **Arbitration International** 1

Schwebel S M — "A celebration of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards" (1996) 12 **Arbitration International** 83

Semple W G — "The UNCITRAL Model Law and Provisional Measures in International Commercial Arbitration" (1994) 3 **The Arbitration and Dispute Resolution LJ** 269

Stipanowich T J — "Arbitration and the Multiparty Dispute: The Search for Workable Solutions (1987) 72 **Iowa Law Review** 473

UNCITRAL Secretariat — **Explanatory note by the UNCITRAL secretariat on the Model Law on International Commercial Arbitrations** United Nations Vienna 1994

Van den Berg A J — **The New York Arbitration Convention of 1958** Kluwer Deventer 1981

Van den Berg A J — "Non-domestic arbitral awards under the New York

Convention" (1986) 2 **Arbitration International** 191

Van den Berg A J — "Consolidated Arbitrations, the New York Arbitration Convention and the Dutch Arbitration Act 1986 - a Replique to Mr Jarvin" (1987) 3 **Arbitration International** 257

Williams V C, Hannay W M, Littenberg M R and Robinson L G (eds) — **A Lawyers Guide to doing business in South Africa** American Bar Association New York 1996

REPORTS AND MEMORANDA

Association of Arbitrators **Amendments to Arbitration Act 42 of 1965 Commentary on Proposed Amendments** (20 July 1994 - submission to the S A Law Commission)

Departmental Advisory Committee on Arbitration Law **Report on the Arbitration Bill** February 1996 (The Saville Report)

ICSID 1995 **Annual Report**

Law Reform Commission of Hong Kong **Report on the Adoption of the UNCITRAL Model Law of Arbitration** Topic 17 1987

Mustill M Report of the Departmental Advisory Committee on the UNCITRAL Model Law (London, 1989) "the Mustill Report" reproduced in (1990) 6 **Arbitration International** 3

New Zealand Law Commission **Arbitration** NZLC R20 1991

Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of other states (18 March 1965)

Report of the Secretary-General: possible features of a model law on international commercial arbitration (A/CN9/207 of 14 May 1981)

Report of the Working Group on International Contract Practices on the work of its third session (A/CN9/216 of 23 March 1982)

Report of the Working Group on International Contract Practices on the work of its fourth session (A/CN9/232 of 10 November 1982)

Report of the Working Group on International Contract Practices on the work of its fifth session (A/CN9/233 of 28 March 1983)

Report of the Working Group on International Contract Practices on the work of its sixth session (A/CN9/245 of 22 September 1983)

Report of the Working Group on International Contract Practices on the work of its seventh session (A/CN9/246 of 6 March 1984)

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

Analytical Commentary on draft text of a model law on international commercial arbitration (A/CN9/264 of 25 March 1985)

Report of the United Nations Commission on International Trade Law on the Work of its eighteenth session (A/40/17 of 21 August 1985)

UN General Assembly Resolution 40/72 of 11 December 1985

S A Law Commission **Verslag oor Rente op Gelede Skade** Project 78 1994

S A Law Commission **Arbitration** Working Paper 59 1995

TABLE OF CASES

SOUTH AFRICA

Amalgamated Clothing and Textile Workers Union of South Africa v Veldspun (Pty) Ltd 1994 1 SA 162 (A)

Austen v Joubert 1910 TS 1095

Benidai Trading Co Ltd v Gouws and Gouws (Pty) Ltd 1977 3 SA 1020 (T)

Bester v Easigas 1993 1 SA 30 (C)

Dadoo Ltd v Krugersdorp Municipal Council 1920 AD 530

Frankel Max Pollak Vinderine Inc v Menell Jack Hyman Rosenburg and Co Inc 1996 3 SA 355 (A)

Harlin Properties (Pty) Ltd v Rush and Tomkins 1963 1 SA 187 (D)

Interciti Property Referrals CC v Sage Computing (Pty) Ltd 1995 3 SA 723 (W)

John Sisk and Son (SA) (Pty) Ltd v Urban Foundation 1985 4 SA 349 (N); 1987 3 SA 190 (N)

Jones v Krok 1996 1 SA 504 (T); 1996 2 SA 71 (T)

Kathrada v Arbitration Tribunal 1975 1 SA 673 (A)

Middleton v The Water Chute Co Ltd (1905) 22 SC 155

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

Polysius (Pty) Ltd v Transvaal Alloys (Pty) Ltd 1983 2 SA 630 (W)

Schoch NO v Bhettay 1974 4 SA 860 (A)

Tradex Ocean Transportation SA v MV Silvergate (or Astyanax) 1994 4 SA 119 (D)

Tucker v F B Smith and Co (1908) 25 SC 12

Tuesday Industries (Pty) Ltd v Condor Industries (Pty) Ltd 1978 4 SA 379 (T)

Van Heerden v Sentrale Kunsmis Korporasie (Edms) Bpk 1973 1 SA 17 (A)

Van Zyl v Von Haebler 1993 3 SA 654 (SE)

Victor E Gillian Trust v Sessions unreported CPD case no 10801/1994, 2 August 1995

Wayland v Everite Group Ltd 1993 3 SA 946 (W)

Wynland Municipality v Town Council of Cape Town (1892) 9 SC 412

ENGLAND

Arenson v Casson Bechman Rutley and Co 1977 AC 405

Czarnikow v Roth, Schmidt and Company [1922] 2 KB 478

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)

Hiscox v Outhwaite (No 1) [1991] 3 All ER 641 (HL)

AUSTRALIA

Resort Condominiums International Inc v Bolwell (1993) 118 ALR 655 SC (Qld) 675

A DRAFT INTERNATIONAL ARBITRATION ACT FOR SOUTH AFRICA

CHAPTER 1

INTRODUCTION

(a) A brief history of the arbitration project

1.1 On 1 August 1994, the Executive Director of the Association of Arbitrators 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.

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

1.3 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 United Nations Commission on International Trade Law's Model Law on International Commercial Arbitration ('the UNCITRAL Model Law'), beyond recommending that is should be adopted for international arbitrations only.

1.4 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.

1.5 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.

1.6 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.[1]

1.7 The extended date for comments to Working Paper 59 was 31 December 1995. An overview of the response is given in para (b) below.

1.8 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.

1.9 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.

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1 S A Law Commission **Arbitration** Working Paper 59 1995 para 51 (hereinafter referred to as "Working Paper 59"); regarding opt-in and opt-out provisions, see the commentary on s 5 in Chapter 2, para (b) below.

1.10 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 2 of this memorandum) 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 3). 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.

(b) The response to Working Paper 59

1.11 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.[2]

1.12 Of those respondents who adopted a position on the Model Law, only one favoured its adoption for domestic arbitrations.[3] However, it is fair to say that a majority of the respondents 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.

CHAPTER 2

2 These were 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.

3 See the response on behalf of the Council of South African Bankers, dated 20 October 1995.

SOUTH AFRICA'S RESPONSE TO THE UNCITRAL MODEL LAW

(a) Proposed draft legislation

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

2.1 The possible responses by South Africa to the Model Law referred to in Working Paper 59 of the SA Law Commission are set out in para 1.5 above. Subject to our comments on s 5 in para (b), the Commission favours option (c) and rejects options (a) and (b). The Model Law should therefore be adopted for international arbitrations only, while retaining a separate statute for domestic arbitrations.

2.2 The concept 'international arbitration' is defined in article 1(3) of the Model Law. Subject to our comments on article 1(3) in para (b) hereunder, we are satisfied that this definition should be adopted for determining which arbitrations qualify as international and are therefore subject to the Model Law.

2.3 The 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.[4]

2.4 The reasons why South Africa should adopt the Model Law for international arbitration only and as a matter of urgency have been well aired and do not require detailed repetition.[5] The urgency of the matter arises because South Africa's existing

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4 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.

5 Working Paper 59 paras 10-28; Christie R H "Arbitration: Party Autonomy or Curial Intervention II:

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.[6]

2.5 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 both international and domestic arbitration. However, this approach is understandable in that both those countries' existing arbitration legislation and their case law on arbitration were much less developed than that of South Africa.

2.6 If the Model Law is adopted for international arbitrations only, it may be argued that the dualistic system thereby created is unnecessarily complicated and confusing. However, a dualistic system is unavoidable if the Model Law is adopted, because it will

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International Commercial Arbitrations" (1994) 111 **SALJ** 360-72, especially 370-2 (hereinafter referred to as "Christie (1994)"); Christie R H "South Africa as a Venue for International Commercial Arbitration" (1993) 9 **Arbitration International** 153, especially 165 (hereinafter referred to as "Christie (1993)"); Butler D "South African Arbitration Legislation - the Need for Reform" (1994) 27 **CILSA**, 118 especially 134-5 (hereinafter referred to as "Butler"); Adv A Findlay SC Submission in response to Working Paper 59 para 5.

6 Sanders P 'Unity and diversity in the adoption of the Model Law' (1995) 11 **Arbitration International** 1 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 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 (1987) 26 ILM 949 960 n 13 that there are significant philosophical and textual differences between the Florida statute and the Model Law. Of the major industrial countries in Western Europe, as yet only Germany intends adopting the Model Law (Lôrcher G 'Towards a reform of the German rules governing arbitration' (1995) 11 **Arbitration International** 391 392 states that deviations from the text of the Model Law are mostly of an editorial and not of a substantive nature). New Zealand is to adopt the Model Law for both domestic and international arbitrations (see the Arbitration Act 1995, which is due to commence on 1 July 1997). In India a new Arbitration and Conciliation Bill, based largely on the Model Law, was submitted to parliament in 1995 (see 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 para 2.5 came into force on 1 January 1996 and 13 September 1996 respectively. Pending receipt of a copy of the Zimbabwean Act, the references in the Discussion Paper are to the Arbitration Bill as submitted to Parliament.

probably require substantial amplifications to make it suitable for domestic use.

2.7 The Model Law will also have a substantial influence on the revision of our domestic arbitration laws: compare the proposals submitted to the SA Law Commission by the Association of Arbitrators in this regard, several of which rely at least in part on the Model Law.[7] The revision of our domestic laws will therefore bring the two systems closer together.

2.8 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 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.[8]

2.9 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.[9]

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7 See the following provisions of the Draft Act accompanying the Association's submissions to the SA Law Commission: s 5(2)-(6) (arbitral tribunal's power to rule on own jurisdiction); s 14(2) (general power of tribunal to conduct the reference as it deems fit); s 16(b) (award on the basis of general consideration of justice and fairness if arbitration agreement so provides); s 27(3) (reasoned awards); and s 33 (correction and clarification of award, additional award).

8 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** 2ed Sweet & Maxwel London 1991 (hereinafter referred to as "Redfern & Hunter") 509; Butler 131.

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

2.10 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 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.

(ii) Basic form and contents of implementing legislation

2.11 This matter is raised in paras 33 and 51.3 of Working Paper 59. In the view of the Commission, it is vitally important that the South African version of the Model Law should follow the official English text as closely as possible,[10] 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.

2.12 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.[11] The 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.

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10 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.

11 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** 97 115 (hereinafter referred to as "Davidson")), the United Kingdom for Scotland (see the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 s 66(2) and sch 7), by 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 Law Commission in New Zealand (see the Arbitration Bill of 1995 sch 1 and the Zimbabwe Arbitration Bill of 1995 s 2 and sch 1.

2.13 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 Africa Act 200 of 1993, 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). However, the opt-in provision in the case of domestic arbitration has been included in the text of the Draft Bill as s 5, which has the advantage of highlighting the change.

2.14 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 7 of the draft Bill in para 2(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.

2.15 The 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 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.

2.16 Some arbitration statutes[12] have a provision applying the statute to statutory arbitrations, that is a compulsory reference to arbitration in terms of another statute,

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12 Compare the Arbitration Act 42 of 1965 s 40, New Zealand Bill of 1995 s 7, Zimbabwean Bill of 1995 s 5.

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

2.17 The Draft Bill in Annexure C to this commentary comprises five Chapters and four schedules. Chapter 1 comprises 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 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 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 certain general provisions, including a provision applying the Act to the State and the necessary transitional provisions.

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

2.18 In this section the following portions of the proposed Draft Bill will be discussed, namely Chapter 1 (Statement of Principles), 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: STATEMENT OF PRINCIPLES

S 1 Purposes of the Act

2.19 This provision is based on s 5 of the New Zealand Arbitration Bill of 1995. 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 Act aims at encouraging the use of arbitration as an agreed method of resolving international commercial 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,[13] 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.

2.20 The Model Law is enacted for international arbitrations only, for the reasons discussed in para 2(a)(ii) above. However, there is an 'opt-in' provision in the case of domestic arbitrations. The reasons for this provision appear from the commentary on s 5 below.

2.21 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.

2.22 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

13 The New Zealand Bill of 1995 in s 5(b) does not merely refer to the adoption of the Model Law as being one of the aims of the Bill (compare s 5(b) of the Draft Bill annexed to this commentary). 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.

in the context of Chapter 2 of the Draft Bill, the purpose of which is to implement the UNCITRAL Model Law for international commercial arbitrations with as few changes as possible.

CHAPTER 2: INTERNATIONAL COMMERCIAL ARBITRATION

s 2 Definitions

2.23 The purpose of this section 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 2 is largely based on the Australian International Arbitration Act of 1974 s 15. The Zimbabwean Arbitration Bill of 1995 (s 2(1) and (2)) contains similar provisions.

s 3 Model Law to have force of law

2.24 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 2.17 above.

s 4 Exclusion of Act 42 of 1965

2.25 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.[14]

2.26 To the extent that it is not considered necessary to amplify the Model Law to fill

14 See further para (c) below.

these gaps,[15] 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.

2.27 S 4 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 pitfallls.

s 5 Optional application of Model Law to domestic arbitrations

2.28 The inclusion of 'opt-in' or opt-out' provisions is discussed in Working Paper 59[16]; by Sanders[17] and in paras 92-99 of the Mustill Report.[18] 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 means 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 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

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

16 Paras 30.4 and 39.

17 (1995) 11 **Arbitration International** 1, 5-6 (hereinafter referred to as “Sanders”).

18 (1990) 6 **Arbitration International** 30-33.

2.29 This is permitted, for example, by s 66(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 which implemented the Model Law in Scotland.[19] S 66(4) provides:

> '(4) 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 7 to this Act, agree that the Model Law as set out in that Schedule shall apply, and in such a case the Model Law as so set out shall apply to that arbitration.'

2.30 There are two main considerations in relation to the inclusion of an 'opt-in' provision.[20] Allowing parties to contract in relation to what is objectively a domestic arbitration avoids 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.

2.31 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.

2.32 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

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19 Sanders 5.

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

international arbitration.[21]

2.33 The test for establishing whether or not a transaction is in *fraudem legis* under South African law was formulated by Innes CJ in **Dadoo Ltd v Krugersdorp Municipal Council**[22] as follows:

> 'An examination of the authorities therefore leads me to the conclusion that a transaction is in *fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions. Thus stated, the rule is merely a branch of the fundamental doctrine that the law regards the substance rather than the form of things - a doctrine common, one would think to every system of jurisprudence and conveniently expressed in the maxim *plus valet quod agitur quam quod simulate concipitur*.' (See also Christie **The Law of Contract**.[23])

2.34 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 Law.

2.35 The second consideration is one of policy. Should parties to a domestic arbitration be entitled to opt for the Model Law, thereby avoiding the more stringent controls by the courts contained in the 1965 Arbitration Act?

2.36 The crucial powers of the court to set aside or to refuse to enforce an award (contained in articles 34 and 36 of the Model Law) do not differ significantly in their effect from those in ss 31, 32 and 33 of the present Act, although the grounds on which remittal would be possible (compare article 34(4)) are more narrow. Moreover, the

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21 See Sanders 10 and compare Broches A **Commentary on the UNCITRAL Model Law on International Commercial Arbitration** Kluwer Deventer 1990 (hereinafter referred to as "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.'

22 1920 AD 530 547.

23 Christie R H **The Law of Contract in South Africa** 2 ed Butterworths Durban 1993 414-6.

grounds on which enforcement could be refused are defined with greater clarity in article 34 than in s 31 of the current Act.[24] The powers of the court in the present Act or common law which are not in the Model Law concern additional powers of assistance, supervision and interference before and during the reference. There appears to be no objection in principle to allowing parties to contract out of these powers.[25]

2.37 The Commission therefore recommends the inclusion of an 'opt-in' provision on the lines of that in the Scottish legislation.[26] S 5 of the draft Bill gives effect to this recommendation.

Opting out

2.38 At least three 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.[27]

2.39 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

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24 See generally Christie (1993) 160-164.

25 Compare for example Butler 141-2 who suggests that s 20 of the present Act ('Statement of case for opinion of court or counsel during arbitration proceedings') should be amended to authorise parties expressly to contract out of this provision.

26 An alternative method of achieving the same result would be to adopt the Nigerian approach, and incorporate an additional article 1(3)(d) in the definition of an international arbitration in the Model Law:

'(d) the parties, despite the nature of the contract, expressly agree that any dispute arising from the commercial transaction shall be treated as an international arbitration.'

(See s 57(2)(d) of the (Nigerian) Arbitration and Conciliation Act of 1988 and Sanders 5.)

27 Sanders 5-6; Working Paper 59 par 39.5-39.6.

learnt to exploit and abuse so successfully over the years?

2.40 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 international arbitration practice is also essential. Although the 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.[28]

2.41 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.

s 6 Matters not subject to arbitration

2.42 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. 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 matters[29] further restrictions on arbitrability are contained in s 2 of the Arbitration Act 42 of 1965. By excluding Chapter 2 of the Draft Bill from the operation of the 1965 Act (see the commentary to s 4 above) it becomes necessary to include a provision similar to s 2 of the Arbitration Act in the legislation enacting the Model Law. 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

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28 See Butler 121-122; Association of Arbitrators **Amendments to Arbitration Act 42 of 1965 Commentary on Proposed Amendments** (20 July 1994) (hereinafter referred to as "Association of Arbitrators") par 1.5.

29 Butler D & Finsen E **Arbitration in South Africa - Law and Practice** Juta Cape Town (hereinafter referred to as "Butler & Finsen") 55-6.

legislation.[30]

s 7 Interpretation

2.43 Because the Model Law's provisions sometimes represent a compromise between different legal traditions and its wording differs from that customarily used by some legislatures, 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*.

2.44 This technique has traditionally not been permitted for courts applying rules of statutory interpretation derived from English law.[31] 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, New Zealand and Zimbabwe. However, the Kenyan Arbitration Act of 1995 appears to contain no such provision.

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

2.46 However, as the Model Law is the product of several drafts and several sessions

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30 See the New Zealand Arbitration Bill of 1995 s 8(1) and (2) and the Zimbabwean Arbitration Bill of 1995 s 4.

31 See eg Davidson 107 regarding the traditional approach in Canada; Christie (1994) 364.

of the Commission's working group, the working papers used its preparation are fairly numerous.[32] Therefore the legislatures referred to above in permitting 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*.

2.47 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)[33] and the legislation of the Canadian provinces apart from British Columbia[34] 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'[35] and (b) the Report of the United Nations Commission on International Trade Law on the work of its Eighteenth Session (3-21 June 1985).[36] To ensure the general availability of the documents, the Canadian Minister of Justice was required to effect their publication in the *Canada Gazette*.[37]

2.48 British Columbia, Scotland, 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

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32 See the documents referred to by Broches 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).

33 See Kaplan N "The Model Law in Hong Kong - Two years on" (1992) 8 **Arbitration International** 223 235 and the Law Reform Commission of Hong Kong **Report on the Adoption of the UNCITRAL Model Law on Arbitration** Topic 17 1987 pars 4.18 - 4.26.

34 See eg Davidson 79 regarding s 12 of the International Commercial Arbitration Act of Ontario (Ont. Stat. ch 30 (1988)).

35 Analytical Commentary on draft text of a Model Law on International Commercial Arbitration A/CN9/264 of 25 March 1985 (hereinafter referred to as A/CN9/264).

36 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).

37 See the Commercial Arbitration Act 1986 s 7.

Arbitration Law'.[38] 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 Law as set out in schedule 7 of this Act'.[39] The Australian, New Zealand and Zimbabwean legislation is to the same effect as that of Scotland.[40]

2.49 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 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.

2.50 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);

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

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

40 See the (Australian) International Arbitration Act of 1974 (as amended in 1989) s 17(1); the New Zealand Arbitration Bill of 1995 s 3; the Zimbabwean Arbitration Bill of 1995 s 2(3).

(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).

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

2.51 Article 1(1) provides that the Model Law 'applies to international commercial arbitration', with a definition of 'commercial' being provided in a footnote. The Hong Kong Law Commission Topic 17 paras 4.11-4.16 recommended that the reference to 'commercial' in article 1(1) of the Model Law plus the definition in the footnote should be deleted. The Australian version of the Model Law retains the definition in a footnote.[41] 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.[42]

2.52 The 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. We are also of the view that the inclusion of a definition of 'commercial' is not necessary.

2.53 Although the drafters of the Model Law went to great lengths to make the definition as comprehensive as possible,[43] the main reason why the definition was included in a footnote was the drafters' inability to formulate a generally acceptable definition.[44] The definition may therefore have certain gaps, or a party trying to evade the Model Law, by arguing that the dispute does not relate to a commercial matter, may attempt to find or create a gap.

2.54 The term 'commercial' was extensively discussed in the *travaux préparatoires*[45]

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41 For the response of other countries, see Sanders 10-11.

42 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.

43 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.

44 See A/40/17 par 20.

45 See eg Report of the Working Group on International Contract Practices on the work of its sixth session A/CN9/245 of 22 September 1983 pars 161-2 (hereinafter referred to as A/CN9/245); Analytical

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

2.55 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.

2.56 Article 1(3) and (4) define an international arbitration for purposes of the Model Law. The definition is important, because a domestic arbitration, unless the parties use the opt-in provision in s 5, 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. The further possibility of the parties agreeing that the arbitration is international because the subject-matter of their agreement relates to more than one country has been discussed in the context of s 5 above.

2.57 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 6 above.

Article 2 Definitions and rules of interpretation

2.58 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'.

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compilation of comments by Governments and international organisations on the draft text of a Model Law or International Commercial Arbitration A/CN9/263 of 19 March 1985 pars 12-17 (hereinafter referred to as A/CN9/263); A/40/17 pars 19-26.

2.59 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.[46]

2.60 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

2.61 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.

Article 4 Waiver of right to object

2.62 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 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

46 A/CN9/264, commentary on article 2.

2.63 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 (a)(i) above). Article 5 emphasises this object, by providing that '[i]n matters governed by this Law',[47] no court shall intervene except where so provided in the Model Law.

2.64 In the 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 for commencing arbitration agreement') these powers will not be available in an arbitration under the Model Law by virtue of the provisions of s 4 of the Draft Bill, for the reason referred to in the commentary on that section.

Article 6 Court for certain functions of arbitration assistance and supervision

2.65 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)).

2.66 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, 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

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47 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).

the state concerned.

2.67 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.

2.68 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 Scotland[48] 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 specified in the South African version of the Model Law, either in article 6 or article 9. The latter method would promote legal certainty.

2.69 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 Supreme Court having jurisdiction in the area where the arbitration is to take place,[49] or where the South African party is resident or carries on business, to cover the situation where the court is required to assist with the appointment of an arbitrator before the place of arbitration has been determined.

2.70 Where there is no South African party, and the arbitration agreement provides for

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

49 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.

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 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.

2.71 Article 6 envisages that certain functions of the court (eg the power to appoint arbitrators) could be officially allocated in the Model Law to a designated arbitral body. It is submitted that no arbitral body in South Africa presently has sufficient status to assume this role, unless the role is conferred on it by the parties' agreement. We say this because the parties may particularly require assistance regarding the identification and appointment of suitable international arbitrators from neutral countries. If this recommendation is accepted, the words 'or other authority' after 'court' in articles 11(3), (4) and (5), 13(3) and 14(1) should be deleted.

CHAPTER II: ARBITRATION AGREEMENT

Article 7 Definition and form of arbitration agreement

2.72 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,[50] in the interests of uniformity with most other Model Law countries, no change is recommended.

Article 8 Arbitration agreement and substantive claim before court

2.73 This article requires a court to refer a dispute covered by an arbitration

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50 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 Bill sch 1 article 7 which extends to an oral agreement.

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.

2.74 The New Zealand Bill recommends a further ground for non-enforcement under article 8, 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'.[51]

2.75 No change to this article is recommended, which will also cover the enforcement of arbitration agreements under the New York Convention (see para 3(c) below). The restriction of the court's powers of interference are in line with one of the objects of the Model Law and also brings South African law pertaining to international arbitrations into line with generally accepted international standards.

Article 9 Arbitration agreement and interim measures by court

2.76 This article provides that it is not incompatible with an arbitration agreement to request 'interim measure[s] of protection' from the court before or during the arbitration proceedings, but without defining the concept 'interim measure of protection'.

2.77 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.[52] The court's power to grant interim measures must be compared to that of the arbitral tribunal in article 17 (see the

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51 Arbitration Act of 1996 s 9; Saville Report 19 para 55.

52 A/40/17 par 96.

commentary on this article below).

2.78 Holtzmann & Neuhaus[53] are of the view that article 9 and the court's powers to grant interim measures can be excluded in the arbitration agreement.[54]

2.79 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.[55]

2.80 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.[56] These powers would not be affected by the exclusion of the 1965 Act recommended in Chapter 3 par (d) above. To the extent that these powers overlap with powers conferred on the court by the Model Law, they would be excluded by article 5.

2.81 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,**[57] although the court stressed it would only be exercised in exceptional circumstances and did not exercise it in that case.

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53 *Op cit* 333.

54 They cite as authority par 96 of the Commission's report (A/40/17), which is however ambivalent.

55 Butler 142-143. 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.

56 Butler & Finsen 61-62; Butler 124.

57 1978 4 SA 379 (T).

2.82 We therefore recommend that South Africa should follow the approach recommended by the New Zealand Law Commission[58] and adopted by the legislature in Scotland[59] and spell out which powers the court may exercise as interim measures of protection in terms of article 9.[60]

2.83 Article 9(2) in sch 1 of the New Zealand Arbitration Bill of 1995 serves as an example, and 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.'

2.84 Because of a South African court's common-law powers referred to above, it would probably be 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. See article 9(5) of the Draft Bill.

2.85 The Scottish legislature[61] made a further addition to article 9 by providing:

> '(3) Where:
> (a) a party applies to a court for an interim interdict or other interim order; and

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58 New Zealand Law Commission **Arbitration** NZLC R20 168-9 (hereinafter referred to as "NZLC R20").

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

60 For a discussion of interim measures under the Model Law in Scotland, see Semple WG 'The UNCITRAL Model Law and provisional measures in international commercial arbitration' (1994) 3 **The Arbitration and Dispute Resolution LJ** 269-89.

61 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 the First Schedule to the 1995 Arbitration Bill.

(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.'

2.86 We believe that this addition merits serious consideration for South Africa. It will serve to expedite court applications on interim measures, in that the arbitral tribunal's factual findings will no longer be open to dispute. It also prevents article 9 being used as an avenue for disguised appeals or reviews of the arbitral tribunal's procedural rulings. Finally, a point which was apparently not considered by the New Zealand Law Commission, it provides an indirect method of enforcing certain procedural rulings by the arbitral tribunal (compare the commentary on article 17 below). A provision to give effect to this recommendation has been incorporated as article 9(3).

2.87 Problems could however arise where the arbitral tribunal's ruling on interim measures also has or is 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 Commission therefore recommends 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.

CHAPTER III: COMPOSITION OF ARBITRATION TRIBUNAL

Article 10 Number of arbitrators

2.88 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).

2.89 Certain jurisdictions, eg Scotland, have modified article 10(2) to provide for a

single arbitrator, unless the parties agree otherwise.[62] This reduces expense and is in accordance with the usual South African practice. The 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. A modification similar to that adopted in Scotland is therefore recommended.

Article 11 Appointment of arbitrators

2.90 Article 11(1) is aimed at countering restrictions in some jurisdictions which preclude foreigners from acting as arbitrators.[63] The parties are free to agree on the procedure for the appointment of arbitrators subject to the mandatory provisions of article 11(4) and (5) regarding the powers of the court. The qualifications for an arbitrator are not set out. However, the parties in practice should have regard to the factors to be taken account by the court in making an appointment in article 11(5) as well as the grounds in article 12 on which an appointment may be challenged.[64]

2.91 As article 11 is not one of those articles which has extra-territorial application (see article 1(2)), the powers of the court 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)).

2.92 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.[65] Secondly, the court's power to appoint an arbitrator

62 Sanders 12-13; The Zimbabwean Arbitration Bill of 1995 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 both domestic and international arbitrations. However, the Kenyan Arbitration Act of 1995, which also applies to both international and domestic arbitrations, stipulates that there shall be a single arbitrator in both instances unless the parties agree otherwise.

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

64 Broches (1990) 57-8.

65 Compare s 11(1)(b) of the Arbitration Act 42 of 1965 and Butler 144. The difference between a third

where the mechanism agreed to by the parties has failed is wider and will cover the situation where the power to make the appointment was conferred on a third party who has failed to make the appointment.[66] Both these differences are an improvement on the present position.

2.93 No changes to the substance of article 11 are proposed.

Article 12 Grounds for challenge

2.94 Article 12(1) imposes a duty on a prospective arbitrator to disclose circumstances which are likely to affect that arbitrator's independence and impartiality. 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.[67]

2.95 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.

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

Article 13 Challenge procedure

2.97 This article deals with the procedure for a challenge to an arbitrator's

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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.

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

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

appointment on the grounds contained in article 12. 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.[68] 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.

2.98 If a challenge under an agreed procedure or the default mechanism is unsuccessful, the unsuccessful party may refer the matter to court. As in other instances of court intervention during the arbitration (see articles 11(5) and 16(3)) the decision of the court is not subject to appeal. This 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. Where the tribunal is of the view that the challenge is unjustified it has the discretion to continue with the arbitration pending the outcome of the court proceedings. This is a desirable safeguard against the challenge procedure being used as a delaying tactic.[69]

Article 14 Failure or impossibility to act

2.99 Regarding the grounds for terminating the arbitrator's mandate in article 14, 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.[70] 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

68 A/40/17 para 124.

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

70 A/40/17 para 137.

a factor because this could open the door to a review of the substantive work of the arbitral tribunal.[71] 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 controversy remains as to the presence of the grounds referred to in article 14 it will have to be resolved by the court.[72]

Article 15 Appointment of substitute arbitrator

2.100 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.

2.101 Article 15 thereby endeavours to embrace all possible cases where the need to appoint a substitute arbitrator may arise.[73] 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

71 A/40/17 para 138.

72 Broches (1990) 67.

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

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.[74]

2.102 The New Zealand Arbitration Bill of 1995 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 made prior to the replacement, is not invalid solely because there has been a change in the composition of the tribunal.[75] 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.[76]

2.103 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.

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

75 First Schedule article 15(2) and (3). The Zimbabwe Arbitration Bill first schedule article 15(2) and (3) and the Kenyan Arbitration Act 1995 s 16(2) and (3) contain similar provisions.

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

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

2.104 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.**[77] 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.**[78] The **Wayland** case is completely contrary to trends in other jurisdictions[79] and both Butler[80] and Christie[81] 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.[82] Article 16(1) and (2) should therefore be adopted unchanged.

2.105 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

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77 1993 3 SA 946 (W).

78 1973 1 SA 17 (A).

79 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).

80 *Op cit* 147-8.

81 Christie (1993) 158; Christie (1994).

82 See the cases in footnote 76, 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.

earlier review creates the opportunity for delaying tactics.

2.106 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.[83]

2.107 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.[84] 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. We therefore recommend that article 16, including article 16(3), should be adopted without amendment.

Article 17 Power of arbitral tribunal to order interim measures

2.108 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.[85] The Model Law does not provide measures for enforcing such orders. Australia and Scotland therefore include an additional provision to enable such orders to be enforced as an award.[86]

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83 A/40/17 par 157 - par 163.

84 Holtzmann & Neuhaus 486.

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

86 S 23 of the (Australian) International Arbitration Act of 1974 (which is an optional or 'opt-in' provision) and sch 7 of the Scottish legislation article 17(2), which applies automatically, unless the parties contract out of article 17. The New Zealand Law Commission (NZLC R20 179-80) recommends a similar provision, but on a contract-out basis (see article 17(2) of the First Schedule to the 1995 Arbitration Bill). Because the order can be enforced like an award, all these provisions envisage, whether expressly or by implication, that the court could refuse to enforce the order on one of the grounds referred to in article 36.

2.109 We do not consider such an addition to be necessary. A party who foresees that it will be unable to enforce the tribunal's order would be well advised to apply directly to court under article 9 (see the commentary on article 9 above). However, if our recommendation above for the inclusion of an additional article 9(3) is accepted, factual findings or rulings by the arbitral tribunal may be used to support the court application.

CHAPTER V: CONDUCT OF ARBITRAL PROCEEDINGS

Article 18 Equal treatment of parties

2.110 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. This 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.[87]

Article 19 Determination of rules of procedure

2.111 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 Law (articles 18, 23(1), 24(2) and (3), 27, 30(2), 31(1), (3) and (4), 32, 33(1)(a), (2), (4) and (5)[88] which are aimed at ensuring procedural fairness.

2.112 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

87 Compare article 34(2)(b)(ii) and see UNCITRAL Secretariat para 42.

88 Holtzmann & Neuhaus 583.

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.

2.113 No changes to this article are recommended.

Article 20 Place of arbitration

2.114 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 tribunal, who are obliged to have regard to the circumstances of the case, including the convenience of the parties.

2.115 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.

2.116 No changes to this article are recommended.

Article 21 Commencement of arbitral proceedings

2.117 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. 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.[89] Article 21 also gives the parties the freedom to make their own arrangement in this respect.

2.118 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.

2.119 Given the pragmatic attitude of our courts when applying s 13(1)(f),[90] 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 Commission therefore recommends that the wording of article 21 should be adopted without alteration.

Article 22 Language

2.120 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

2.121 'The required contents of the initial statement of claim and of the respondent's

89 Report of the Working Group on International Contract Practices on the work of the third session A/CN9/216 of 23 March 1982 (hereinafter referred to as "A/CN9/216") par 72; A/CN9/264-49; Broches 108; Holtzmann & Neuhaus 610, who point out that determination of the commencement of arbitral proceedings is also relevant for the application 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').

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

reply may be regarded as so basic and necessary as to conform with all established arbitration systems and rules.'[91] The provision is however non-mandatory in its detail leaving the parties free to make use of particular arbitral rules. Article 23(1) 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

2.122 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.

2.123 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.

2.124 No changes to this article are recommended.

Article 25 Default of a party

2.125 This article gives the tribunal certain powers in the event of a party's default,

91 A/CN.9/264 51.

unless those powers are excluded or modified in the arbitration agreement. Article 25(a) requires the tribunal to terminate the proceedings if the claimant request 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 that 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. We recommend that it should be adopted without amendment.

Article 26 Expert appointed by arbitral tribunal

2.126 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 (article 12) and UNCITRAL (article 27).

2.127 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.)

2.128 A similar power is to be conferred on arbitrators in England by s 37 of the

Arbitration Act of 1996. We recommend that this provision should be adopted without amendment.

Article 27 Court assistance in taking evidence

2.129 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'.

2.130 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.'[92]

2.131 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.

2.132 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.[93]

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92 *Op cit* 738. See also A/140/17 par 223-5.

93 Butler & Finsen 241.

2.133 S 21(1)(c) of the Arbitration Act 42 of 1965 gives the supreme court the same power to order 'the examination of any witness before a commissioner in the Republic ... or abroad and the issue of a commission or a request for such examination' as it has for purposes of a court action.[94]

2.134 We have recommended that the Arbitration Act 42 of 1965 should not apply to arbitrations held under the Model Law (see the commentary to s 4 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.

2.135 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.

2.136 We recommend that pursuant to the international practice of giving the arbitrator greater control over what evidence is presented,[95] 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 supreme court for the appointment of a commissioner.

2.137 The recommended addition to article 27 to implement these recommendations is loosely based on the New Zealand Arbitration Bill of 1995 sch 1 article 27(2) and the English Arbitration Act of 1996 s 44.

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94 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.

95 See the ICC Arbitration Rules (1988) article 14; *International Bar Association Supplementary Rules Governing the Presentation and Reception of Evidence in International Commercial Arbitration* (1983), contained in Redfern & Hunter 704-707, 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

2.138 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.

2.139 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.

2.140 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).[96]

2.141 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.[97] The English Arbitration Act of 1996 however follows article 28(2) of the Model Law.[98]

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96 UNCITRAL Ssecretariat para 35.

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

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

2.142 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 of conflict of laws'[99] and recommend that the provisions should be adopted unchanged.

2.143 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'.[100]

2.144 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.[101] 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 Appellate Division.[102] 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.[103]

2.145 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

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

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

101 Butler & Finsen 254-5.

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

103 See s 46(1)(b) and the 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'.

importance of the place of the arbitration.[104]

2.146 It is also possible to give a practical interpretation to a clause authorising the arbitrator to act as *amiable compositeur* in a South African context[105] and the inclusion of a provision on the lines of article 28(3) and (4) in our domestic legislation has also been recommended.[106]

2.147 The precise meaning of the terms '*amiable compositeur*' and '*ex aequo et bono*' is unclear.[107] Nevertheless, we believe that South Africa should follow the example of other Commonwealth jurisdictions[108] 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.*[109]

Article 29 Decision-making by panel of arbitrators

2.148 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

2.149 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

104 A/CN9/264 63 par 8; Holtzmann & Neuhaus 770.

105 Butler & Finsen 254-5.

106 Butler 153.

107 Holtzmann & Neuhaus 770.

108 For example Australia, British Columbia and Scotland. See further Sanders 18.

109 A/CN9/264 63 par 9.

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 fiscus. A similar provision has been included in the English Arbitration Act of 1996.[110] We recommend that this provision should be adopted unchanged.

Article 31 Form and contents of award

2.150 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.

2.151 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,[111] 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.[112] Requiring reasons improves the quality of arbitral decisions.[113] However, reasons could result in the award being rendered less speedily, increase costs and render the award more susceptible to challenge.[114] 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 in

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

111 A/CN9/216 par 80; Holtzmann & Neuhaus 838.

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

113 See Butler & Finsen 269-70; A/CN9/216 par 80.

114 See A/CN9/216 par 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.

national statutes and institutional rules pertaining to international arbitration.[115] It is also in line with a modification to South Africa's domestic legislation proposed by the Association of Arbitrators.[116]

2.152 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),[117] discussed in Chapter 3 par (b)(iii) below, in the context of awards subject to the New York Convention.

2.153 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 criticised[118] and is not necessarily observed in practice[119] where the parties agreed that the arbitrator could publish his award by transmitting it to them by telefax. The Commission therefore recommends that article 31(4) should be adopted unchanged.

Interest

2.154 The UNCITRAL Model Law contains no provision on interest, and several states with a common-law tradition have deemed it necessary to include a provision on interest when enacting the Model Law.[120] Butler[121] examines the existing South African

115 Redfern & Hunter 389-90; London Court of International Arbitration (LCIA) Rules of 1985 article 16.1. 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.

116 Association of Arbitrators 18-19 and s 27(3) of the Draft Bill.

117 [1991] 3 All ER 641 (HL).

118 Butler 158-60.

119 **Van Zyl v Von Haebler** 1993 3 SA 654 (SE) 663I-J.

120 Sanders 33; Butler D 'The Recovery of Interest in Arbitration Proceedings: an Agenda for Lawmakers

common law and legislation regarding interest and concludes that, particularly in the context of international arbitration, the existing rules are inadequate in the light of commercial realities.

2.155 The SA Law Commission[122] also recommends certain changes to the law on interest, particularly in the context of unliquidated claims for damages and regarding the prohibition on interest in duplum. Although much of the research has been done, converting the Law Commission's recommendations into legislation will take time and it is also debatable whether the Commission's recommendations are adequate to deal with all the problems which can arise in relation to interest in the context of an international arbitration. This would require careful investigation which would delay the implementation of the Model Law.

2.156 It is sufficient to say that the present inadequacies in the South African law on interest, when measured against international standards, work heavily in the defendant's favour and encourage delaying tactics, particularly when the claim is for unliquidated damages. Furthermore, with one exception, the institutional rules used in international arbitrations fail to deal with interest.[123]

2.157 We therefore recommend[124] that the Model Law should be amplified along the lines of the approach adopted in British Columbia[125] to confer a broad discretion on the arbitral tribunal to award interest and to determine the rate and period for which such

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(1995) 6 **Stel LR** 291 306-12 (hereinafter referred to as "Butler (1995)").

121 Butler (1995) 294-307.

122 S A Law Commission **Verslag oor Rente op Gelede Skade** Project 78 1994.

123 Butler (1995) par 3 n 155. The exception is the rules of the LCIA (1985) article 16.5. A major consideration behind the provision was the avoidance of delay.

124 See also Butler (1995) 320-22.

125 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 Zimbabwe Arbitration Bill of 1995 contains a similar provision in schedule 1 article 3196. Bearing in mind the object of the provision, it is submitted that the approach in British Columbia is 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.

interest should be awarded. The period could, in the arbitrator's discretion, start to run from the date when the arbitration proceedings commenced, or, in appropriate case, even from the date on which the cause of action arose,[126] until the date of payment. The rate would not be restricted to the statutory rate, but the arbitrator 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.

2.158 This sort of wide discretionary power 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.

2.159 A proposed addition to give effect to this recommendation is incorporated in Schedule 1 article 31(5) of the annexed Draft Bill.

Costs

2.160 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).[127] Some jurisdictions have therefore amplified the Model Law to include a

126 In this respect the recommendation goes further than the Prescribed Rate of Interest Amendment Bill of 1996, 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.

127 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/CN9/263 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/CN9/264). 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 equally, article 32 of the American Association of Arbitrators International Arbitration Rules (1991) does give the arbitral tribunal the discretion to apportion costs.

provision on costs.[128]

2.161 The position is complicated in South Africa by the fact that our courts will currently interfere with the way in which an arbitrator exercises his/her statutory discretion on costs under s 35 of the Arbitration Act 42 of 1965 if the arbitrator fails to exercise that discretion in the same way as a court.[129]

2.162 A *bona fide* mistake of law by the arbitrator 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.[130]

2.163 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.[131]

2.164 Article 5 ('Extent of court intervention') must therefore be applied to exclude the **Harlin Properties** and **Kathrada** cases referred to in the previous footnote. 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

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128 Sanders 31-3; the Zimbabwe Arbitration Bill 1995 Schedule 1 article 31(5).

129 See **Harlin Properties (Pty) Ltd v Rush & Tomkins** 1963 1 SA 187 (D) 198A-B; **Kathrada v Arbitration Tribunal** 1975 1 SA 673 (A) 680C-681A; **John Sisk & Son (SA) (Pty) Ltd v Urban Foundation** 1985 4 SA 349 (N) and 1987 3 SA 190 (N). 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 & Co** (1908) 25 SC 12 14; **Austen v Joubert** 1910 TS 1095 1096-7.

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

131 Compare the submission of Adv A Findlay SC in response 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.

costs based on a *bona fide* mistake of law would be contrary to public policy (art 34(2)(b)(ii)).

2.165 A proposed addition to give effect to this proposal has been incorporated as article 31(6) in Schedule 1 to the annexed Draft Bill. It includes a proviso designed to restrict court interference with awards on costs, for the reason discussed above.

Article 32 Termination of proceedings

2.166 This provision has three purposes.[132] 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.

Article 33 Correction and interpretation of award; additional award

2.167 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.[133]

2.168 Secondly, and only with the agreement of the parties, may the tribunal interpret an ambiguity in the award. Although not expressly sanctioned by the 1965 Act, the possibility of the arbitrator clarifying an award has recently been sanctioned by our courts[134] and is permitted by the English Arbitration Act of 1996, s 57(3).

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132 A/CN.9/264 68.

133 Butler 160-1; Butler & Finsen 272.

134 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**

2.169 Thirdly, the tribunal may request an additional award, unless the parties agree otherwise, 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.

2.170 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

2.171 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.

2.172 An application for setting aside must be brought within three months of receipt of the award. Setting an award aside under article 34 in the country where it was made renders the award unenforceable in all other countries (compare article 36(1)(a)(v)).[135]

2.173 *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

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Max Pollak Vinderine Inc v Menell Jack Hyman Rosenberg & Co Inc 1996 3 SA 355 (A). See generally on the power of an arbitral tribunal to interpret its award Knutson RDA 'The interpretation of arbitral awards - when is a final award not final? (1994) vol 11 no 2 **Journal of International Arbitration** 99-109.

135 UNCITRAL Secretariat paras 41-44.

public policy defence. In this regard one must bear in mind that misconduct has a narrower meaning under South African law than under English law and is restricted to wrongful or improper conduct involving dishonesty or moral turpitude.

2.174 However, remittal will have a more limited role 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.

2.175 No changes to this article are recommended.

CHAPTER VIII: RECOGNITION AND ENFORCEMENT OF AWARDS

Article 35 Recognition and enforcement

2.176 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.

2.177 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

2.178 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.

2.179 No changes to this article are recommended.

(c) Other possible additions for consideration

2.180 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[136] where certain problems with the wording of the present provision are discussed). There is no comparable provision in the Model Law. Is one desirable in the South African version of the Model Law?

2.181 Bearing in mind the goal of uniformity in national laws pertaining to international arbitration procedures, the Commission is not presently aware of any compelling reason to add a provision equivalent to s 8 of the 1965 Act to the South African version of the Model Law.[137]

2.182 Regarding other additions, Sanders[138] refers particularly to conciliation and consolidation. Some common-law jurisdictions have also added a express provision to exclude arbitrators from liability for negligence.

Conciliation

2.183 Apart from encouraging mediation/conciliation as a means of settling disputes, a statutory provision can solve two possible practical difficulties.

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136 Butler 137-9.

137 Compare the submissions of Adv A Findlay SC in response to Working Paper 59 para 26 who favours the inclusion of such a provision.

138 *Op cit* 26-31.

2.184 First the court or an arbitration body can be empowered to appoint a conciliator where the parties are agreed on conciliation but cannot agree on a conciliator.

2.185 Secondly, where an arbitrator acts as conciliator, the question arises whether his/her involvement in the conciliation makes it proper to continue to act as arbitrator. This can be sanctioned by legislation, thereby ostensibly reducing the risk of a subsequent challenge to the arbitrator's appointment or award purely because of his/her previous involvement as a conciliator. Depending on the extent of this involvement in the unsuccessful conciliation attempt, it could be undesirable for the conciliator to act as arbitrator. In these circumstances, however, the financial incentive of the arbitrator's remuneration may make the conciliator reluctant to decline appointment as arbitrator or to withdraw from that office.

2.186 The Commission therefore believes that it is preferable to leave the question of the conciliator continuing as arbitrator entirely to the agreement of the parties. We do not recommend the addition of any provisions to the Model Law on the subject of conciliation.

Consolidation

2.187 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.[139] Certainly, any provision for formal consolidation in South African legislation adopting the Model Law should be on a contract-in basis and not apply automatically.

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139 On the complexity of the task of legislating on consolidation see Mustill M "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.

2.188 There are divergent approaches by legislatures in adopting provisions on consolidation in their international arbitration statutes concerning the contents of those provisions.[140] 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.

2.189 A proper investigation of this subject would delay the implementation of the Model Law in South Africa. Therefore, although one of the responses to Working Paper 59 was a plea for a statutory solution to this problem,[141] it is suggested that there should be no statutory provision on consolidation at this stage and that the matter should stand over and be investigated as part of the inquiry into improving the domestic arbitration legislation. Any provision in domestic arbitration could then be applied to international arbitration on a contract-in basis.

Arbitrator's liability for negligence

2.190 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**.[142] Because of this uncertainty, some common-law jurisdictions have supplemented the Model Law by incorporating a provision limiting the

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140 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, with some statutes giving this power to the court and others giving it to the arbitration tribunal, at least in the first instance.

141 See the submission dated 13 October 1995 by H J Bennett of Damant Bostock Inc, Johannesburg.

142 1977 AC 405. See Mustill & Boyd 224-6; Butler & Finsen 101-2.

arbitrator's liability. These jurisdictions include Australia and New Zealand.[143]

2.191 Originally, those working on the reform of arbitration law in England favoured this matter being left to the courts.[144] 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 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.[145]

2.192 It appears that 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. It would also be in line with the position traditionally adopted in South-African law and remove any uncertainty on this point. A provision on arbitral immunity could be incorporated in Chapter 2 of the Draft Bill. The Commission invites comments on this issue.

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143 See the Australian International Arbitration Act of 1974 s 28 and the New Zealand Arbitration Bill of 1995 s 11. 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 11 of the New Zealand Bill, 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 vi.)

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

145 See the Saville Report 32 paras 131-136. See also Butler & Finsen 102-3.

CHAPTER 3

THE NEW YORK CONVENTION

(a) Introduction

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

3.1 The New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 ('NYC') was adopted at the headquarters of the United Nations on 10 June of that year.[146] 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'.[147]

3.2 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 procedure with the agreement, or violation of public order by enforcement of the award.'[148]

3.3 The obligation of contracting states under the NYC to enforce arbitration

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

147 See Mustill M J 'Arbitration: history and background' (1989) vol 6 no 2 **Journal of International Arbitration** 43 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 3-4 (hereinafter referred to as "Graving") who describes it as '[t]he mortar in the edifice of international commercial arbitration'; the 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.

148 See Graving 4 (footnotes omitted).

agreements is discussed in para (c) below. The issue of which awards fall under the Convention is discussed in para (b)(i) below.

3.4 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.[149]

3.5 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.

3.6 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 are in principle bound by that decision, with the result that the setting aside has extra-territorial effect.[150]

3.7 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

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

150 Van den Berg A J 'Non-domestic arbitral awards under the New York Convention' (1986) 2 **Arbitration International** 191 199-200 and compare article V(1)(e) of the Convention (hereinafter referred to as "Van den Berg (1986)").

court in another foreign country.[151]

3.8 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'. 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.[152]

3.9 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.

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

3.10 Although South Africa acceded to the NYC with effect from 1 August 1976 without reservation,[153] the Recognition and Enforcement of Foreign Arbitral Awards Act 40 of 1977, which was enacted to give effect to this accedence, 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

151 Van den Berg (1986) 199.

152 Van den Berg (1986) 213-4.

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

the bare fact of officially recorded Convention acceptance.'[154]

3.11 The 1977 Act has been subjected to four main criticisms.[155] 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).

3.12 A fifth criticism is the failure to make express provision for the recognition of foreign arbitral awards as opposed to their enforcement.[156] 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.[157] These criticisms will be dealt with in more detail in the context of our proposals for improvements to the legislation below.

3.13 Because of the substantial degree of overlap between the NYC and the UNCITRAL Model Law, it is possible to argue that detailed separate legislation implementing the NYC will become superfluous if South Africa adopts the UNCITRAL Model Law.[158]

3.14 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. First, the 1977 Act was enacted pursuant to South Africa's

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154 Graving 45.

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

156 See para (a) above for this distinction and para (d)(ii) for criticism of the existing South African legislation.

157 See para (d)(i) below.

158 Compare the approach of the drafters of the New Zealand Arbitration Bill of 1995 discussed in para (a)(iii) below.

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.[159] Moreover, certain foreign arbitral awards qualify as NYC awards, without qualifying for enforcement under the UNCITRAL Model Law.[160] Thirdly, several other countries when adopting the UNCITRAL Model Law have nevertheless retained their legislation giving effect to the NYC (see eg the Australian International Arbitration Act of 1974, as amended, Part II and sch 1).

3.15 However, because of the defects in the 1977 legislation, discussed below, we recommend 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.

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

3.16 This survey considers the draft legislation of 1995 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.

3.17 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.

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159 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.

160 See para (a)(iii) below at n 20 and para 2.4.4 below at n 47.

3.18 A monistic system is proposed for 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.[161] 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.[162]

3.19 The approach recommended by the 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, subject to a contract-in provision in the case of other arbitrations. 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.

3.20 While adopting a basically monistic approach, the draft New Zealand legislation of 1995 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).

3.21 The New Zealand Bill of 1995 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

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

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

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 enforcement of arbitral awards and the grounds in article 36 on which recognition and enforcement of an international arbitration award could be refused. The 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.[163] Similarly, the 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.[164]

3.22 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)).

3.23 However, the NYC also applies to the recognition and enforcement of an award made in a foreign country in a domestic arbitration.[165] 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.

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163 NZLC R20 paras 127 and 146.

164 NZLC R20 paras 143 and 146.

165 See Van den Berg (1981) 17-18.

3.24 The New Zealand Bill is not intended to apply only to commercial matters.[166] Moreover, the Bill 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 6A). As a result, an award made in a domestic arbitration in a foreign country could still be enforced in New Zealand.

3.25 However, the same result would not be achieved in South Africa, if the 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.

3.26 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.

3.27 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,[167] 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.

3.28 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

166 See sch 1 article 1 which modifies article 1(1) of the Model Law by omitting 'commercial' and applies the Schedule to the arbitrations referred to in ss 6 and 7.

167 See the International Arbitration Amendment Act 1989 ss 3, 4 and 6.

unnecessary in the light of the availability of articles 8, 35 and 36 of the Model Law for this purpose.

3.29 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 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.

3.30 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 is to be 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, s 86 contains an exception, giving the court a wider discretion not to stay court proceedings than that conferred by s 9, when the dispute is covered by a domestic arbitration agreement, as defined in s 85. 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

3.31 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

3.32 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.'

3.33 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.'

3.34 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.[168] 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.[169] South Africa made no such reservation.

3.35 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' or 'floating' awards).

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168 See, presently, the Arbitration Act 1975 s 7 'Convention award', which will be replaced by a similar definition in s 100(1) of the 1996 Act.

169 Van den Berg (1981) 410, 416.

These arbitral awards are not governed by any arbitration law at all, but solely by the agreement between the parties.[170]

3.36 Van den Berg, after also considering the second definition in article I(1) concludes that the NYC does not apply to stateless awards.

3.37 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.[171] 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 <u>in the territory of a state other than South Africa</u>'.

3.38 The purpose and operation of para (b) of the definition of a 'foreign arbitral award' in the 1977 Act, quoted above, is unclear.[172] 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'.

3.39 Neither England[173] nor Australia[174] thought it necessary to incorporate the second category referred to in article 1(1) of the Convention in their definitions of a `foreign' or `Convention' award. One could therefore argue that para (b) of our definition is superfluous.

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170 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) 53 **ICLQ** 53-61.

171 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.

172 Cf Butler & Finsen 313; Jacobs 164.

173 Arbitration Act 1975 s 7(1) or Arbitration Act 1996 s 100(1).

174 International Arbitration Act of 1974 s 3(1).

3.40 However, 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.

3.41 Van den Berg states that the second category was included in the definition of 'arbitral award' in article I(1) of the Convention to cover the possibility where the land 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'.[175] 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.

3.42 Nevertheless, parties are in practice unlikely to arbitrate in one country under the arbitration law of another because of the complications involved.[176] If the 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,[177] 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.[178]

(ii) The place where an award is made

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175 Van den Berg (1981) 23. See also Van den Berg (1981) 24-5.

176 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.

177 See the commentary in Chapter 2 para (b) above on s 5 of the Draft Bill.

178 See also Van den Berg (1986) 214 who concludes that the first criterion seems to be the only relevant one in practice.

3.43 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 remains to consider how the place where an award is made is determined for purposes of the Convention.

3.44 This question arose in the English case of **Hiscox v Outhwaite** (No 1).[179] 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.[180]

3.45 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.

3.46 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

179 [1991] 3 ALL ER 641 (HL).

180 At 646e-h.

reference to the seat of the arbitration in the legal sense.[181]

3.47 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 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.

3.48 The English legislature has now also taken corrective action to reverse the decision in the **Hiscox** case.[182]

3.49 We therefore recommend that the definitions section in Chapter 2 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 part 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.'[183]

(iii) <u>The court having jurisdiction</u>

3.50 'Court' is defined in s 1 of Act 40 of 1977 as a court of a provincial or local

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181 See eg Van den Berg (1986) 202, Mann F A 'Where is an award "made"?' (1985) 1 **Arbitration International** 107 108; Reymond C 'Where is an arbitral award made?' (1992) 108 **LQR** 1 2-5.

182 S 100(2)(b) 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 Saville Report paras 253 and 349-54). 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 (art 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.

183 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'.

division of the Supreme Court of South Africa. This definition will have to be amended in line with the description of the courts in the final Constitution. Consideration could also possibly be given to giving the magistrate's court jurisdiction to enforce awards for amounts falling within its jurisdiction.

(c) Enforcement of arbitration agreements

3.51 A strange omission from Act 40 of 1977 is any equivalent of article II of the NYC regarding the enforcement of arbitral agreements.[184] Although the enactment of article 8 of the Model Law will 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.

3.52 As stated above (see Chapter 3 para (a)(iii)), 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.

3.53 It is stated below (see para (d)(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. The same argument does not appear to apply in respect of arbitration agreements covered by article II of the NYC and article 8 of the Model Law. Therefore, a section in Chapter II of the draft legislation on the enforcement of the NYC which duplicates article 8 of the Model Law appears to be unnecessary.

(d) Recognition and enforcement of arbitral awards

184 Butler & Finsen 311-312.

(i) Extent of court's power to refuse recognition or enforcement

3.54 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 italics). 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.

3.55 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.[185]

3.56 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.

3.57 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 conclude[186] that it had a general discretion whether or not to enforce a foreign award.[187]

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185 Van den Berg (1981) 243.

186 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'.

187 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 Bobwell**' (1994) 10 **Arbitration International** 385 393).

3.58 This problem could not arise under the English Arbitration Act of 1996. S 101(1) 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.

3.59 We recommend that the wording of the existing South African legislation should be modified to deal with these problems.

(ii) Need to deal with recognition and enforcement

3.60 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.[188]

3.61 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.

3.62 The comparable English Arbitration Act of 1975 and the Australian International Arbitration Act of 1974 also deal mainly with the enforcement of awards, but they at least both contain a provision declaring a NYC award to be *binding for all purposes* on the persons as between whom it is made.[189] This provision ensures the recognition of an award even in the absence of an application for its enforcement.

3.63 The English Arbitration Act of 1996 goes still further by also referring to

188 See para (a)(i) n 4 above.

189 See the English Arbitration Act of 1975 s 3(2) and the Australian International Arbitration Act of 1974 s 8(1). Compare s 101 of the English Arbitration Act of 1996 and article III of the NYC.

`recognition or enforcement' in the sections dealing with the evidential requirements and the grounds on which recognition or enforcement may be refused.[190] In this respect the 1996 Act promotes clarity and moves closer to the wording of the relevant articles of the NYC.

3.64 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

3.65 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 and we are of the view that only one change to the substance of this provision is required. Pursuant to our recommendations in the previous paragraph, we recommend 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.

(iv) Grounds on which recognition or enforcement may be refused

3.66 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.[191] 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.

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190 Ss 102(1) and 103.

191 A/CN 9/264 78.

3.67 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.

3.68 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.[192]

3.69 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.[193] 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'. 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'. Under the NYC the law of the place where the award was made is only relevant to test the validity of the arbitration 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.[194]

(e) Other matters

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192 See the discussion of the New Zealand legislation in para (a)(iii) above and also para (a)(ii) above at n 15.

193 Butler & Finsen 314 n 136 and 315 n 139.

194 Article 36(1)(a)(i) and (iv).

(i) Preservation of other bases for recognition

3.70 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'.

3.71 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.[195]

3.72 S 104 of the English Arbitration Act of 1996[196] 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).

3.73 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.[197]

3.74 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, we recommend that the proposed revised South African legislation to implement the NYC should, in the interests of legal certainty, contain an express provision in this regard:

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195 Van den Berg (1981) 82-3.

196 See also s 6 of the 1975 Act.

197 **Benidai Trading Co Ltd v Gouws & 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).

'Nothing in this Part affects any other right to rely on or to enforce a foreign arbitral award, including the right conferred by article 31 in Schedule 1.'

(ii) Enforcement of awards in a foreign currency

3.75 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.

3.76 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.[198]

(iii) Inclusion of the text of the Convention in a schedule

3.77 When South Africa acceded to the NYC, its text was published in the *Government Gazette*.[199] However, some other countries adopting the Convention have included its English text in a schedule to the legislation.[200] 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.

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198 Butler (1995) 291, 318 and 322.

199 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.

200 See eg the (Australian) International Arbitration Act 1974 sch 1; the (New Zealand) Arbitration Bill 1995 s 5(f) and the Third Schedule.

(f) Other legislation relevant to enforcement of foreign arbitral awards

3.78 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,[201] 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'.[202]

3.79 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.[203]

3.80 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

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201 '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).

202 See Forsyth C F **Private International Law** 3 ed 1996 402. See generally Forsyth 402-4 regarding the Protection of Businesses Act (hereinafter referred to as "Forsyth").

203 See ss 1A-1C.

South African law.[204] 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.

3.81 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.[205] In the two reported cases to date, the provisions have been restrictively interpreted by the courts.[206]

3.82 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**[207] 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,[208] 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.[209]

3.83 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

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204 See s 1D.

205 See Forsyth 402.

206 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.

207 At 515H.

208 At 516E.

209 At 517G-H. Leave to take the judgment on appeal to the Appellate Division has since been granted (see **Jones v Krok** 1996 2 SA 71 (T)).

providing excessive protection.[210] 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 foreign policy defence in the Draft Arbitration Bill.[211]

3.84 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 is nevertheless proposed that the references to arbitral awards in the Act should be omitted. See Annexure D. The Commission invites further comments on this issue.

(g) Summary of recommendations

3.85 The 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 commercial arbitration.

3.86 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.

3.87 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.

3.88 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

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210 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 159-60.

211 See s 11(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).

achieve that object.

3.89 The provision (s 2(2)) regarding awards in a foreign currency should be repealed.

3.90 The references to arbitral awards in the Protection of Businesses Act 99 of 1978 should be deleted, because these matters appear to be adequately provided for by the public policy defence.

3.91 A separate provision in this Chapter regarding the enforcement of foreign arbitration agreements (corresponding to article II of the NYC) is unnecessary, because this matter is covered by article 8 of the UNCITRAL Model Law.

3.92 The English text of the NYC should be in schedule to facilitate access to its wording by South African parties and their lawyers.

CHAPTER 4

THE WASHINGTON CONVENTION OF 1965

(a) Introduction: purpose and special features of the Washington Convention

4.1 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.

4.2 The Convention established a 'specialized autonomous and self-contained arbitration system'[212] to resolve an investment dispute between a Contracting State (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.[213]

4.3 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.

4.4 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.[214]

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212 See Broches 'Arbitration under the ICSID Convention' 1.

213 See Broches 1-2.

214 See Delaume 'ICSID Arbitrations' in Lew (ed) **Contemporary Problems in International Arbitrations** (1986) 23 (hereinafter referred to as "Delaume"); Ahmed Sadek El-Kosheri 'ICSID Arbitration and Developing Countries' (1993) 8 ICSID **Rev - Foreign Investment LJ** 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'.

4.5 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.

4.6 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.

4.7 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 2 above does not apply to the enforcement of stateless awards, but only to awards which are governed by a specific national arbitration law.[215]

4.8 In order for ICSID to achieve the high degree of acceptance among both states and private investors which it has (see further para 4(b) 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.[216]

4.9 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

215 Van den Berg A J (1986) 213.

216 Delaume 24.

4.10 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.[217]

4.11 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'.[218] When the parties have given their consent, no party may withdraw its consent unilaterally (article 25(1)).

4.12 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.[219]

4.13 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)).

4.14 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

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217 Delaume 25. For a detailed discussion of ICSID's jurisdiction, see Lamm 'Jurisdiction of the International Centre for Settlement of Investment Disputes' (1991) 6 ICSID **Rev - Foreign Investment LJ** 462-83 (hereinafter referred to as "Lamm").

218 Lamm 463; Hirsch A **The Arbitration Mechanism of the International Center for the (sic) Settlement of Investment Disputes** 1993 Martinus Nijhoff Dordrecht 47 (hereinafter referred to as "Hirsch").

219 Hirsch 48.

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.

4.15 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'.[220]

4.16 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.[221] The parties thus have a large measure of discretion in deciding what constitutes an investment.[222] 'Investment' may therefore be widely interpreted to include the transfer of services and technology,[223] but political, economic or purely commercial disputes are excluded.[224] This wide interpretation of investment allows the Convention

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220 *Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States* (18 March 1965) para 26. Compare Nathan VSK '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 41 (hereinafter referred to as "Nathan" (1995)) 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.

221 *Report of the Executive Directors* para 27.

222 Broches 5.

223 Delaume 26.

224 Lamm 474.

to adapt to 'innovative patterns of investment' which were not foreseen at the time of the drafting of the Convention.[225]

4.17 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.[226] 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.[227]

4.18 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.[228] 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.[229] Certainly, the main contract, the concession agreement between the concession company and the state concerned will qualify as an investment contact for purposes of ICSID jurisdiction,[230] although other forms of

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225 Hirsch 59.

226 Paulsson 'ICSID Arbitration: the Host State's Point of View' in **Private Investments Abroad - Problems and Solutions in International Business** Matthew Bender, 1993 (hereinafter referred to as "Paulsson (1993)") 15-17; Nathan (n 9 above) especially 28, 30-31 and 51-2 but cf Nathan's earlier article 'ICSID and dispute resolution in international civil engineering contracts' (1992) 58 **Arbitration** 193 196-7.

227 Nathan (1995) 28.

228 Nathan (1995) 31 quoting the views of Delaume.

229 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 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.

230 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

arbitration clause will probably have to be considered for the subsidiary contracts, where there is no state party to the contract.

4.19 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.[231] For example, the Secretary-General, when considering whether or not to register a request for arbitration in terms of article 36 (see Chapter 4, para (a)(ii)) will refuse a request where the dispute concerns the sale of goods.[232] 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.[233] This will include the question whether the dispute arises out of an investment.

4.20 A dispute which falls outside the jurisdictional requirements of article 25 could possibly be dealt with under the ICSID Additional Facility (see Chapter 4, para (c) below).

(ii) Self-contained nature of ICSID arbitrations

4.21 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.[234] Although a Contracting State may require the exhaustion of local administrative or judicial remedies as a condition for its consent to

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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.)

231 Hirsch 59.

232 Hirsch 59-60.

233 Arbitration Rule 42(4) and Broches 9.

234 See Broches 9-13.

ICSID arbitration (article 26), this condition has rarely been imposed in practice.

4.22 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.[235]

4.23 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).

4.24 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)).[236] 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.

4.25 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 issue.[237] Should the tribunal erroneously find that it has jurisdiction, an application for

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235 See article 47 rule 39 and generally Brower & Goodman '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.

236 The request must contain the information prescribed by article 36(2).

237 See article 36(3) and Broches 6. Article 41(1) makes the tribunal the judge of its own competence.

the annulment of the award is possible.[238]

4.26 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.[239] There is also a procedure for the replacement and disqualification of arbitrators in certain circumstances.[240]

4.27 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.[241]

(iii) Recognition and enforcement of ICSID awards

4.28 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

238 The procedure for annulment is contained in article 52: see para (a)(iii) below.

239 See articles 37-40 read with articles 12-16 and Arbitration Rules 2-6; Broches 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).

240 See articles 56-58 and Arbitration Rules 9-12.

241 See articles 41-47 and Arbitration Rules 13-45; Paulsson 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.[242]

4.29 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)[243] 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)).[244] 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)).

4.30 The distinguishing feature of an ICSID arbitral award concerns the provisions of the Convention regarding its enforcement.[245] The award is binding on the parties and, as stated above, the only remedies of a dissatisfied party are those provided by the Convention.

4.31 In terms of article 54(1), each Contracting State must recognize 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.

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242 Broches 8.

243 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.

244 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 'ICSID's Achievements and Prospects' (1991) 6 ICSID **Rev - Foreign Investment LJ** 380 386-94.

245 See eg Hirsch 22-4.

4.32 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 to execution.

4.33 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.

(b) International acceptance of the Washington Convention

4.34 The Washington Convention enjoys a high degree of international acceptance, particularly among African states.[246] 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).[247] 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.[248]

(c) The Additional Facility

4.35 In 1978 ICSID established the Additional Facility for the settlement of disputes

246 See eg Agyemang 'African states and ICSID arbitration' (1988) 21 **CILSA** 177-89.

247 See ICSID 1995 **Annual Report** 14-16, Annexure 1.

248 See the article by Agyemang above.

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'.[249]

4.36 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.

4.37 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.

(d) Benefits for South Africa from ratifying the Convention

4.38 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.[250]

4.39 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.

4.40 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

249 See Additional Facility Rules article 2; Delaume 38; Hirsch 22.

250 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.

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.[251] 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.[252] As appears from the text below, such clauses are already being included in bilateral investment treaties recently entered into by the South African government with the governments of certain foreign states.

4.41 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.

4.42 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.[253] 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.[254]

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251 Compare Agyemang 187.

252 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.

253 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.

254 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

4.43 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.[255]

4.44 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.

4.45 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.

4.46 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.[256] 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.[257]

Rules as alternatives. The treaty with Switzerland is similar, except that it provides for an ICC arbitration as an additional alternative.

255 Paulsson (1991) 382-4; Paulsson (1993) 15-16 - 15-17.

256 Paulsson (1991) 384-6; El-Kosheri 107-8.

257 Information furnished by Antonio R Parra, legal adviser on the staff of ICSID at an interview in

4.47 From the State's perspective, states are also perceived to have faired reasonably well in ICSID arbitrations and have certainly received fair treatment.

4.48 Other factors[258] 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.

4.49 Secondly, as appears from paragraphs (a)(ii) and (iii) above, the ICSID mechanism reduces the involvement of foreign state courts to an absolute minimum, thereby reducing sensitivity concerning national sovereignty.[259]

4.50 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)).

4.51 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.

4.52 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,[260] if it is properly used,

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Washington DC on 16 February 1996.

258 Paulsson (1993) 15-8 15-16.

259 Agyemang 187.

260 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.

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.

(e) Financial implications of ratification for South Africa

4.53 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.

4.54 It is however necessary to consider what the possible additional costs of membership of ICSID would be, pursuant to ratification of the Convention.

4.55 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 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.

4.56 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.[261]

4.57 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.

(f) Form and contents of legislation for implementing the Convention

4.58 The following comments are based on a perusal of the legislation in the United Kingdom;[262] Lesotho;[263] Australia[264] and the comments of the New Zealand Commission[265] on the current New Zealand and Australian legislation implementing the Washington Convention in those countries.

4.59 Although the Commission recommended certain modifications to the legislation implementing the Washington Convention in New Zealand,[266] the Government Administration Committee recommended that these proposed modifications should be deleted from the final Bill.[267]

(i) One consolidated statute?

4.60 The first issue is whether legislation to implement a possible South African ratification of the Convention should be included in legislation implementing the

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261 Information furnished by Antonio R Parra, legal adviser on the staff of ICSID at an interview in Washington DC on 16 February 1996.

262 Arbitration (International Investment Disputes) Act 1966.

263 Arbitration (International Investment Disputes) Act 23 of 1974.

264 The International Arbitration Act 1974 as amended by the ICSID Implementation Act 107 of 1990.

265 NZLC R20, 1991.

266 See the Draft Bill attached to its report, s 13(2) read with Schedule 4.

267 See the Fourth Schedule p 45.

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.

4.61 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.

4.62 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.

4.63 The Commission has therefore included legislation to implement the Washington Convention in Chapter 4 of the Draft Bill and provided in section 20 for different parts to come into force on different dates, should this be necessary in the case of Chapter 4.

(ii) Form of legislation

4.64 As to the form of the implementing legislation, it is suggested that following the method used by the United Kingdom, Australia, New Zealand and 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

4.65 Certain definitions applying only to Chapter 4 of the Draft Bill are required, namely 'award', 'Centre' and 'Convention'.[268] These definitions are in s 13 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.

4.66 The legislation must make provision for the enforcement of an ICSID award in the Supreme (or High) Court, so that it can be executed as a final judgment of that court. The United Kingdom legislation[269] contains a detailed procedure for the registration of awards and the effect of such registration.[270]

4.67 S 15 of the annexed Draft Bill contains a much shorter provision based on the recommendation of the New Zealand Law Commission.[271]

4.68 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.

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268 Compare the New Zealand legislation, Act 39 of 1979 s 1 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.

269 See ss 1 and 2 of the Arbitration (International Investment Disputes) Act 1966.

270 See also ss 4 and 5 of the New Zealand Arbitration (International Investment Disputes) Act 39 of 1979.

271 NZLC R20 (1991) para 448 on p 232 and compare the Australian International Arbitration Act of 1974 s 35(1).

4.69 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 14(1) of the Draft Bill.[272]

4.70 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.) A provision to this effect is included as s 14(2) of the Draft Bill.[273]

4.71 The legislation should bind the State.[274] This is done by s 17 in Chapter 5 of the Draft Bill (General Provisions), rendering a separate provision on this matter in Chapter 4 unnecessary.

4.72 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.[275] S 16 of the Draft Bill provides for a certificate signed by the Minister of Foreign Affairs for this purpose.

(g) Conclusion

4.73 For the reasons set out in paragraphs (d) and (e) above, it is submitted that

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272 It is based on the proposal of the New Zealand Law Commission s 4(1) on p 232 of NZLC R20 of 1991 (compare the Australian International Arbitration Act of 1974 s 32).

273 Compare the New Zealand Law Commission's proposal s 4(2) on p 232 of NZLC R20 of 1991 and the Australian International Arbitration Act of 1974 s 34.

274 See the New Zealand Law Commission's proposal s 3 on p 232 of NZLC R20 of 1991.

275 Compare the Australian Act of 1974 s 36 and the report of the New Zealand Law Commission NZLC R20 (1991) p 232.

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

GENERAL PROVISIONS

5.1 In this section Chapter 5 (General 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 17 This Act binds the State

5.2 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.[276] Sanders[277] 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.[278] 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

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276 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.

277 *Op cit* 11-12.

278 See Fox 'Sovereign immunity and arbitration' in Lew (ed) **Contemporary Problems** 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.'

Immunities Act 87 of 1981.

s 18 Transitional provisions

5.3 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.'

5.4 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.[279] This question should therefore be determined with reference to the provisions of article 21 of the Model Law.[280]

5.5 S 18(1) and (2) of the Draft Bill are based on s 66(6) and (7) of the 3 Scottish legislation. S 18(3), based on the wording of article 21 of the Model Law, spells out when arbitration proceedings must be taken to have commenced for purposes of s

279 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.

280 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.

18(2).

5.6 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 Commission is not in favour of a transitional provision equivalent to s 66(8).

5.7 However, the New Zealand Arbitration Bill of 1995 s 14(4) 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 Bill of 1995 s 6(4) contains a substantially similar provision.

5.8 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.'[281]

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281 NZLC R20 153 para 274.

5.9 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.

5.10 On the other hand, as the new legislation will not apply to arbitration proceedings which have already commenced, by virtue of s 18(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.

5.11 We therefore recommend an amended version of the New Zealand and Zimbabwean legislation under discussion as s 18(4) of the Draft Bill, reading as follows:

> '(4) Parts 2 and 3 of this Act shall apply to every arbitral award whether made before, on or after the date of commencement of those Parts, 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 Part 2 and 3 of this Act comes into force shall be continued and concluded as if those parts had not yet commenced.'

5.12 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 20 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 19 Repeal of Laws

5.13 The 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 this Draft Bill. The reasons for this are discussed in Chapter 3 to this memorandum 'The New York Convention'. Chapter 3, para (f) 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 D.

s 20 Short title and commencement

5.14 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 20(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

Mr Justice J H Steyn (Chairperson)
Adv J J Gauntlett SC (Member of the Commission)
Prof D W Butler
Mr R C Christie QC
Ms Y S Meer

ANNEXURE B

LIST OF RESPONDENTS

1. Damand Bostock Inc
2. Association of Arbitrators
3. Raad op Finansiële Dienste
4. The Council of South African Bankers
5. General Council of the Bar of South Africa
6. Society of Advocates of South Africa (Witwatersrand Division)
7. Association of Retired Persons and Pensioners
8. Society of Advocates of Natal
9. Field of Sims
10. Cox Yeats
11. Anglo American Corporation of South Africa Ltd
12. Pretoria Society of Advocates

ANNEXURE C

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:

CONTENTS OF BILL

CHAPTER 1

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 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)), Zimbawe 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. On the reasons for the changes and additions, see Chapter 3 paras (b)(i), (b)(ii) and (b)(iii) of the commentary*.]

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 equvalent 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) for the reasons discussed in Chapter 3 paras (d)(i) and (d)(ii) of the memorandum. The existing subsection (2) is deleted for the reason stated in Chapter 3 para (e)(ii) of the memorandum*.]

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. The changes follow on those in the previous section*.]

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 no capacity to contract under the law applicable to that party [them], 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 reasons for the other changes appear from Chapter 3 paras (d)(i) and (d)(iv) of the memorandum. 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 reason for this new provision appears from Chapter 3 para (e)(i) of the memorandum. 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 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: 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 comes into force shall be continued and concluded as if those Chapters has 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 *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 Nations Commission on International Trade Law on June 21, 1985)

CONTENTS

[*Note: This table is not part of the Model Law on International Commercial Arbitration and is included for convenience*.]

CHAPTER IV
JURISDICTION OF ARBITRAL TRIBUNAL

CHAPTER V
CONDUCT OF ARBITRAL PROCEEDINGS

CHAPTER VI
MAKING OF AWARD AND TERMINATION OF PROCEEDINGS

CHAPTER VII
RECOURSE AGAINST AWARD

CHAPTER VIII
RECOGNITION AND ENFORCEMENT OF AWARDS

[*Note: For comparative purposes,[deletions] from and <u>additions</u> 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 application[1]

(1) This Law applies to international commercial[2] arbitration, subject to any agreement in force between 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 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.

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

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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 transactionfor the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works, consulting; engineering; licencing; 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.]

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

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 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 it 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), 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 sch1 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) of (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

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 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 amendments 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 [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;

(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.

[*Note: compare the New Zealand Arbitration Bill 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, 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)*.]

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 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 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 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

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.

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.

SCHEDULE 2

DOCUMENTS WHICH MAY BE CONSULTED AS AN INTERPRETATION AID

The documents referred to in section 7 of this Act are:

(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).

SCHEDULE 3

CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS[4]

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.

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4 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.

. 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 depository 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 depository of the 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 depository 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 depository.

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 depository of this Convention. The depository 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 depository 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 depository 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 in to 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.

ANNEXURE D

BILL

To amend the Protection of Businesses Act 99 of 1978 so as to delete certain expressions

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To be introduced by the Minister of Justice

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:-

Amendment of the long title, section 1 and section 1D of Act 99 of 1978

1. The long title/section 1/section 1D of the Act is hereby amended by the deletion of the expression “arbitration award/awards” where it occurs.

Short title

2. This Act shall be called the Protection of Businesses Amendment Act, 1997.